AN EXAMINATION OF THE LEGAL REGIME FOR PRODUCTION SHARING CONTRACTS IN THE UPSTREAM PETROLEUM INDUSTRY IN NIGERIA

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A THESIS SUBMITTED TO THE SCHOOL OF POSTGRADUATE STUDIES, AHMADU BELLO UNIVERSITY, IN PARTIAL FULFILlMENT OF THE REQUIREMENTS FOR THE AWARD OF THE DEGREE OF DOCTOR OF PHILOSOPHY – PhD IN LAW.

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DECEMBER, 2021

DECLARATION

I declare that the work in this Thesis titled: ***An Examination of the Legal Regime for Production Sharing Contracts in the Upstream Petroleum Industry in Nigeria*** has been performed by me in the Department of Commercial Law. The information derived from other literature has been duly acknowledged in the text and a list of references provided. No part of this Thesis has been previously presented for another degree or diploma at this or any other Institution.

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CERTIFICATION

This Thesis titled: ***AN EXAMINATION OF THE LEGAL REGIME FOR PRODUCTION SHARING CONTRACTS IN THE UPSTREAM PETROLEUM INDUSTRY IN NIGERIA*** by Gospel Rawlings ADAMS meets the regulations governing the award of the degree of Doctor of Philosophy – Ph.D Law of Ahmadu Bello University, Zaria and is approved for its contribution to knowledge and literary presentation.

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DEDICATION

This Thesis is dedicated to the memory of my late father, Chief Medrack Arigunwo Adams who spoke last with me on the 2nd day of March, 2014.

May he continue to rest in peace.

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I am profoundly gratitude to God almighty for His grace and mercy generally. Indeed, it is His mercy that brought me this far and His mercy will continue to lead me.

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LIST OF ABBREVIATIONS

A.C	-	Appeal Cases
All E.R.	-	All England Law Reports
All F.W.L.R.	-	All Federation Weekly Law Reports
All N.L.R	-	All Nigeria Law Reports
Cap.	-	Chapter
CFRN	-	Constitution of the Federal Republic of Nigeria
Ch.D.	-	Chancery Division Law Reports
F.S.C.	-	Federal Supreme Court Reports
F.W.L.R.	-	Federation Weekly Law Reports
FIRS	-	Federal Inland Revenue Service
IOC	-	International Oil Companies
N.L.R.	-	Nigeria Law Reports
N.M.L.R.	-	Nigerian Monthly Law Reports
N.N.L.R.	-	Northern Nigeria Law Reports
N.S.C.C.	-	Nigerian Supreme Court Cases
N.S.C.Q.R.	-	Nigerian Supreme Court Quarterly Law Reports
N.W.L.R.	-	Nigeria Weekly Law Reports
NOGICDA	-	Nigeria Oil and Gas Industry Content Development Act
PSC	-	Production Sharing Contract
Q.B	-	Queen's Bench Reports
S.C.	-	Supreme Court Cases.
S.C.N.J.	-	Supreme Court of Nigeria Judgments
S.C.N.L.R.	-	Supreme Court of Nigeria Law Reports

T.L.R.N. - Tax Law Report of Nigeria

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CHAPTER ONE

GENERAL INTRODUCTION

1.1 Background to the Study

Production Sharing Contract (PSC) is an arrangement used in the upstream petroleum sector for the exploration and exploitation of petroleum resources by several oil producing countries, particularly the developing ones such as Algeria; Angola; and Gabon.[1] In the case of Nigeria, the PSC arrangement has been largely adopted for the exploration and exploitation of the offshore and inland basin petroleum reserves.[2] It is an arrangement in which the international oil company (IOC) usually referred to as the contractor, solely deploys its capital and expertise into petroleum exploration and production on the understanding that such produced crude oil would be shared with the state party at agreed ratio after deduction of costs and applicable taxes. A PSC is a contractual arrangement between an IOC and the host State authorizing the IOC to conduct petroleum exploration within a certain area in accordance with the terms of the contract.[3] The PSC or production sharing agreement (PSA) as it is also called[4] differs from the other concessionary systems in two main respects. First, it does not grant the international oil company (IOC) ownership rights over the resources in situ. Accordingly, the Government may take a greater interest in technology transfer, preparing for the eventual turning over of the resources to its hands if it so wishes. Secondly, unlike the concessions, which grants the IOC rights over the resources for a specified period of time, the PSC grants the IOC an interest in the resources that is tied to the recouping of sunk costs and, then of course, to the garnering of a profit. Importantly,

[1] Ola, V.; *et al.* (2021) Comparative Analyses of Nigeria and Malaysia's Production Sharing Contract (PSC). *European Journal of Business and Management Research.* Vol. 6 Issue 1, p. 12.
[2] Ogunleye, T.A. (2015) A Legal Analyses of Production Sharing Contract Arrangements in the Nigerian Petroleum Industry. *Journal of Energy Technologies and Policy.* Vol.5 No. 8, p.1
[3] Oni, A., (2021) *Understanding Petroleum (Oil & Gas) Transactions and the Nigerian Market*. Ciplus Limited. Lagos, P. 118
[4] Jennings, A., (2002) *Oil and Gas Exploration Contracts*. Sweet & Maxwell Ltd. London, p. 4

during a successful post-discovery phase of cost recoup and profit garnering, the Government does take a share of the financial largess through taxation and royalty. Production sharing contracts system has mostly been devised to encourage private investment in untested areas of petroleum deposits.[5] This explains why Production sharing contract as a distinct petroleum contractual arrangement is more appealing to most developing countries in that it meets their dual and intertwined objective of exercising sovereign rights over their resources as well as their economic desires by providing the requisite capital and technology for the exploration and production of the petroleum resources particularly in uncertain and untested areas.

Prior to the adoption of production sharing contracts in Nigeria, one of the major contract models for the purpose of exploration, development and production of Nigerian oil resources was the joint venture arrangement (JVA). Under the JV arrangements, the Federal Government of Nigeria, acting through the National Oil Company, had to contribute substantial counterpart funding known as cash calls to meet equity participation in the JVs and because the government invariably had majority shares, its portion of the cash calls were more than that of the JV partners.[6] The consistent inability of the Nigerian government to adequately meet its cash call obligations under the JV arrangements led it to explore other modes of developing the nation's vast oil resources.[7] The PSC arrangement provided a ready solution for both government and the operators. While government no longer needs to meet its periodic cash call obligations to Joint Venture programmes, the operators on the other

[5] Likosy, M. (2009) *Contracting and Regulatory Issues in the Oil and Gas and Metallic Minerals Industries*. Transnational Corporations – UN Conference on Trade & Development Division on Investment and Enterprise. Vol. 18, No. 1, pp.10-11.
[6] Usenu, I. (2020) *The Impact of the Covid-19 Pandemic on Production Sharing Contracts in Nigeria*. Oil and Gas Law Committee Publications of the International Bar Association. http//ibanet.org/Article/NewDetail.aspx retrieved on 26th April, 2021 at 3:05pm.
[7] Ibid.

hand readily embraced the varying degree of fiscal incentives and convenient work programs offered by the PSC arrangement.[8]

The Nigerian government considered the PSC system suitable as it absolved the government from any financial burden unlike the Joint Venture Contracts (JVCs) system where there were problems of fulfilling cash call obligations. It has been said[9] that the Production sharing contract was deployed as a panacea for continued offshore exploration activities at a time Nigeria was lying prostrate under the Babangida and Idika Kalu Structural Adjustment Programme (SAP) era in the late 1980's to early 1990's. The international oil companies had opted to share the produced oil in return for sourcing expertise and funding for exploration activities offshore. Nigeria, with a grossly devalued naira was cash strapped and could not afford counterpart funding for cost sensitive oil explorations.[10] The big international oil corporations had the geological maps and technology, which showed the promise of major oil reserves in Nigeria's offshore. As a safeguard however, the Deep Offshore and Inland Basin Production Sharing Contracts Act, 1999 was promulgated to provide statutory impetus to the tax stipulations in the PSCs and to complement the Petroleum Profit Tax Act.[11]

Garrick[12] summarized the underlining objective of the Nigerian upstream oil industry when he enthused that:

> Nigeria's oil industry has always struggled with the challenge of devising appropriate legal regimes and fiscal policies aimed at maintaining the balance

[8] Ibid.
[9] Nwosu L.E., *The Need for the PIB: Imperatives for Speedy Promulgation*. A paper presented at the NBA Annual General Conference held at the International Conference Centre, Abuja from August 21 -27, 2015; see also Thisday Lawyer, Tuesday, September 29, 2015. pp. 8, 9, 10 & 13.
[10] Ibid.
[11] Nwosu, L.E., ibid. p.13
[12] Garrick, N. (2013). *The Evolution of Upstream Contracts in the Nigerian Oil and Gas Industry.* Energy Mix Report at www.energymixreport.com/the-evolution-of-contracts-in-the-nigerian- assessed on 16/10/2015 @10am.

between meeting national objectives and at the same time responding to developing trends in the global oil industry and encouraging investment. A result of this has been the use of various types of petroleum contracts over the course of Nigeria's petroleum development history.

To maximize the benefit from the petroleum deposits within its shores, Nigeria has adopted a number of other arrangements in the upstream petroleum industry apart from the Production sharing contracts (PSCs). These are: the concession; the joint venture contracts (JVCs); and the service contracts.[13] Like the other systems in the upstream petroleum industry in Nigeria, the PSC has been described as a form of taxation designed to satisfy the political objectives for state participation.[14] The PSCs often embody a number of terms that assist in shoring up the revenue of the participating state party. Some of these terms are, royalty, signature bonuses, scholarships and training of citizens of the state party, grants to government authorities and educational institutions, domestic market obligations and public participation options amongst others.[15]

Unfortunately, the extant legal regime regulating production sharing contracts in the upstream sector especially as it relates to taxation are both uncertain and obsolete and therefore, requires urgent reforms. The weaknesses in the fiscal framework no doubt have adversely affected the income Nigeria would have earned from petroleum operations by way of taxes. The importance of tax cannot be over emphasized. This is because tax is one of the main sources of income for government.[16] For Nigeria, taxation of profits from petroleum

[13]Arogundade, J.A. (2010). *Nigerian Income Tax and Its International Dimension*. Spectrum Books, Ibadan, 2nd Ed., p. 198.; Omorogbe, Y. (2001) *Oil and Gas Law in Nigeria.* Malthouse Press Ltd. Lagos, pp. 46-48.
[14]Ogunleye, T.A.; Op. cit. p. 1; Daniel P. (1995) "*Evaluating State Participation in Mineral Projects: Equity, Infrastructure and Taxation*" In: Otto, J. (ed.) *The Taxation of Mineral Enterprises*, London. Graham & Trotman/Martinus Nijhoff.
[15]Pongsiri, N. (2004). *Partnerships in Oil and Gas Production-Sharing Contracts*. The International Journal of Public Sector Management (IJPSM) Vol. 17. No. 5. p. 431.
[16]Farayola, G.O. (1987) *Guide to Nigerian Taxes*, All Crowns Ltd, Lagos, p. 3

operations is the prime sustainer of the national budget. This explains why the issue of taxation in the oil and gas industry has often generated controversies between the tax authorities and petroleum regulatory agencies on one hand and the international oil companies (taxpayers) on the other. This controversy or dispute generally stems from the very nature of tax itself, the various upstream petroleum contractual systems, (in this case, the PSCs, the JVCs, the Concession and the service contracts) and the inherent weaknesses in the extant fiscal regime. The production sharing contracts are generally made between Nigerian government, represented by the Nigerian National Petroleum Corporation (NNPC) and the international oil companies (IOCs). Often times, the NNPC and the IOCs construe these production sharing contracts (especially the aspects touching on taxation) differently leading to disputes.

Generally, taxes are levies imposed under the authority of the legislature and they are levied by a public body for public purposes.[17]Tax is created by law and levied on individuals, incomes, commodities and transactions to yield public revenue that affords government the opportunity to offer protection and other socio – economic amenities to the citizens.[18]

Taxes are imposed by Statutes only.[19]The issue of tax is consequently outside the ambit of common law. Therefore, for any individual to be chargeable to tax there must be a clear link between the charging provisions and the intended taxpayer. The link must be direct, not inferential.[20] The insistence on the direct link between the charging provisions and the intended taxpayer has been a source of sustained controversies between the NNPC and the

[17] *Lawson v. Interior Tree Fruit and Vegetable Committee of Direction* (1931) SCR 357. Per Duff J.
[18] Abdulrazaq, M.T. (1993) *Principles and Practice of Nigerian Tax Planning and Management*, Batay Law Publications Ltd. Ilorin, p.1
[19] *Tenant v. Smith (1892) A*.C. 150. It was held that no person must be made to pay tax except the taxing Acts specifically provided for it; also in *Addax Petroleum Development (Nig.) Ltd vs FIRS*. (2012) 7 T.L.R.N. 74, @ 85, the Tax Appeal Tribunal held that "payment of tax or who is entitled to pay tax is an issue of law not of agreement, contract or compromise." Ayua, I.A. (1996) *Nigerian Tax Law,* Spectrum Law Publishing Ltd. Ibadan, p.46.
[20] Abdulrazaq, M.T. (2010) *Revenue Law And Practice In Nigeria*, Malthouse Press Ltd. Lagos, p.11

IOCs[21]under the production sharing contracts (PSCs). This work, therefore, focusses on the fiscal regime for production sharing contracts in the Nigerian upstream petroleum Industry.

1.2 Statement of the Research Problem

The prevailing acrimony between the Nigerian National Petroleum Corporation (NNPC) and the International Oil Companies (IOCs) regarding the applicable fiscal regimes to the production sharing contracts is a complete departure from the expected collaboration of parties to a production sharing contract. At the moment, the entire hierarchies of Nigerian Courts are dotted with cases arising from the disagreements between the NNPC and the IOCs.[22] Another problem is that the Deep Offshore and Inland Basin Production Sharing Contracts Act[23] (DOA) vis-à-vis the Production Sharing Contracts between the NNPC and the IOCs are uncertain regarding the issue of consolidation and recovery of cost incurred in exploring oil prospecting licenses (OPLs) from any oil mining lease (OML) derived therefrom in a given contract area. In other words, neither the relevant statutes nor the document embodying the terms of the production sharing contract itself provides with certainty what the position is regarding the issue of cost consolidation of OPLs and recovery of same from any OML derived therefrom. Again, the conflicting decisions of the courts on the issue of the applicable fiscal regime for PSCs has not helped matters just as the limited amendment of the principal Act, that is, the Deep Offshore and Inland Basin Production Sharing Contracts (Amendment) Act, 2019 did not address the problem of cost consolidation as opposed to cost ring-fencing for cost recovery purposes in the operation of PSCs in

[21] Adams, G.R. (2015) *An Evaluation of the Rules of Practice and Procedure of Tax Appeal Tribunal in Nigeria,* LL.M. Dissertation (Unpublished), Faculty of Law, A.B.U., Zaria, p.1.
[22] *Federal Inland Revenue Service vs NNPC & 4 Ors*. **(**2012) 6 T.L.R.N. 1; *SNEPCO & 3 Ors. vs NNPC*. Suit No. FHC/ABJ/CS/282/13; *FIRS vs ESSO E & P (Exxon Mobil)* Appeal No. CA/A/402/2012; *FIRS vs SNEPCO (SHELL) & Ors.* Appeal No. CA/A/208/2012; NNPC vs Statoil Nigeria Ltd & 4 Ors. Supreme Court No.SC/432/2013; Suit No. FHC/L/CS/1275/2016- Statoil Nigeria Ltd & Anor. vs NNPC.
[23] Cap. D3, Laws of the Federation of Nigeria, 2004.

Nigeria. The implication of this is that the IOCs will continue to earn more than their entitlement under normal circumstances.

The general secrecy in the entire fiscal systems in the upstream petroleum industry in Nigeria is a major problem. The official secrecy in the petroleum fiscal system[24] makes it difficult, if not impossible for Nigerians to publicly debate the terms of the fiscal systems. It also effectively shuts out the Nigerian academic community (which is the largest pool of knowledge and expertise) from contributing their ideas to the development of our petroleum fiscal systems. Furthermore, there is a clear conflict between section 10 (1) (g) and section 13 (2) of the Petroleum Profits Tax Act[25] regarding the issue of recoverability and tax deductibility of interest on inter-company loans obtained under terms prevailing in the open market, that is the London Inter-Bank offer Rate (LIBOR) by companies engaged in crude oil production and operation in Nigeria under production sharing contracts. While Section 10(1) (g) allows deductions of such expenses, section 13(2) in attempting to limit the operation of section 10(1) (g) grievously makes reference to section 10(1) (d) which has nothing to do with inter-company loans but Royalties. Another problem relates to the ambiguity of the Petroleum Profits Tax Act, the Deep Offshore and Inland Basin Production Sharing Contracts Act, the Deep Offshore and Inland Basin Production Sharing Contracts (Amendment) Act, 2019 and the document embodying the terms of the Production Sharing Contracts[26] signed between the NNPC and the IOCs regarding the issue of who, between the NNPC and the IOC is actually entitled to Investment Tax Credit (ITC). This ambiguity has created serious contest over who is entitled to Investment Tax Credit between the NNPC and the IOC in practice.

[24] Section 5, Petroleum Profits Tax Act CAP. P13, L.F.N., 2004.
[25] Cap P.13, L.F.N., 2004.
[26] *The Production Sharing Contract between NNPC and Statoil (Nigeria) Limited and BP Exploration (Nigeria) Limited entered into on the 18th day of May, 1993.* All references to PSCs except where otherwise stated shall be to the instant PSC. It must be noted however that the clauses are substantially the same with others between the NNPC and other IOCs.

It is against this background that this research raises the following research questions:

a. Whether the extant legal/fiscal regime for production sharing contracts in the upstream Petroleum industry in Nigeria is adequate to regulate the operation of the acreage or the oil mining leases to which they apply?
b. What are the factors responsible for the recurrent disputes between the NNPC and the international oil companies (contractors) as it relates to the fiscal regime for production sharing contracts in Nigeria?
c. What is the judicial attitude to the resolution of the disputes between the NNPC and the IOCs as it relates to the applicable legal/fiscal regime for production sharing contracts in Nigeria? and
d. What are the challenges hindering public debate of applicable legal regimes in production sharing contracts in Nigeria?

1.3 Aim and Objectives of the Research

The aim of this research is to examine the fiscal regime for production sharing contracts in the upstream petroleum industry in Nigeria. It examines the concept, features, history and major outlines of production sharing contracts (PSCs) in the upstream sector of the oil and gas industry vis-à-vis the relevant statutes governing the system with the aim of highlighting the numerous lacuna and the challenges they present in practice. It also reviews the various statutory instruments and institutions regulating the operation of production sharing contracts in Nigeria. It discusses the challenges in the operation of PSCs in the upstream petroleum industry in Nigeria with a view to achieving the following objectives:

a. scrutiny of the extant fiscal regime for production sharing contracts in Nigeria with a view to unraveling the extent of their adequacy to regulate the operation of the acreage or oil mining leases to which they apply;

b. determining the factors responsible for the disputes between the NNPC and the IOCs as it relates to the applicable fiscal regime for production sharing contracts in the upstream petroleum industry in Nigeria;

c. analysis of the divergent judicial interpretations of the provisions of the production sharing contracts as it relates to the applicable fiscal regimes for production sharing contracts in Nigeria;

d. examination of the factors limiting public debate of applicable fiscal regimes for production sharing contracts in Nigeria.

1.4 Scope and Limitations of the Research

This research focuses on the legal regime for production sharing contracts in the upstream petroleum industry in Nigeria. Accordingly, it is limited to the relevant provisions of the extant statutes governing production sharing contracts especially as it affects the tax liabilities of the international oil companies and other Nigerian companies operating in the upstream petroleum industry. To that extent, the legal regime governing the midstream and downstream operations shall not be considered in this research except where otherwise necessary.

1.5 Research Methodology

The research methodology used in this research is the doctrinal method. Under doctrinal method, a number of key primary sources, such as the Petroleum Profits Tax Act[27], the Deep Offshore and Inland Basin Production Sharing Contracts Act[28], the Petroleum Act[29], the Federal Inland Revenue Service (Establishment) Act, 2007, and the Nigerian National

[27] Cap. P13, Laws of the Federal Republic of Nigeria, 2004
[28] Cap. D3, ibid.
[29] Cap. P10, ibid.

Petroleum Corporation Act[30] were analysed. Applicable case laws are also analyzed. The research examines a number of secondary sources, such as Textbooks, articles in peer review Journals, Newspapers, Magazines and publications on relevant websites.

1.6 Literature Review

A number of writers have written on this subject. However, none of these writers had specifically focused on the fiscal regime for production sharing contracts in the upstream petroleum industry in Nigeria as this research does.

Oni[31]examined the overview of Nigerian petroleum regime beginning with the Nigerian economy before oil, the early policy developments following oil discovery, the nationalization of the petroleum industry as well as the structure and composition of the petroleum industry. He also looked at host government contracts as well as transactional and regulatory considerations in upstream petroleum acquisitions in Nigeria. He highlighted the distinction between share acquisition and asset acquisition while noting that an investment in an upstream oil and gas business may be structured as a share acquisition or asset acquisition. He concluded that each has its own implications. However, he did not specifically discuss the fiscal regime for PSCs and neither did he address the distressing challenges affecting the operation of PSCs in Nigeria as this research does. He also did not analyse any of the contentious arbitrations between the NNPC and any of the IOCs as this research does.

Arogundade[32] discussed the taxation of profits from petroleum operations generally. He considered the various fiscal regimes in the oil industry in Nigeria. He also discussed the regime of production sharing contracts as well as a number of the points of disagreement

[30] Cap. N123, ibid.
[31] Oni, A. (2021) *Understanding Petroleum (Oil & Gas) Transaction and the Nigeria Market*. Ciplus Limited, Lagos.
[32] Arogundade, J.A. (2010) *Nigerian Income Tax and Its International Dimension.* Spectrum Books, Ibadan, 2nd Ed.

between the NNPC and the IOCs. He did not relate the provisions of the production sharing contracts with the relevant statutes. He also did not discuss any of the decided cases relating to the dispute between the NNPC and the IOCs. This is one aspect in which the present work is distinct from that of Arogundade's as it considers each of the stipulations of the extant statutes side by side with the clauses in the production sharing contracts.

Etikerentse[33] wrote generally on the fiscal laws, regulations and practices relating to the upstream sector of the petroleum industry. He also discussed licences, leases and other contractual arrangements for the exploration and production of petroleum. He discussed the history of production sharing contracts and also distinguished it from the traditional joint venture arrangements. He however did not discuss the specific fiscal regimes that govern the operation of production sharing contracts in Nigeria which is what this work does.

Nwamara[34]wrote extensively on the Petroleum Profits Tax Act and tax laws generally. However, his writing was limited to the provisions and case laws relating to the Petroleum Profits Tax Act. He did not discuss production sharing contracts and its governing statutes. This is one aspect where this research is different from Nwamara's work as it discusses the specific statutes governing the tax stipulations of production sharing contracts.

Abdulrazaq[35]wrote on this subject particularly petroleum profits tax. Notwithstanding his in depth discussion of the subject, there remains some outstanding areas which this research covers especially the many decided cases arising from the dispute between the NNPC and the IOCs over the production sharing contracts in the upstream sector of the petroleum industry in Nigeria.

[33] Etikerentse, G. (2004) *Nigerian Petroleum Law*. Dredew Publishers, Lagos, 2nd Edition.
[34] Nwamara, T.A. (2008*) Encyclopedia of Taxation Law and Practice*, Law and Educational Pub. Ltd. Lagos.
[35] Abdulrazaq, M.T. (2010) *Revenue Law and Practice In Nigeria*, Malthouse Press Ltd. Lagos.

Omorogbe[36] made useful contributions to the literature on this subject. She discussed the importance of petroleum and energy as well as the historical perspective of the Nigerian oil industry. She discussed contracts for exploration and production of crude oil as well as fiscal matters pertaining to the petroleum industry generally. However, she stopped short of focusing on the nagging issues in contention between the NNPC and the IOCs especially in relation to taxes payable under the applicable taxing statutes as the present work does.

In another of her Book,[37]she examined the fundamental premises of each of the parties (primarily a host country and an international oil corporation) to a long-term contractual relationship for the exploration, production and development of crude oil. She argued that international business disputes between IOCs and the host country are unwelcome but same are invariably inevitable occurrences for the parties involved. She contends that these disputes are time and money consuming and tend to sour what could have been a mutually beneficial relationship for the parties. Furthermore, she analyzed the various types of contracts for exploration and production of crude oil as well as Government policy and formulation of a mutually beneficial contract. However, she did not specifically discuss the fiscal regime for PSCs and neither did she address the distressing challenges affecting the operation of PSCs in Nigeria as this research does.

Ipaye[38] did a good work that is relevant to this research in that he substantially discussed one of the fiscal regimes for PSCs, that is the Petroleum Profits Tax Act. Ipaye however focused on the operations of the Petroleum Profits Tax Act only. He did not discuss the Deep Offshore and Inland Basin Petroleum Sharing Contracts Act and other related

[36] Omorogbe, Y. (2001) *Oil and Gas Law in Nigeria*. Malthouse Press Limited. Lagos.
[37] Omorogbe, Y. (1997) *The Oil and Gas Industry: Exploration and Production Contracts*. Florence & Lambard Limited, Lagos.
[38] Ipaye, A. (2014) *Nigerian Tax Law & Administration: A Critical Review*. SCO Prime Publishers. London.

legislation like the Oil Terminal Dues Act[39] that govern the Nigerian upstream fiscal systems thus making this research distinct from it.

Idornigie[40] wrote on dispute resolution system (Arbitration), which is just one aspect of this research. Idornigie's work was only limited to his argument that the subject matter of the dispute between the NNPC and the IOCs were tax disputes and therefore not arbitrable under Nigerian statute and case laws. He however did not focus on the other provisions of the fiscal systems as they affect the tax liabilities of the IOCs. This research is consequently different on this point.

Etomi[41] wrote of Nigerian commercial law generally with a specific focus on arbitration, which is just one aspect of this research. He also did not focus on the fiscal regime as they affect the tax liabilities of the IOCs. This research is therefore distinct on this point.

Olisa[42] also contributed to the literature in this aspect of Nigerian law. Olisa discussed the historical setting and sources of Nigerian Petroleum law. He examined exploration and production rights, such oil exploration licence, oil prospecting licence and oil mining leases as well as the obligations of the licensee and lessee. He discussed petroleum arrangements such as joint ventures, service contracts and production sharing contracts. He also discussed Petroleum Profits Tax and other fiscal incentives in the industry. However, the entire work is silent on the provisions of the Deep Offshore and Inland Basin Production Sharing Contracts Act which a fundamental fiscal regime for production sharing contracts in Nigeria. This is one of the areas where this research is distinct from Olisa's work.

[39] Cap O8, Laws of the Federation of Nigeria, 2004.
[40] Idornigie, P.O. (2015) *Commercial Arbitration Law and Practice in Nigeria*. LawLords Publications. Abuja.
[41] Etomi, G. (2014) *An Introduction to Commercial Law in Nigeria: Texts, Cases & Materials.* MIJ Professional Publishers, Lagos.
[42] Olisa, M.M. (1997) *Nigerian Petroleum Law and Practice*. Jonia Ventures Ltd. Lagos. 2nd edition.

Oche[43] is another author that contributed to the existing literature in this area of Nigerian law. He examined the historical background of Petroleum law, the etymology of petroleum, nature, origin and occurrence of petroleum as well as restrictions on petroleum operations. He discussed the concessionary petroleum arrangement, its obligations, alienation and revocation. He considered other arrangements such as the production sharing contract, risk service contract and the pure service contract. He however did not discuss the fiscal regime for PSCs which is the main thrust of this research.

Kachikwu[44] recently published a work that significantly adds to the literature of this research. He extensively considered the issue of ownership of petroleum in Nigeria. He discussed fiscal issues with particular reference to Petroleum Profits Tax Act, which is a key fiscal regime for production sharing contracts in Nigeria. He also discussed licences, leases and collaborative agreements as well as divestments in the petroleum industry. He also reviewed the concept of marketing and transportation of petroleum products, knowledge acquisition and transfer of technology as well as the negative trend in the petroleum industry. However, Kachikwu did not discuss the challenges affecting the operation of PSCs in Nigeria as this research does.

Kachikwu[45] published another work that is also very relevant. The work analyzed the salient provisions of the previously proposed Petroleum Industry Bill. It considers the proposed Petroleum Industry Governance Bill 2015 and its objectives as well as the role of stakeholders in the development of the Petroleum Industry Bill. As evident, Kachikwu merely focused on the narrow issue of designing an acceptable legislative framework for the

[43] Oche, P.N. (2004) *Petroleum Law in Nigeria: Arrangements for Upstream Operations*. Heirs Great Commission, Jos.
[44] Kachukwu, I. E. (2016) *Legal Issues in the Nigerian Petroleum Industry.* LPCS Limited. Lagos.
[45] Kachikwu, I.E. (2016) *The Petroleum Industry Bill: Getting to the Yes*. LPCS Limited, Lagos.

petroleum industry in Nigeria. It did not specifically discuss the fiscal regime for PSCs as the instant research does.

Gidado[46] discussed the legal perspectives on multinational oil corporations, Nigerian foreign investment policies and the petroleum industry and the background to the formation of the NNPC and the duties, powers and organization of the NNPC generally. He considered the early forms petroleum contracts (concessions arrangement), the joint venture and the production sharing contracts which he describes as special forms of participation agreements. He, however, did not discuss the fiscal regime for PSCs in Nigeria unlike this research.

Atsegbua[47] also made a useful contribution to the existing literature in this aspect of Nigerian law. He discussed the history of the oil industry in Nigeria, the ownership and control of petroleum and jurisdiction over offshore natural resources. He discussed the acquisition of rights under the Petroleum Act and under contractual joint ventures. He also examined petroleum taxation and fiscal regimes with particular reference to the Petroleum Profits Tax Act. Atsegbua also discussed the different phases of production sharing contracts in Nigeria as well as the Deep Offshore and Inland Basin Production Sharing Contracts Act. However, he did review the Act extensively neither did he consider the challenges in the operation of PSCs. More importantly, he did not discuss the recent amendment to the Act, that is, the Deep Offshore and Inland Basin Production Sharing Contracts (Amendment) Act, 2019 as done in this research.

[46] Gidado, M.M. (1999) *Petroleum Development Contracts with Multinational Oil Firms – The Nigerian Experience.* ED-Linform Services. Maiduguri.
[47] Atsegbua, L. (2012) *Oil and Gas Law in Nigeria: Theory and Practice*. Fifers Lane publishers, Benin. Third Edition.

Johnston[48] is another author that has contributed to the literature in this aspect. He considered the global history of Petroleum fiscal systems and Production sharing contracts. He reviewed the American, Ecuadorian, Indonesian, Malaysian and the Gulf state models of the PSCs. Expectedly, he did not pay particular attention to the Nigerian model unlike this research.

Ajogwu and Nliam[49] discussed the history of oil and gas as well as oil and gas industry activities in Nigeria. They also reviewed the major upstream oil and gas production arrangements in Nigerian including production sharing contracts. The work extended to the issue of sustainable development of oil and gas industry in Nigeria. However, it did not specifically focus on the fiscal regime for production sharing contracts as this research does.

Jennings[50] published a textbook on this aspect of the law. He generally discussed production sharing contracts and the operator. He discussed the difference between Licenses and Production Sharing Contracts and emphasized that taxation is a crucial part of PSCs. He mentioned the alternate name for PSCs as production sharing agreement (PSA) and discussed the background as well as the nature of the PSC. He also analyzed joint venture agreements, agreements for services, drilling contracts and transactions generally. He, however, did not narrow down his discussions to the Nigerian fiscal regime for production sharing contracts as this research does.

Ola, et al.[51] did a comparative analysis of Nigeria and Malaysia's Production sharing contracts. They discussed the history and implication of PSCs in both jurisdictions. In particular, they briefly discussed the recent amendment to the Deep Offshore Act, that is, the

[48] Johnston, D. (1994) *International Petroleum Fiscal Systems and Production Sharing Contracts*. Ponwell Books. Tulsa, Oklahoma.
[49] Ajogwu, F. and Nliam, O. (2014). *Petroleum Law & Sustainable Development*. Centre for Commercial Law Development. Lagos.
[50] Jennings, A. (2002). *Oil and Gas Exploration Contracts*. Sweet & Maxwell Ltd. London.
[51] Ola, V., *et al*. (2021) Comparative Analyses of Nigeria and Malaysia's Production Sharing Contract (PSC). *European Journal of Business and Management Research.* Vol. 6 Issue 1, pp. 11 and17.

Deep Offshore and Inland Basin Production Sharing Contracts (Amendment) Act, 2019 highlighting price based royalty system that was introduced in the amended Act. Other than that, they did not discuss any other fiscal regime for PSCs in Nigeria as this research does.

Ubani and Ikpaisong[52] appraised the Nigerian upstream petroleum fiscal arrangements generally focusing on the joint venture and Production sharing contracts. They reviewed the history of PSCs and royalty tax system but they did not focus exclusively on the fiscal regime for production sharing contracts as this research does.

Mohammed[53] focused more on the background of common oil and gas contracts especially the concession and Joint ventures and PSCs. He touched on the history of Production sharing contracts arrangements in Nigeria and thereafter turned to the descriptive analyses of technology transfer and its economic benefits. He did not discuss the fiscal regime for PSCs neither did he discuss the challenges. In particular, he never discussed the recent amendment to the Deep Offshore Act, that is, the Deep Offshore and Inland Basin Production Sharing Contracts (Amendment) Act, 2019.

Ogunleye[54] analyzed the Production sharing contracts arrangements in Nigeria. He considered the history, features and overview of production sharing contracts in Nigeria. He highlighted the major differences in the various PSCs namely, the 1977 PSCs, the 1993 and the post 1993 PSCs. Ogunleye examined albeit briefly, the Deep Offshore and Inland Basin Production Sharing Contracts Act and concluded with an evaluation of the PSCs in Nigeria. Notwithstanding his beautiful work, he did not relate it to the fundamental disputes between

[52] Ubani, C. Ikpaisong U. (2020). "A Comparative Analyses of Joint Venture and Production Sharing New Contractual System in the Nigerian." *International Journal of Scientific & Engineering Research*. Vol.11 Issue 3, pp.71-77.
[53] Mohammed, S.D. (2018). "Technology Transfer and Economic Benefits: A Descriptive Analyses of Joint Venture and Production Sharing Contracts in Nigerian Oil and Gas Industry." *The Macrotheme Review 7(2),* pp. 59and 76. www. Macrotheme.com/yahoo_site_admin/assets/docs retrieved on 26th April, 2021 at 5:30pm.
[54] Ogunleye, T.A. (2015). "A Legal Analyses of Production Sharing Contract Arrangements in the Nigerian Petroleum Industry." *Journal of Energy and Policy*. Vol.5 No. 8, pp.1-10.

the NNPC and the IOCs over certain provisions of the production sharing contracts. This is one area where this work is distinct from that of Ogunleye.

Oshineye[55] on his part, considered the overview of the petroleum industry in Nigeria. He discussed albeit briefly, both the upstream and downstream sectors of the industry. He addressed the history of petroleum exploration in Nigeria as well as indigenous participation in the industry. However, he did not focus on the fiscal regime for production sharing contracts as done in this work.

Likosky[56] wrote on contracting and regulatory issues in the oil and gas and metallic industries in different nations including Nigeria. He examined the extractive industry generally and thereafter narrowed down to production sharing contracts. He traced the history of production sharing contracts to Indonesia and highlighted the key features. However, he did not focus on the Nigerian PSCs in the upstream sector as this research does.

Pongsiri[57] did an article in a journal that is related to this study. He focused more on the provisions of the production sharing contracts which attracts state parties to adopt it as the petroleum arrangement of choice in the upstream petroleum sector. He however, did not focus his discussion on the Nigerian system as done in this research.

Amoako-Tuffour and Owosu-Ayim[58]focused on the petroleum fiscal regime of Ghana but they made comparisons of some of its key features with those of a sample of Sub-Saharan African countries such as Angola, Lybia and Nigeria. They assessed the strengths of the regime on the basis of progressivity, stability, flexibility, neutrality and its risk-sharing

[55] Oshineye, A. (2000) "The Petroleum Industry in Nigeria: An Overview." *Modern Journal of Finance & Investment Law.* Vol.4 No. 4, Pp. 325-344.
[56] Likosy, M. (2009) "Contracting and Regulatory Issues in the Oil and Gas and Metallic Minerals Industries." *Transnational Corporations – UN Conference on Trade & Development Division on Investment and Enterprise.* Vol. 18, No. 1, Pp.10 and 11.
[57] Pongsiri, N. (2004). "Partnerships in Oil and Gas Production-Sharing Contracts." *The International Journal of Public Sector Management (IJPSM)* Vol. 17. No. 5.
[58] Amoako-Tuffour, J and Owosu-Ayim, J. (2000) "An Evaluation of Ghana's Petroleum Fiscal Regime." *Ghana Policy Journal*. Vol. 4. Pp. 7-34.

features. As evident, this article focuses more on the Ghanaian system unlike this work which focuses on the petroleum arrangements in Nigeria.

Bielu[59] did an article in a journal that is relevant to this study. He focused on the concept of tax, arbitration and non-arbitrability of tax disputes which is one of the challenges of the operation of PSCs in Nigeria. He however, did not specifically discuss any of the PSC arbitrations as done in this research.

John[60] made a useful contribution that is tangentially related to this work particularly as it affects the secrecy in the petroleum fiscal systems in Nigeria. As mentioned earlier, the official secrecy rule that operates in the sector makes it impossible for Nigerians to publicly debate the terms of its petroleum fiscal systems. John re-echoed this position when he argued that the citizens' expression cannot be put forward where there is no awareness or to put it properly, where the people are not informed or educated on the subject matter which their expression is sought. He added that every citizen without discrimination whatsoever, must have a right to know and the right to access information held by public bodies. Commendable as his arguments are, he however, did not focus on the legislated secrecy in the petroleum fiscal systems as this work does.

Usman[61] made an instructing discussion of production sharing contracts in Nigeria. He directly made reference to the production sharing contract between the NNPC and Statoil which is one of the prime contracts on which the discussions in this research are based. However, his discussion of the select production sharing contract was limited to the aspect

[59] Bielu, K.J. (2020). "Rethinking the Non-Arbitrability of Tax Disputes in Nigeria: Implications for Production Sharing Contracts." *Nnamdi Azikiwe University Journal of Commercial & Property Law (NAU.JCPL)* Vol. 7. No. 2. Pp. 51 and 59.

[60] John, D.C., (2014). "The Right to Freedom of Information as a Basis for Global Best Practice for Democratic Governance: A Challenge for Nigeria." *Journal of Policy And Development Studies*. Vol. 1, No. 1, February. pp. 110-140.

[61] Usman, A.K. (2014 & 2015) "Corporate Social Responsibility vs. Protection of Foreign Investment: The Experience of Niger Delta Communities and International Oil Corporation in Nigeria." *Ahmadu Bello University Journal of Commercial Law* (ABUJCL). Vol. 7, No.1. pp. 38-55.

dealing with corporate social responsibility only. This research does a lot more in that it x-rays the entire production sharing contract in the upstream industry.

As it is, it is clear that this research topic has not been comprehensively treated in any single material anywhere. Admittedly, certain aspects of it are not entirely new, however, its specialized scope distinguishes it from other existing literature on the subject.

1.7 Justification of the Research

This research examines the legal regime for production sharing contracts in the upstream sector of Nigerian petroleum Industry with the aid of Statutes, case laws, relevant government regulations, amongst others. It explains the root causes of the recurrent dispute between the NNPC and the international oil companies. The research also unravels the underlying objectives of the Nigerian government to garner economic rents through the extant legal regime for production sharing contracts. It highlights the grey area in the extant legal regimes thereby drawing attention to the root causes of the challenges in the operation of PSCs as well as relevant suggestions on how to correct the challenges. It is hoped that it will help obliterate or reduce the frustrations and incessant bitter disputes between the Nigerian state and the IOCs and above all expand the upstream petroleum fiscal law jurisprudence.

1.8 Organizational Layout

Chapter One covers the introduction to the research, background, statement of research problem, aim and objectives of the research, its justification, scope and limitations of the research, as well as the research methodology. It also includes literature review, its justification and organizational layout.

In Chapter Two, the thesis discusses the conceptual analysis of production sharing contracts (PSCs) in Nigeria. The concept and features, history and the general outline of production sharing contracts are considered. The outlines are considered in terms of the various clauses in a PSC such as the definitions clause, scope, terms, exclusion of areas, work programmes and expenditures, management committee, rights and obligations of the parties under a PSC, recovery of operating cost and crude oil allocation as well as valuation of available crude oil and payments. Others are title to equipment, employment and training of

Nigerian personnel, books and accounts, audits and overhead charges, bonuses, royalty and taxes, insurance, confidentiality and public announcements as well as force majeure, laws and regulations, utilization of natural gas, consultation and arbitration, effectives and notices. Chapter two also compares and contrast PSCs and other petroleum arrangements such as the concession system, the joint venture contracts system, the service contracts systems and the marginal fields.

In Chapter Three, the attention of the thesis focuses on the fiscal framework for production sharing contracts in Nigeria. The chapter thereafter reviews the Deep Offshore and Inland Basin Production Sharing Contracts Act focusing on the duration of oil prospecting licences relating to PSCs; determination and payment of applicable taxes and royalties under the Deep Offshore Act. Other issues discussed are the determination of petroleum profits tax, investment tax credit or investment tax allowance, allocation of crude oil such as royalty oil, costs oil, tax oil and profit oil. The other aspects discussed relates to the adoption of laws and periodic review of the Deep Offshore and Inland Basin Production Sharing Contracts Act as well as the Deep Offshore and Inland Basin Production Sharing Contracts (Amendment) Act, 2019. Chapter three also reviews the Petroleum Profits Tax Act, the imposition of chargeable tax, the ascertainment of profits, adjusted profits, assessable and chargeable profits as well as allowed deductions under the Petroleum Profits Tax Act. The chapter also considers deductions not allowed, assessable tax, accounting and return of estimated tax, notice of assessment and objections, notice of refusal to amend as well as appeals against wrongful assessment of chargeable tax. Lastly, other fiscal obligations applicable to PSCs such as rents, fees, bonuses, and oil terminal dues are discussed.

In Chapter Four, an appraisal of the legal framework for regulation of production sharing contracts constitutes the focal point of discussion. Also discussed here are the

Petroleum Act and the Minister of Petroleum Resources; the Minister's right of pre-emption, the Minister's powers generally as well as offences under the Petroleum Act. Chapter four further talks about regulatory institutions for production sharing contracts such as the Ministry of Petroleum Resources, the role of the Department of Petroleum Resources (DPR) as an arm of the Ministry of Petroleum Resources, the Nigerian National Petroleum Corporation (NNPC), the general duties and powers of the NNPC, the role of the National Petroleum Investment Management Services (NAPIMS) as an arm of the NNPC; the Nigerian Content Development and Monitoring Board established under the Nigerian Oil and Gas Industry Content Development Act, 2010, the functions of the Board as well as offences and penalties under the Act. Another issue discussed relates to the Nigeria Extractive Industries Transparency Initiative (NEITI), its objectives, functions together with the offences and penalties under the constitutive Act of the NEITI. Lastly, the chapter thereafter considers the Federal Inland Revenue Services (FIRS), its establishment, objectives, powers, functions as well as tax administration and enforcement by the FIRS.

Chapter Five discusses the prospects and challenges in the operation of production sharing contracts in Nigeria. It considers the challenging clauses in Production Sharing Contracts beginning with the background of the dispute leading to the arbitration between Statoil & Anor. v. NNPC over PSC; the jurisdiction of arbitration Tribunal and arbitrability of tax disputes under PSCs and the concept of arbitration and arbitrability under Nigerian law. Chapter five extensively reviews the case of *FIRS v. NNPC & 4 Ors*[62] and its implication on arbitrability of tax disputes in Nigeria. Other challenging clauses considered are the issue of cost consolidation as opposed to cost ring-fencing for recovery and petroleum profits tax purposes; investment tax credit/allowance: whether the IOC is entitled thereto as well as

[62] (2012) 6 T.L.R.N. 1.

dispute over interests on inter-company loan as allowable tax deductions pursuant to the Petroleum Profits Tax Act. Chapter five also discusses another decision of the Federal High Court with respect to PSC: *NNPC vs. Statoil Nig. Ltd & Anor*.[63] Finally, the proposed reforms in the Petroleum Industry in Nigeria is discussed with particular emphasis on the Petroleum Industry Governance Bill, 2017 (the PIG Bill), the functions and powers of the Minister of Petroleum Resources under the PIG Bill, the establishment of the Nigeria Petroleum Regulatory Commission (NPRC), the establishment of the Ministry of Petroleum Incorporated (MOPI); the establishment of the Nigeria Petroleum Assets Management Company, the National Petroleum Company as well as the Nigeria Petroleum Liability Management Company. The chapter concludes with a review of the adaptation and repeal of certain existing laws by the PIG Bill, 2017.

Chapter Six is the last chapter. This chapter summarizes the entire research after which the research findings are identified and conclusion drawn based on the analysis and discussions in preceding chapters. Chapter Six also proffers recommendations on how to improve and sustain effective and efficient operation of production sharing contracts in Nigeria.

[63] Suit No. FHC/L/CS/638/2015 delivered on 7th March, 2017 by the Federal High Court, Lagos, per Buba, J.

CHAPTER TWO

CONCEPTUAL ANALYSIS OF PRODUCTION SHARING CONTRACTS IN NIGERIA

2.1 Introduction

Production sharing contract (PSC) was principally borne out of Nigerian Government's desire to shift away from the traditional joint venture arrangements with its heavy cash call obligations. The present amount of Nigeria's cash call indebtedness is quite alarming. It was recently reported that the Nigerian Senate decried the current cash call indebtedness of the Nigerian National Petroleum Corporation (NNPC) to its Joint Venture partners which has risen to well over US$ 6 billion. The Senate noted that the issue has become a huge problem staring the nation's economy in the face.[1] In fact, it has been said that the PSC arrangement as used reduces Nigerian Government's burden of upstream cash call commitments and appears to provide solution to the difficulty of the Nigerian Government in meeting its cash call obligations.[2] This explains why this chapter focuses on the conceptual and historical analyses of production sharing contracts in Nigeria; the concept and features of production sharing contracts; the history of production sharing contracts in Nigeria; general outlines of production sharing contracts and the differences between PSCs and other petroleum arrangements such as the concession system; the joint venture contracts system, the service contracts system and the marginal fields. The foregoing are discussed in some detail below beginning with the concept and features of production sharing contracts.

2.2 The Concept and Features of Production Sharing Contracts

[1] Umoru, H. & Erunke J. *Vanguard Newspapers*, Thursday, July 21, 2016, http://linkis.com/www.vanguardngr.com/agPGp retrieved on 3/8/2016 at 3:53pm.
[2] Nlerum, F.E., (2007-2010) "Reflections on Participation Regimes in Nigeria's Oil Sector." *Nigerian Current Law Review*. p. 158. www.nials-nigeria-org/pub/NCLR5.pdf retrieved on 3/8/2016 at 4:40pm.; Arogundade, J.A. (2010) *Nigerian Income Tax and Its International Dimension*. Spectrum Books, Ibadan, 2nd Ed, p. 206.

Section 17 of the Deep Offshore and Inland Basin Production Sharing Contracts Act[3] (DOA) defines production sharing contracts (PSCs) to mean "any agreement or arrangement made between the Corporation or the holder and any other petroleum exploration and production company or companies for the purpose of exploration and production of oil in the Deep Offshore and Inland Basins."[4] A production sharing contract is a contractual agreement between a contractor (usually an international oil company) and a host government whereby the contractor bears all exploration costs and risks of development and production in return for a stipulated share of the production resulting from this effort.[5] Production sharing contract has also been described as a contractual arrangement made between an oil company (contractor), which in most cases is a foreign one, and a designated state enterprise (state party) authorizing the contractor to conduct petroleum exploration and exploitation within a certain area (contract area) in accordance with the rules of the agreement.[6] It is essentially a form of commercial transaction for the development of petroleum resources of the state which, as a sovereign owner of vital depletable resources, seeks to exercise its sovereign rights in the development of the resources by foreign enterprises.[7] It is basically an arrangement in which the international oil company (IOC) solely deploys its capital and expertise into petroleum exploration and development on the understanding that such produced hydrocarbons would be shared with the state party at agreed ratio after deduction of costs and applicable taxes.

The most important factor to the government under a PSC is the investment by the international oil company. Broadly speaking, in a PSC, the oil company invests, by invitation

[3] *Deep Offshore and Inland Basin Production Sharing Contracts Act*. Cap. D3, L.F.N. 2004.
[4] Section 17, ibid.
[5] Johnston, D. (1994). *International Petroleum Fiscal Systems and Production Sharing Contracts*. Ponwell Books. Tulsa, Oklahoma, p.310.
[6] Ogunleye, T.A. (2015) "A Legal Analyses of Production Sharing Contract Arrangements in the Nigerian Petroleum Industry." *Journal of Energy Technologies and Policy.* Vol.5 No. 8, p.1
[7] Iloba-Aninye, O. (2015). *An Examination of the Legal Framework for the Marketing of Petroleum Products in the Downstream Sector of the Oil and Gas Industry in Nigeria*. PhD Thesis (Unpublished), Faculty of Law, Ahmadu Bello University, Zaria, p.60.

of the host government, in the exploration of the area, and is rewarded, if a development follows, first with recovery of its costs after deduction of royalty and then with a share in production, such share being determined by the agreement.[8]

In the case of Nigeria, the international oil company funds the whole of the initial cost of exploration and exploitation in return for tax concessions and allocation of cost oil when the field starts producing. Cost recovery is a key point from the point of view of the international oil company (IOCs). Upon production, the host government will seek to compensate itself out of the income ultimately coming to the company for the tax it has forgone and any other revenues, such as royalty, which it would have received, before eventually taking a share of the profits in a predetermined manner.[9]

Under a PSC, the international oil company contracts directly with either the host government or a government owned company designated for the purpose. In the case of Nigeria, the Nigerian National Petroleum Corporation (NNPC) enters into or signs production sharing contracts with oil companies on behalf of the Nigerian government. The PSC is today the toast of Nigerian petroleum industry. It is an agreement born in response to the funding problems faced by the old Joint Venture arrangements as well as the desire of the Nigerian government to open up the sector for more foreign participation. The PSC arrangement governs the understanding between the NNPC and all new participants in the new deep and ultra-deep water acreages.[10]

One basic feature of a production sharing contract is that of state ownership of the petroleum resources.[11] The contractor merely receives a share of production for services

[8] Jennings, A., (2002) *Oil and Gas Exploration Contracts*. Sweet & Maxwell Ltd. London, p. 5
[9] Ibid. p. 5
[10] www.napims.com/dynamic.html. Retrieved on 7/4/2016 at 5pm.
[11] Likosy, M. (2009). *Contracting and Regulatory Issues in the Oil and Gas and Metallic Minerals Industries*. Transnational Corporations – UN Conference on Trade & Development Division on Investment and Enterprise. Vol. 18, No. 1, pp.10-11; Tordo, S. (2007). *Fiscal Systems for Hydrocarbons: Design Issues*. World Bank Working Paper No. 123. Washington DC. p.8 retrieved on 7/4/2016 at 3:52am.

performed. The contractor has no proprietary interest in the resources other than his share of the production. The contractor bears the entire cost and risk of exploration activities, and only reaps the reward after oil is discovered in commercial quantities.[12] Oil is deemed to have been discovered in commercial quantities by the holder of an oil prospecting licence if the Minister, upon evidence adduced by the licensee, is satisfied that the licensee is capable of producing at least 10,000 barrels per day of crude oil from the licensed area.[13] Where the contractor fails or is unable to find oil in commercial quantity, he loses the entire cost incurred in prospecting for oil within his licence area.[14]

Another key feature of a PSC is the sharing of the oil produced from the contract area amongst the parties according to predetermined ratio. In fact, it has been said that the "sharing of production is the heart and soul of a PSC" and that the best way to evaluate a PSC is to begin with how the production is shared.[15] The contractor's share is often referred to as the contractor's entitlement.[16] The other basic features common to PSCs are Cost recovery (Cost oil), Tax oil and Profit oil. In the case of Nigeria and most other countries, Royalty oil is a fundamental feature in PSCs.[17]

It must be emphasized that there is no universal PSC model anywhere in the world, rather each country has developed its own peculiar variant of the contract over the years. However, it has been observed that production sharing contracts has retained certain basic features which are summarized as follows:

> The international oil company (IOC) is appointed by the Host Country (HC), directly or through its national oil company

[12] Ajogwu, F. and Nliam, O. (2014). *Petroleum Law & Sustainable Development*. Centre for Commercial Law Development. Lagos. p. 70.
[13] Paragraph 9, First Schedule, *Petroleum Act*. Cap P10, L.F.N. 2004.
[14] Former Nigerian Ambassador to Brazil, Ambassador Kayode Garrick informed this writer on 21/6/2016 at Sheraton Hotel, Abuja that the Brazilian Oil Company, Petrobras unsuccessfully conducted oil exploration in Nigeria and lost their entire investments on account of their failure to discover hydrocarbons in commercial quantity.
[15] Johnston, D., Op. cit. p. 71.
[16] Ibid. p. 71
[17] Etikerentse, G. (2004) *Nigerian Petroleum Law*. Dredew Publishers, Lagos, 2nd Edition. pp. 90-92.

> (NOC), as the exclusive "contractor" (and not as a concessionaire) to undertake petroleum operations in certain area during specified periods; the IOC operates at its sole risk, its own expense, and under the control of the HC. If petroleum is produced, it belongs to the HC, with the exception of a share of production that can be taken in kind by the IOC for cost recovery and for profit sharing. The IOC is entitled to recover its eligible costs under the PSC from a portion of the production from the area subject to the contract. After cost recovery, the balance of the production is shared, based on predetermined percentage split between the HC and the IOC. The net income of the IOC is taxable, unless the PSC provides otherwise. The title to the equipment and installations purchased by the contractor pass to the HC either immediately or over time, in accordance with the cost recovery schedules.[18]

Notwithstanding the foregoing features which also relates to the advantages of PSCs over other petroleum arrangements, Etikerentse[19] has identified a few drawbacks to a PSC. First, he mentioned that the contractor realizing that it is commercially rewarding for it to concentrate on one producing field, could slow down the pace of exploration of new areas covered by the PSC with attendant disadvantages flowing to the host country from such unwarranted slow pace of exploitation. He also noted that the contractor could tend to be extravagant or needlessly wasteful since the contractor knows that its cost would be fully met. A typical example of this drawback is the 1993 PSC, where the Nigerian Senate Committee on Upstream Petroleum Sector discovered that Shell incurred the sum of 602 billion naira in the development of the Bonga Oil field and recommended that Shell should pay the amount to the Federal government.[20] He however, added that the post 1992 PSCs sought to address some of these concerns by providing a definite 30 year contractual period, 10 years for exploration and 20 years for production with a provision for the relinquishment of parts of the contract area. The other safeguard against the wasteful conduct of a contractor

[18] Duval, C., et al (2009). *International Petroleum Exploration and Exploitation Agreements: Legal, Economic and Policy Aspects*, (2nd edition) New York: Barrows Company Inc. cited in Ogunleye, T.A. Op.cit. p.2.
[19] Ogunleye, T.A. Op. cit. p.2.
[20] Ogunleye, T.A. Op. cit. p.6

is the provision that subjects every expenses above certain limits to the approval of the Management Committee made up of NNPC officials and that of the contractor.[21]

At the moment, PSCs are now being used in the exploration and development of petroleum resources in many countries including Malta, Guatemala, Libya, Syria, Jordan, Angola, China, Qatar, Gabon, Philippines, Argentina, Bangladesh, Bolivia, Cameroon, Chile, Egypt, Ethiopia, Malaysia, Vietnam, Yemen, Trinidad and Tobago, Equatorial Guinea, Georgia, India, Indonesia, Iraq, Kazakhstan, Madagascar, Uganda, Peru, Russia and Thailand[22] and more recently, Ghana[23], to mention a few

2.3 History of Production Sharing Contracts in Nigeria

Text writers are unanimous that the first PSC in the petroleum industry in the World was signed in Indonesia.[24] Johnston[25] noted that the first PSC was signed by a company named Independent Indonesian American Petroleum Company (IIAPCO) in August 1966 with Permina, the Indonesian National Oil Company at that time (now Pertamina) and that this was when oil companies started becoming contractors. The contract exemplified the basic features of a PSC in that it had the following terms:

a. Title to the hydrocarbon remained with the state of Indonesia;
b. Permina maintained management control, and the contractor was responsible to Permina for execution of petroleum operations in accordance with the terms of the contract;
c. The contractor was required to submit annual work programme and budgets for scrutiny and approval by Permina;

[21] The Management Committee of a PSC will be discussed in some details shortly.
[22] Ogunleye, T.A. Op.cit. p. 2.
[23] Amoako-Tuffour, J and Owosu-Ayim, J. (2000) "An Evaluation of Ghana's Petroleum Fiscal Regime." *Ghana Policy Journal.* Vol. 4. p. 9.
[24] Nlerum, F. E. Op. cit. p. 156; Fabrikant, R. (1975). "Production-Sharing Contracts in the Indonesian Petroleum Industry." *Harvard International Law Journal, vol. 16,* p. 3030. ; Machmud, T.N. (1993). Production-Sharing Contracts in Indonesia: 25 Years' History, *Journal of Energy and Natural Resources Law,* p. 179. Ogunleye, T.A. Op. cit. p. 1; Johnston, D. Op. cit. p. 39; Likosy, M. Op. cit. p. 10.
[25] Johnston, D. Op. cit. p. 40.

d. The contract was based on production sharing and not a profit-sharing basis;
e. The contractor provided all the financing and technology required for the operation and bore the risks;
f. During the term of the contract, after allowance for up to a maximum of 40% of annual oil production for recovery of costs, the remaining production was shared 65% / 35% in favour of Permina. The contractor's taxes were paid out of Permina's share of profit oil; and
g. All equipment purchased and imported into Indonesia by the contractor became the property of Permina. Service company equipment and leased equipment were exempt.[26]

In the case of Nigeria, the history of Production Sharing Contracts (PSCs) can be traced to three different epochs, namely, the 1973 epoch; the 1993; and the post 1993 epochs. Each of the epochs are considered below for ease of comprehension beginning with the very first one, that is, the 1973 epoch.

2.3.1 The 1973 production sharing contract

In Nigeria, Production Sharing Contract was first utilized in 1973, in a contract between the Nigerian National Oil Company (NNOC now NNPC[27]) and Ashland Oil Nigeria Company (now Addax Petroleum Development Company Nigeria Limited)[28] signed on June 12, 1973 for a term of 20 years. The PSC also referred to as the Ashland PSC was in respect of Oil Prospecting Licences (OPLs) 48 and 98. The Nigerian government utilized the PSC as a response to the 1972 government policy shift away from concession and towards contracts

[26] Ibid. p. 40.
[27] S.23 (2) *Nigerian National Petroleum Corporation Act*, CAP. N123, L.F.N., 2004. This Act was made on 1st April, 1977.
[28] Ajogwu, F. and Nliam, O. Op.cit. p. 72; Olisa, M.M. (1997). *Nigerian Petroleum Law and Practice*. Jonia Ventures Ltd. Lagos, p. 2.

which emphasize the contractual status of the oil company.[29] The Ashland PSC was subject to a renewal period of five years after the expiration of the first twenty years.[30] The terms of this particular agreement were criticized due to its high overall tax and cost recovery allocations and final NNOC production split which was considered inconsequential due to the small percentage of oil left for sharing and the profit sharing ratio.[31] **Omorogbe**[32] detailed the terms of the Ashland PSC which attracted adverse critisms in the following words:

> According to these terms when a commercial discovery had been made, the costs were recoverable out of a maximum of 50 per cent per annum of the total crude oil produced. Of the balance, 55 per cent (slightly more than half) was allocated to Ashland as tax Oil and the price received applied towards payment of Petroleum Profits Tax. Outstanding amounts payable as tax were borne by the two parties in proportion to their participating interest shares. The remaining crude oil, less than 25% of total production, was divided between the two parties. When production was less than 50,000 barrels a day the production split was 65/35 in Ashland's favour and 70/30 when production exceeded this amount. On the face of it, this clauses appeared lopsided in favour of the contractor. This was the opinion of the Tribunal of enquiry set up to investigate an alleged loss of $2.8 billion from the accounts of NNPC, who felt that the PSC certainly has no benefit whatsoever to Nigeria.

Ogunleye[33] also offered a comprehensive insight to the pitfalls of the first PSC in Nigeria leading to its revocation by the Federal Government on 13th June 1997 in the manner below:

> A number of shortcomings were associated with this PSC. It was executed when Nigeria had little or no knowledge about the concept of a PSC and the model terms that could benefit the country. The Government assumed that since it was not concession it had control over the petroleum operations which obviously did not reflect in the provisions. For instance, no Management Committee was established by the PSC to

[29] Omorogbe, Y. (2001). *Oil and Gas Law in Nigeria.* Malthouse Press Ltd. Lagos, p. 49.
[30] Etikerentse, G. Op.cit. p. 88
[31] Garrick N., (2013). *The Evolution of Upstream Contracts in the Nigerian Oil and Gas Industry.* Energy Mix Report at www.energymixreport.com/the-evolution-of-contracts-in-the-nigerian- assessed on 16/10/2015 @10am.
[32] Omorogbe, Y. Op .cit. pp. 49-50.
[33] Ogunleye, T.A. Op. cit, p. 3

> superintend over the petroleum operations. Although the PSC mandated the contractor to submit the work programme and budget to the NNPC, the contractor was apparently in control of the operation as there were no defined Work Programme obligations in quantitative terms. Some terms of the PSC were at variance with the basic framework of a contemporary PSC, such as the transfer of title to available oil at wellhead which is a feature of concession. Generally, title to oil in most PSCs passes at the point of export or valuation. Also in the PSC production premiums was recoverable as part of cost oil; this is not common in a present-day PSC. Furthermore, the PSC was found to be lopsided in favour of Ashland by the Crude Oil Sales Tribunal set up to investigate an alleged loss of N2.8 billion from the accounts of the NNPC, with the Midland Bank in London, between 1978 and 1979. The Tribunal recommended that the PSC be reviewed in order to make the terms equitable and Government accepted this recommendation. Consequently, the PSC was amended in 1979 and 1986. The 1979 amendment increased the volume of cost oil as a share of total available production while the 1986 amendment improved Ashland's royalty, Petroleum Profit Tax, Investment Tax Credit and profit sharing terms while it also altered the form of cost recovery.

Nonetheless, the amended 1973 PSC was replaced with another PSC in 1994, which had the basic terms in the model PSC that was used in the award of acreages in the 1991 licencing round in Nigeria (Olisa, M.M.1997). Besides, NNPC executed another PSC covering OPLs 90 and 225 with Ashland Nigeria Exploration Unlimited, which is a sister company of Ashland on 25 March, 1992. The two PSCs were however terminated by the Federal Government on 13 June, 1997 because Ashland transferred its interest in the PSCs to Perenco Investments S.A. of France without the consent of the Government (Daily Times 18 June, 1997:10). After the termination of the PSCs, an Eight Man Interim Committee was set up by NNPC to take over and manage the operations of the PSCs and report to National Petroleum Investment Management Service (NAPIMS) on a regular basis; while another Committee was also set up to negotiate a new PSC with a prospective "Contractor", which initially was TOTAL Exploration (Nigeria) Limited (Total) but eventually with Addax

Petroleum Development (Nigeria) Limited (Addax) as Total did not agree with the terms of the draft PSC and wanted a new fiscal package. The Ashland PSCs were however transferred to Addax and a PSC to that effect was executed on 6 May, 1998, between the NNPC and Addax, covering OPLs 98 and 118 (now OMLs 123 and 124 respectively) and OPLs 90 and 225 (now OMLs 126 and 137 respectively).

The PSCs subsequently underwent a number of both formal and informal amendments in 1977, 1992-1993 and post 1993. This explains why the use of PSCs as a contractual arrangement in the upstream petroleum industry in Nigeria can be classified into three eras, namely, the 1973 era, the 1993; and post 1993 eras. The later models, that is, the 1993 and post 1993 PSCs can further be classified into three broad models based on the differences in their terms.[34]

2.3.2 The 1993 model production sharing contracts

On 8th October, 1990, the Nigerian Government issued a press statement inviting applications from international oil companies to bid for various open acreages. The press statement was issued by the then Minister of Petroleum Resources, Professor Jibril Aminu. This invitation is generally referred to as the 1990 Bidding Round.[35] In the press statement, the government explained that it was its policy to encourage exploration in all sedimentary basins including the deep offshore with a view to increasing Nigeria's proven reserves from the current level of 16 billion to 20 billion barrels by 1995. The Minister stated that the Federal Government had in the past given various fiscal and other incentives to encourage investment in oil exploration and that the Government planned to continue to review these incentives so as to ensure the attractiveness of investment in the Nigerian petroleum sector.[36]

[34] Ogunleye, T.A. Op.cit. P. 2
[35] Partial Award in the Arbitration between Shell Nigeria Exploration & Production Company Ltd (SNEPCO) & 3 Ors vs NNPC dated 30th day of May, 2013, p. 33. (the SNEPCO & NNPC Partial Award).
[36] Ibid.

In the 1990 bidding round, Government deliberately chose to move away from the previous joint venture model because same have proved to be unsatisfactory as it required a substantial financial input from the government as a joint venturer. The preference for a PSC was intended to take away the Government's investment obligations and to impose the financing and the risk of exploration and development on the IOCs in return for reimbursements of their costs and expenses, and a suitable return after taking into account matters such as royalty and tax. Driven by this objective, the Nigerian government issued a model PSC in March 1991 which it indicated would form the basis of an agreement in respect of each of the offered oil blocs. The Government also invited comments from the wider oil and gas industry on the incentives required to attract investment from the IOCs. [37]

Following the Government's invitation for comments, Shell Petroleum Development Company of Nigeria Limited and other IOCs operating in Nigeria at that time expressed the concern that deep water drilling and exploration was extremely challenging, both technically and commercially. The IOCs indicated that the fiscal terms such as royalty rate, tax rate and investment tax credit rate would need to be improved to make such projects economically feasible. Prior to the conclusion of the negotiations, the existing fiscal regimes in the petroleum industry were as follows:

a. Royalty rate: 20% for onshore field; 18.5% for offshore of up to 100 meters water depth; and 16.67% for offshore of water depth greater than 100 metres.[38]
b. Petroleum Profits Tax (PPT): 65.75% in respect of onshore and shallow water of up to 200 metres operations for the first five years of a company's actual production and 85% for the period thereafter.[39]
c. Investment Tax Credits (ITC): 5% for on-shore operations; 10% for offshore operations in territorial waters and continental shelf areas up to and including 100 metres of water depth; 15% for offshore operations in waters and

[37] Ibid. p. 34
[38] Petroleum Profits Tax (Amendment) (No.2) Decree No. 24, 1979.
[39] Section 1(b) *Petroleum Profits Tax (Amendment) (No.2) Decree* No. 24, 1979. However, Decree No. 30 of 1999 introduced PSCs to the PPTA – Section 11, Finance (Miscellaneous Taxation Provisions) Decree 1999.

> continental shelf areas in water depth between 100 metres and 200 metres; and 20% for operation in territorial waters and continental shelf areas beyond 200 metres of water depth.[40]

On receipt of the views of the IOCs, the Nigerian Government indicated its willingness to improve the fiscal terms as requested by the IOCs. Consequently, Shell submitted bids for two oil prospecting licenses (OPLs) 212 and 219.[41]

On 20th November, 1991, the then Minister of Petroleum, Professor Aminu wrote to Shell confirming the award of deep-water OPLs 212 and 219 subject to a number of conditions including the fact that the development of the blocs shall not be subject to consolidation with Shell's existing operations through SPDC.[42] In deference to this condition, Shell incorporated Shell Nigeria Exploration and Production Company Limited (SNEPCO) as a special purpose vehicle for the operation of OPLs 212 and 219. The second reason why SNEPCO was incorporated in Nigeria was to comply with the provisions of the Petroleum Act which stipulates that an oil prospecting licence or lease may be granted only to a company incorporated in Nigeria under the Companies and Allied matters Act or any corresponding law.[43]

The IOCs and the Government continued negotiations over the fiscal terms through 1992 and into 1993. The Federal Government eventually improved the fiscal terms and reached an agreement with the SNEPCO and other IOCs. Unfortunately, the improved fiscal terms required formal legislation or extension of existing Nigeria laws. To circumvent this requirement, the Government issued a Side Letter[44]dated 19th April, 1993 wherein it

[40] Section 5 (a) *Petroleum Profits Tax (Amendment)* (No.3) Decree No. 95, 1979.
[41] Paragraph 2.5 of the plaintiffs' statement of claim in suit No. FHC/ABJ/CS/282/2013-*Shell Nigeria Exploration & Production Company Ltd & 3 Ors. v. NNPC.*
[42] Ibid. Para 2.6 of the plaintiffs' statement of claim.
[43] Section 2(2), *Petroleum Act*, Cap. P10, L.F.N., 2004.
[44] Side Letters are supplemental to the main Agreement. The Side Letter issued by the Government was supplemental to the 1993 PSCs. Jennings, A. (2002) *Oil and Gas Exploration Contracts*. Sweet and Maxwell. London, p. 34.

guaranteed that the terms which required amendments to existing Nigerian laws shall be applicable and enforceable. On the same date, the Government and SNEPCO signed the PSC relating to OPLs 212 which was later converted to Oil Mining Lease (OML) 118 and otherwise known as the Bonga PSC.[45]

The two paged Side Letter of 19th April, 1993 signed by the then Hon. Secretary of Petroleum and Mineral Resources, Mr. P.C. Asiodu for and on behalf of the Federal Government of Nigeria became 'the applicable fiscal terms' to the 1993 model PSCs. The full text of the letter is reproduced below for ease of reference and to show its scope and limitations even though they are merely ministerial directions or, at best, soft rules:

Dear Sir,

Reference is made to the Production Sharing Contracts (PSC) to be signed between Nigerian National Petroleum Corporation (NNPC) and Shell Petroleum Development Company of Nigeria Limited (Contractor) relating to OPL(s) No. 212, 219, 803, 806 and 809 and any subsequent OML(s) that may be derived therefrom.

Pursuant to Government policy, the PSC will be approved with the guarantee that the following terms which require amendments to existing Nigerian Laws are applicable and enforceable:

(I) The OPL(s) shall be for a maximum term of ten (10) years;

(II) The Petroleum Profit Tax (PPT) for petroleum operations under the PSC shall be 50% flat in accordance with the PSC terms;

(III) The Investment Tax Credit (ITC) for NNPC and the contractor in respect of petroleum operations under the PSC shall be 50% flat in accordance with the PSC terms,

[45] The SNEPCO & NNPC Partial Award, p. 36. The Bonga PSC is currently a subject of litigation at the Federal High Court and Court of Appeal in Suit No. FHC/ABJ/CS/282/2013 – *SNEPCO & 3 Ors vs NNPC* and Appeal No. CA/A/434/2015 – *NNPC vs SNEPCO & 3 Ors* respectively.

(IV) Royalty Rates shall be as provided in the PSC, and computation and payment of the estimated and final PPT is to be made in US dollars on the basis of the US dollar returns filed.

This letter shall be valid until the respective applicable laws are amended to reflect the terms of the PSC herein stated.

Dated this 19th day of April, 1993.[46]

The government's holding out of a mere 'Side Letter' as 'the applicable fiscal terms' to the 1993 model PSCs is, to say the least, invalid. The reason for this is simple. The law is trite that fiscal terms can only be specified by positive law. In other words, for any tax to be levied, there must be a direct legislation authorizing same. In the case of *Addax Petroleum Development (Nig.) Ltd vs Federal Inland Revenue Service,*[47] the Tax Appeal Tribunal re-echoed the established position of the law and held that "payment of tax or who is entitled to pay tax is an issue of law not of agreement, contract or compromise." Side letter is an addendum to an agreement or contract between parties. It is not an instrument of legislation. The Side Letter was not a decree made by the then Federal Military Government and therefore, could not have been sufficient to embody applicable fiscal terms. Perhaps, it is in recognition of this obvious lapse that, to give proper legislative backing to the contents of the Side Letter, the Federal Government promulgated the Deep Offshore and Inland Basin (Production Sharing Contracts) Degree, 1999 wherein it enacted that the effective date of the Decree shall be January 1, 1993.[48] In effect, the government back dated the effective date of the decree to make up for the period of about six years when the Side Letter was purportedly in force as the applicable fiscal terms to the 1993 PSCs.

[46] Record of Appeal in Appeal No. CA/A/434/2015 – *NNPC vs SNEPCO & 3 Ors*. pp. 250-251.
[47] (2012) 7 T.L.R.N. 74, 85,
[48] Decree No. 9 of 1999 made on 23rd March, 1999. This Decree was subsequently repealed by the Deep Offshore and Inland Basin Production Sharing Contracts Act Cap D3, L.F.N., 2004.

The Bonga PSC was among the several PSCs that the NNPC entered into with other IOCs notably, the Agbami PSC.[49] The Bonga and Agbami PSCs have assumed some notoriety on account of the hugely contested arbitrations that emanated from each of them. These arbitrations and their Awards and the matters arising therefrom are considered in chapter five of this research. Suffice it to state that the 1993 model PSCs have some key provisions which are discussed under general outlines of a PSC. It is also important to emphasize that all the 1993 PSCs had similar provisions the only differences between them are the Contract Area to which each PSC relates and the expenditures required to fulfill the minimum Work Programme and Expenditure. While the Contract Areas are described in Annex A to each PSC, clause 5 of each PSC sets out the respective minimum Work Programme and Expenditures.

2.3.3 The Post 1993 Model Production Sharing Contracts

In the period between 1991 and 2007, the Federal Government has conducted about five (5) licensing rounds namely: 1990/1991, 2000, 2005, 2006, and 2007. From the various licensing rounds, three different PSC models have noticeably emerged from the contracts executed between the NNPC and the IOCs. The first sets are the 1993 models discussed above while the other two are the 2000 and 2005 PSCs which are together described as post 1993 PSCs. As stated earlier, the PSCs are quite similar in many respects but some provisions in the 2000 and 2005 PSCs are improvements made based on the shortcomings observed in the 1993 models.[50] One of such improvements is that each of the latter PSCs are restricted to

[49] Production Sharing Contract between NNPC and Statoil (Nigeria) Limited and BP Exploration (Nigeria) Limited entered into on the 18th day of May, 1993. The PSC is now a subject of litigation in different suits such as Statoil & Ors vs NNPC. Suit No. FHC/L/CS/837/2015 (Partial Award) and Suit No. FHC/L/CS/1469/2015 for final Award as well as NNPC vs Statoil & Ors. Suit No. FHC/L/CS/638/2015. This suits arose from an Arbitration over the same PSC in which the NNPC lost leading to the suits. While the Contractor is seeking to enforce the Arbitral Award, the NNPC is seeking to set aside the Award on the principal ground that tax disputes are not arbitrable under Nigerian statute and case laws. There is also an appeal pending at the Supreme Court on account of the instant PSC in SC/432/2013 - NNPC vs Statoil Nigeria Ltd & 4 Ors.

[50] Ogunleye, T.A. Op.cit. p. 4.

the particular OPL or oil Bloc to which it relates. This is intended to avoid the dispute associated with consolidation of costs and recovery of same from any producing OML. In simple terms, the post 1993 PSCs are ring-fenced within the select OML or oil bloc to which they relate.[51]

The key features of the various models and their deferences are considered shortly. In the interim, it is important to mention that the PSC has since become the petroleum arrangement of choice for the Nigerian government. The rationale behind the adoption of PSCs were the funding constraints being experienced in the Joint Venture arrangement, the high geological risk associated with deep water and inland basins exploration, the desire of the government to retain title to the oil concession and the aspiration to increase the nation's reserve base. Accordingly, oil prospecting licences (OPL) awarded during the 1991 licencing round and subsequent licencing rounds were on PSC terms.[52]

2.4 General Outline of Production Sharing Contracts in Nigeria

The text of the 1993 model PSCs contain certain outlines.[53] Each of the outlines are considered below albeit briefly to highlight their respective contents. It must be emphasized that the 2005 PSCs[54] which represents the post 1993 PSCs in this research also have substantially similar provisions. However, the important differences are highlighted as each of the outlines are discussed below.

[51] PSC signed between NNPC and Elf Petroleum Nig. Ltd covering Block 221, dated 19th November 2003.
[52] Ogunleye, T. A. Op. cit. p. 3.
[53]Production Sharing Contract signed between the NNPC and Shell Nigeria Exploration and Production Company Ltd dated 19th April, 1993; the PSC signed between the NNPC and Statoil (Nigeria) Limited and BP Exploration (Nigeria) Ltd dated 18th May, 1993.
[54]PSC between NNPC and South Atlantic Petroleum Ltd and Total Upstream Nigeria Ltd covering OML 130 made on 25th April, 2005. This PSC will be used as a reference to the 2005 PSCs in this research.

2.4.1 Recital/Preamble

This portion of the Contract identifies the parties thereto as the NNPC and the relevant IOC who is described as the "CONTRACTOR". It discloses the date of the PSC, the OPL to which the PSC relates and the promises and mutual covenants under which the parties agreed to enter into the Contract. Importantly, it states that the NNPC has the right, power and authority to enter into the contract and that the Contractor has the technical competence and professional skills necessary to conduct petroleum operations and has the funds both local and foreign for carrying on the said operations.

2.4.2 Definitions

Definitions clauses are standard contract sections that define specifically technical and financial terms to promote a common understanding and source of reference. They can be fairly straight forward and can provide an important foundation for mutual understanding of the contract.[55] The definitions clauses in the 1993 model PSCs ascribe meaning to specified words used in the Contract. They specifically define words like Accounting Procedure, Available Crude Oil, Commercial Quantity, Contract Area and the like.

2.4.3 Scope

Under the scope of the PSC, the NNPC as holder of all rights in and to the Contract Area appoints the Contractor as the exclusive company to conduct Petroleum operations in the Contract Area. This is consistent with the provisions of the Petroleum Act which stipulates that the holder of an oil prospecting licence shall have the exclusive right to explore and prospect for petroleum within the area of his licence.[56] During the term of the PSC, the total Available Crude Oil (ACO) shall be allocated to the parties in accordance with the terms of the PSC. It states that the Contractor shall provide funds and bear the risk of operating cost

[55]Johnston, D. Op.cit. p. 157.
[56] Paragraph 5, first Schedule, *Petroleum Act*. Cap. P10, L.F.N. 2004.

required and shall therefore have economic interest in development of Crude Oil deposits in the Contract Area. The Contractor is agreed to be engaged in Petroleum operations pursuant to the Petroleum Profits Tax Act[57]and therefore the Companies Income Tax Act[58] is expressly excluded.

2.4.4 Term

The 1993 PSC provides that the term shall be for thirty (30) years from effective date inclusive of ten (10) years exploration and twenty (20) years Oil Mining Lease (OML) period. The 20 year OML period is subject to renewal.[59] The term of the exploration period is inconsistent with the Petroleum Act. Paragraph 6 of the First Schedule to the Petroleum Act provides that the "duration of an oil prospecting license shall be determined by the Minister, but shall not exceed five years (including any periods of renewal). It thus follows that the 10 year exploration period included in the PSC is in violation of the Petroleum Act. Regardless of this inconsistency, section 2 of the Deep Offshore and Inland Basin Production Sharing Contracts Act[60] effectively cures this defect. It provides that "the duration of an oil prospecting licence relating to production sharing contracts in the Deep Offshore and Inland Basin shall be determined by the Minister and shall be for a minimum period of five years and an aggregate period of ten years". Furthermore, by virtue of section 15(2) of the Deep Offshore and Inland Basin Production Sharing Contracts Act, if the provisions of any other enactment or law including but not limited to the Petroleum Act and Petroleum Profits Tax Act are inconsistent with the provisions of the Deep Offshore and Inland Basin Production sharing Contracts Act (DOA), the provisions of the Act shall prevail and the provisions of that other enactment or law shall, to the extent of that inconsistency be void. In effect, the 10 year OPL timeline under the PSC and sanctioned by the DOA overrides the provisions of the

[57] *Petroleum Profits Tax Act*, Cap. P13, L.F. N., 2004.
[58] *Companies Income Tax Act*, Cap C21, L.F.N., 2004.
[59] Clause 3, the Bonga and Agbami PSCs of the 1993 epochs.
[60] Cap. D3, L.F. N., 2004.

Petroleum Act, 1969. It remains to mention that the term of the Oil Mining Lease of 20 years is however consistent with the Petroleum Act.[61]

The term also sets out the mode of termination of the PSC by the parties which is by giving not less than ninety (90) days prior written notice to that effect. However, where at the end of the sixth year from the effective date, the agreed work programme has not been substantially executed, the PSC shall terminate forthwith. The challenge here is how to determine whether or not the work programme has been substantially executed. The PSC unfortunately did not provide the standard of measurement in this regard. Furthermore, where at the end of the sixth year, oil is not discovered in commercial quantity, the contractor shall have the option to terminate the contract without any further obligations. The contract will generally terminate if no petroleum is found after ten years from the effective date.

2.4.5 Exclusion of Areas

Not later than ten years from the effective date, fifty percent of the Contract Area shall be excluded and such excluded areas shall revert to Government. Provided that such areas to be excluded must be agreed by both parties and shall not include the surface areas of any field where oil has been found in commercial quantity. The 2005 PSCs describes Exclusion of Areas as Relinquishment of Areas and it is contained in clause 5.

2.4.6 Work Programme and Expenditure

Work Programmes and Expenditures is one of the important sections of a Production sharing contract.[62]The minimum Work Programme for the Bonga and Agbami fields PSCs[63] are similar and they are as follows during the exploration period:

a. Contract Years 1-3 a total of twenty-four (24m) million US Dollars.

[61] Paragraph 10, First Schedule, Petroleum Act. Cap. P10. L.F.N., 2004.
[62] Johnston, D. Op.cit. P. 159.
[63] The Bonga and Agbami PSCs are of the 1993 epochs. The one signed on 19/4/1993 (NNPC & SNEPCO) relates to OML 118 while the other signed on 18/5/1993 (NNPC & Statoil) relates to OML 128 and they have both become popular because of the Arbitration proceedings emanating from them.

b. Contract Years 4-6 a total of thirty (30m) million US Dollars.

c. Contract Years 7-10 a total of sixty (60m) million US Dollars.

However, if during the period of Contract Years, the Contractor should spend less than the amount required to be so expended, an amount equal to such under expenditure shall be carried forward and added to the amount to be expended in the following period of Contract Years. In effect, the sums budgeted should be expended in working the field regardless of the stage at which they were budgeted.

Within two months after the effective date and thereafter at least three months prior to the beginning of each year, the Contractor shall prepare and submit for review and approval by the Management Committee, a Work Programme and Budget for the Contract Area setting forth the Petroleum Operations which the Contractor proposes to carry out during the ensuing year, or in case of the first Work Programme and budget, during the remainder of the current Year. The Management Committee shall review and approve such Work Programme and Budget prior to the submission of same to the Ministry.[64] The Contractor is also required to submit performance Bond from a reputable international institution to cover the amount of 54 million US Dollars agreed in the Work Programmes for the first 6 years and another performance Bond of 60 million US Dollars to cover the agreed Work Programmes for the last 7 – 10 years.[65] A similar provision is found at clause 6 of the 2005 PSCs.

2.4.7 Management Committee

The Management Committee (MACOM) is a very crucial organ in a PSC. The Operator or Contractor executes the minimum Work Progaramme under the supervision of the Management Committee and expenditures are to be authorized by that Committee except in case of emergency expenditures.[66] The Management Committee is the institutional link

[64] Clauses 5.1 of the Bonga and Agbami PSCs.
[65] Ibid. clauses 5.3
[66] Jennings, A. Op.cit. p. 50.

between the operator and non-operators and the Committee consists of representatives of each party to the joint operating agreement (JOA).[67]

The Bonga and Agbami PSCs make similar provisions for Management Committee as well as their purpose at clause 6.1 which provides: "A Management Committee shall be established within thirty (30) days from the date of execution of this Contract for the purposes of providing orderly direction of all matters pertaining to the petroleum Operations and Work Programmes." It remains to be added that the 2005 PSCs also have similar provisions regarding Management Committee.

2.4.7.1 Powers and Duties of the Management Committee

The Management Committee has enormous and extensive powers and duties under a production sharing contract. The Management Committee is the highest decision making organ of a production sharing contract. All proposals relating to the work programme and expenditure are considered and approved by the MACOM before they are implemented by the operator. The powers and duties of the Management Committee are stated to include but not limited to the following:

a. the review, revision, and approval of all proposed Work Programme and Budgets in accordance with Clauses 5 and 6.3(e);
b. the review, revision, and approval of any proposed recommendations made by either Party or by any sub-committee, pursuant to Clause 6.6 with respect to petroleum Operations;
c. ensuring that the CONCTRACTOR (sic) carries out the decisions of the Management Committee and conducts Petroleum Operations pursuant to this Contract;

[67] Ajogwu, F. and Nliam, O. Op.cit. p. 58.

d. the consideration and decision on matters relating to the exclusion of areas in the Contract Area pursuant to Clause 4; and in accordance to this Contract;

e. settlement of claims and litigation in excess of five hundred thousand Naira (N500,000) or the equivalent thereof in Foreign Currency, or such other amount as may be approved by the Management Committee in so far as such claims are not covered by policies of insurance maintained under this Contract;

f. consideration and approval of the sale or disposal of any item or movable property relating to Petroleum Operations in accordance with the provisions of this Contract except for items/properties of historic costs less than one million Naira (N1,000,000); and any sale or disposal of fixed asset shall be referred to the CORPORATION (sic);

g. settlement of unresolved audit exceptions arising from audits as provided for in Clause 13.2 of this Contract;

h. ensuring that the CONTRACTOR (sic) implements the provisions of the Accounting Procedure (Annex B), the Lifting Procedure (Annex D), and the Procurement and Project Implementation Procedures (Annex E) and all amendments and revisions thereto as agreed by the parties;

i. Any other matters relating to Petroleum operations except:

   (i) those matters under the sole discretion and control of the CONTRACTOR (sic) in carrying out its duties and functions,

   (ii) those matters elsewhere provided for in this Contract, or

   (iii) those matters reserved to the parties in their respective rights pursuant to Clause 7;

j. consideration and approval of the sale or disposal and exchange of information to third parties other than routine exchange of seismic data and other such data commonly exchanged within the industry,

k. consideration and determination of any matter relating to the Petroleum Operations which may be referred to it by any Party (other than any proposal to amend this Contract) or which is otherwise designated under this Contract for reference to it.[68]

2.4.7.2 Appointment and membership of the Management Committee

The membership of the Management Committee consist of ten (10) persons appointed by the Parties as follows:

The Corporation (NNPC) - 5

The Contractor (IOC) - 5

Each Party is required to notify the other in writing, of the names, titles and addresses and the alternates of its representatives to serve as members of the Management Committee.[69] Each Party may however, change any of its respective members or alternates to the Management Committee (MACOM) from time to time by notifying the other party in writing not less than ten (10) days in advance of the effective date of such change.[70]

The Corporation (NNPC) appoints the Chairman of the MACOM while the Contractor (IOC) appoints the Secretary. The Secretary is not a member of MACOM but he keeps the minutes of all meetings and records of all decisions of the MACOM. At least 14 business days prior to each meeting, the secretary shall provide an agenda, with briefs to be considered during such meeting. Any Party desiring any addition to the agenda shall give the other Parties notice of same at least 7 days before the scheduled meeting. No other agenda

[68] Clause 6.1 of the Bonga and Agbami PSCs of 1993
[69] Ibid. Clause 6.2 (a) and (b).
[70] Ibid. Clause 6.2(d)

shall be added except by the mutual agreement of the Parties. However, agenda shall not be required in the event of an emergency meeting.[71]

Within 14 days after each meeting, the Secretary is under obligation to forward drafts of the minutes to the parties. Within 14 days thereafter, each party is required to return the minutes with its comments to the Secretary who shall within 14 days thereafter forward the final draft to the other party. Minutes of each meeting shall be approved by the MACOM at the next meeting and copies thereof shall be supplied to the Parties. In addition, the secretary shall at each meeting, prepare a written summary of any decision made by the MACOM for approval and signature by the Parties prior to adjournment.[72] The secretary shall in consultation with the Chairman convene all meetings of the MACOM other than the emergency meetings.[73] In practical terms, the secretary to the MACOM serves as the head of the secretariat and is in charge of the administration of the meetings of the MACOM.

2.4.7.3 Procedure of meetings of the Management Committee

The MACOM shall determine and adopt rules to govern its procedures except as may be expressly provided in the Contract.[74] Not later than the 28th day of February of each year, the Chairman shall prepare and forward to the Parties, a calendar of meetings as agreed by the MACOM for that year.[75] Unless otherwise agreed, the meetings of MACOM shall be at the head office of the Contractor and shall hold once every four calendar months or at such intervals or venue as may be agreed.[76] The quorum for any meeting of the MACOM shall consist of a minimum of three (3) representatives of the Contractor and three (3)

[71] Ibid. Clause 6.2(c)
[72] Ibid. Clause 6.2(e)
[73] Ibid. Clause 6.3(d)
[74] Ibid. Clause 6.4(a)
[75] Ibid. Clause 6.3(a)
[76] Clause 6.3(b)

representative of the Corporation. However, the Chairman or his alternate and the Managing Director of the Contractor or his alternate must be present at every meeting for a quorum to be formed. If no such quorum is formed, the Chairman shall call another meeting giving at least 14 days' notice of such meeting.[77] Within 8 weeks after the submission of a Work Programme and Budget by the Contractor, the MACOM shall meet to consider and approve such submission. The Corporation (NNPC) is however at liberty to propose the revision of certain specific features of the Work Programme and Budget. The rationale for this is that the NNPC is the licence holder and therefore obligated to ensure that the features of the work Programme and Budget are such that would guarantee a successful development of the oil field. Where the NNPC has not proposed any revision within 6 weeks, the Work Programme and Budget shall be approved by resolution of the MACOM.[78]

Members attending a meeting of the MACOM may be accompanied by advisers and experts to the extent reasonably necessary to assist with the conduct of such meeting. The essence is to provide members of the MACOM with the requisite technical and expert guidance that they may stand in need in the course of the meeting. The attendance of experts and advisers at MACOM meetings assists the members to make quick decisions and therefore prevents a situation where such meetings are unduly adjourned for want of expert advice. Such advisers and experts are however, not entitled to vote or in any way participate in decisions, but may contribute in a non-binding way to discussions or debates of the MACOM.[79] The advisers and experts are not entitled to vote because they are not members of the MACOM. At any MACOM meeting where there is quorum, the Chairman or his alternate shall exercise the voting right of the NNPC and the Managing Director or his alternate shall

[77] Clause 6.3(c)
[78] Clause 6.3(e)
[79] Clause 6.4(b)

exercise the voting rights of the Contractor.[80] This provision ensures that the highest ranking official of each of the parties endorse the decision to avoid a situation where one Party would assert absence of authority after a decision has been made over an issue at the MACOM.

2.4.7.4 Decision making procedure of the Management Committee

All the decisions of the MACOM is made by a unanimous vote of Parties except where otherwise expressly provided in the Contract.

Where the Parties are unable to agree unanimously on any matter, then the MACOM shall meet again to attempt to resolve such matter not later than 14 days after the meeting in which the proposed matter was rejected by a negative vote. However, any portion of such proposal that is not rejected shall in so far as possible be carried out. Furthermore, at least 7 days prior to such second meeting, the Party casting the dissenting vote shall provide to the other Party in writing in reasonable detail the reasons for such dissenting votes. Where such reasons are not provided at least 14 days prior to such second meeting, then the proposal shall be deemed approved. In such second meeting, the agenda shall comprise of such written reasons as provided by the dissenting party.

If unanimity is not obtained in the second meeting, then the MACOM shall meet a third time within 14 days after the second meeting. If unanimity is not obtained in the third meeting, then the Parties may agree to appoint an independent qualified expert to advise on the matter, which advice shall be binding on the Parties. In the event of failure of the Parties to agree to the appointment of the said expert the provisions of Clause 21, shall apply.[81] The Parties are bound and shall abide by each decision made by the MACOM in accordance with the PSC.[82]

[80] Clause 6.4(c)
[81] Clause 6.4(d)
[82] Clause 6.4(e)

It is arguable if the decision making pattern of the MACOM is not such that sets it up for failure *ab initio*. Given the personality differences in human nature, it is almost certain that there may not be unanimity of agreement most times. A situation where a group of 10 persons who are in a business transaction at arms' length are required to unanimously agree on all issues before a discussion would be carried is predictably a herculean task. The options available in the event of a negative vote are patently unhelpful. All that the clause stipulates is for the Chairman to call for a second and third meetings in the hope that the party casting the negative vote would reconsider his position. This is obviously weak if it is remembered that the Chairman or his alternate cast the votes for the NNPC while the Managing Director of the IOC or his alternate casts votes for the Contractor. What happens where it is the Chairman that casts the negative vote? Would he in good conscience be willing to convene the second meeting? Where he convenes the second meeting and the IOC is not able to shift grounds, would he be able to convene the third meeting? These are clearly difficult situations to place humans on given the inherent difficulties and vagaries in human character. What is more, the at least 7 days period before the second meeting limited for the dissenting party to provide a reasonable explanation in writing, his reasons for so dissenting is scarcely enough given the bureaucracy that is inherent in the NNPC. Worst still, it is stipulated that if the dissenting party is unable to provide his written reasons for so dissenting, the proposal shall be deemed approved. This is not safe for the NNPC at all, given the bureaucracy and the internal layers of approvals required before any official position can be taken and thereafter communicated to the IOC.

The other option is for the Parties to refer the issue to an independent expert for determination and such decision would be binding on the Parties. Again, this is fraught with problems. The first problem is who determines the criteria for measuring the Expert's qualifications and proficiency. What is the nationality of the Expert? Who recommends the

expert? These are questions that are potentially hard for Parties who are already in disagreement to settle. Perhaps, it is in view of the difficulty associated with these questions that the 2005 PSCs provides that in the event of failure of Parties to agree to the appointment of the said expert, the President of the Institute of Petroleum of the United Kingdom shall appoint such expert.[83] The last option is for the Parties to proceed to arbitration. This too has its own inherent challenges. As demonstrated later in this research, the starting challenge relates to the membership of the Arbitration Tribunal.

In view of the many challenges in the decision making procedure of the MACOM, it is submitted that decisions on every issue before the MACOM should be by the unanimous agreement of the Parties but in the event of a tie, the Chairman should have a casting vote where there is no express provision for a casting vote. This approach would obviate the likelihood of disagreements in the present decision making procedure of the MACOM.

2.4.7.5 Emergency decision making procedure of the Management Committee

Generally, any matter which is within the powers and duties of the MACOM may be determined by the MACOM without a MACOM meeting if such matter is submitted by either Party to the other with due notice and with sufficient information regarding the matter to be determined so as to enable the Parties to make an informed decision with respect to such matter. However, for urgent matters, each Party shall cast its vote with respect to such matter within 21 days of receipt of such notice and such manner of determination shall be followed unless a Party objects, within 14 days of receipt of such notice, to having the matter determined in such manner. If any party fails to vote before the expiration of the 21 days period for voting, it shall be deemed to have voted in the affirmative. The Secretary shall

[83] Clause 7.5(c), 2005 PSC between NNPC & South Atlantic Petroleum Ltd & Total Upstream Nig. Ltd covering OML 130 Offshore Nigeria.

promptly advise the parties of the results of such vote and the Secretary shall draft a resolution to be signed as soon as possible by the parties.[84]

To cater for decisions at emergencies, the PSC provides that each party shall nominate one of its officers as its representative from whom the other Party may seek binding decisions on urgent matters, including, but not limited to ongoing drilling operations, by telephone, letter, facsimile transmission, telex or in person and they shall advise each other in writing of the person so nominated and any changes thereof.[85] Furthermore, in the event of emergency requiring immediate operational action, either Party may take all actions it deems proper and or advisable to protect the interest and those of its respective employees and any costs so incurred shall be included in Operating Costs. Prompt notification of any such action taken by a Party and the estimated cost shall be given to the other Party within 48 hours of the commencement of the event. All decisions made at emergency situations shall be recorded in the minutes of the next scheduled MACOM meeting and same shall, in like force, be binding upon the Parties. [86]

2.4.7.6 Sub-committees of the Management Committee

It remains to be added that the MACOM is at liberty to establish sub-committees such as exploration and technical sub-committees and any other advisory sub-committees it considers necessary from time to time such as finance and budget, and legal services sub-committees. The MACOM shall give terms of reference to its sub-committees and they shall be subject to such direction and procedure as the MACOM may determine.[87] The MACOM shall appoint the members of the sub-committees which shall comprise of equal representation from the Parties. The Chairmen and the Secretaries of the sub-committees shall be appointed by the MACOM. The deliberations and recommendations of any sub-

[84] Clause 6.5(a)
[85] Clause 6.5(b)
[86] Clause 6.5(c) & (d)
[87] Clause 6.6(a)

committee shall be advisory only and shall become binding and effective upon acceptance by the MACOM.[88]

Looking at the role of the MACOM as chronicled above, one finds that it is the administrative engine of a PSC. It is the meeting point where Parties interface for the purpose of orderly implementation of the contract.

2.4.8 Rights and obligations of the parties to the production sharing contract

The Bonga and Agbami PSCs, as well as the 2005 PSCs, have common provisions for the rights and obligations of the parties to a production sharing contract. The rights and obligations are reproduced below for ease of reference beginning with that of the Contractor (IOC):

2.4.8.1 Rights and Obligations of the Contractor

In accordance with the Contract, the Contractor shall:

a. provide all necessary funds for payment of Operating Costs including, but not limited to, funds required to provide all materials, equipment, supplies, and technical requirements (including personnel) purchase, paid for or leased in Foreign Currency;
b. furnish such other funds for the performance of Work Programmes that require payment in Foreign Currency, including payments to third parties who perform services as subcontractors;
c. prepare Work Programmes and Budgets and carry out approved Work Programmes in a good and workmanlike manner and in accordance with internationally accepted petroleum industry practices and standards with the object of avoiding waste and obtaining maximum ultimate recovery of Crude Oil at minimum costs;

[88] Clause 6.6(b0 & (c)

d. ensure that all leased equipment paid for in Foreign Currency and brought into Nigeria for Petroleum Operations is treated in accordance with the terms of the applicable leases;

e. have the right to dispose of, assign, transfer, convey or otherwise dispose of any part of its rights and interests under this Contract to other parties including Affiliates with prior written consent of the Corporation (NNPC) which consent shall not be unreasonably withheld;

f. have the right of ingress and egress from the Contract Area and to and from facilities therein located at all times during the term of this Contract;

g. submit to the NNPC for permanent custody copies of all geological, geographical, drilling and well production, operating and other data and reports as it may compile during the term hereof and at the end of the Contract surrender all original data and reports to the NNPC;

h. prepare estimated and final Petroleum Profit Tax returns and submit same to the NNPC on a timely basis in accordance with the Petroleum Profits Tax Act;

i. have the right to lift in accordance with Annex D and freely export and to retain abroad the receipts from the sale of Available Crude Oil allocated to it hereunder;

j. prepare and carry out plans and programmes for industrial training and education of Nigerians for all job classifications with respect to Petroleum Operations in accordance with the Petroleum Act Cap 350 Laws of the Federation of Nigeria 1990, as amended (sic);

k. employ only such personnel as are reasonably necessary to conduct the Petroleum Operations in a prudent and cost effective manner;

l. Give preference to such goods which are available in Nigeria or services rendered by Nigerian nationals, provided they meet the specifications and the standards of the goods and services;

m. In respect of payments of customs duties and other like charges, the CONTRACTOR (sic) and its subcontractors shall not be treated differently from any other companies and their subcontractors engaged directly in similar Petroleum Operations in Nigeria;

n. Indemnify and hold harmless the CORPORATION (sic) from and against losses (including legal fees and expenses) of whatever kind and gesture resulting from the CONTRACTOR's willful misconduct in carrying out Petroleum Operations and as a consequence of any final decision given by a Nigerian Court, except where such losses are shown to result from any action or failure to act on the part of the CORPORATION, provided however, that under no circumstances shall the CONTRACTOR be liable to the CORPORATION for reservoir damage or pollution or any consequential losses or damages occurring including, but not limited to, lost production or lost profits;

o. have the right to finance Petroleum Operations from external sources under terms and conditions approved by the CORPORATION, which approval shall not be unreasonably withheld; and

p. not exercise all or any rights or authority over the Contract Area in derogation of the rights of the CORPORATION.[89]

2.4.8.2 Rights and Obligations of the Corporation

Similarly, in accordance with the Production Sharing Contract, the CORPORATION (NNPC) shall:

[89] Clause 7.1

a. pay to the Government in a timely manner, all Bonuses, Royalties, Concessions Rentals and Petroleum Profits Tax accruing out of Petroleum Operations;

b. with its professional staff attached pursuant to clause 12.4, work jointly with the CONTRACTOR's professional staff in the CONTRACTOR's Exploration, Petroleum Engineering, Facilities/Materials and Finance Departments;

c. otherwise assist and expedite the CONTRACTOR's execution of Petroleum Operations and Work Programmes including, but not limited to, assistance in supplying or otherwise making available all necessary visas, work permits, rights of way and easements as may be requested by the CONTRACTOR (Expenses incurred by the CORPORATION at the CONTRACTOR's request in providing such assistance shall be reimbursed to the CORPORATION by the CONTRACTOR in accordance with Clause 10.1. The CONTRACTOR shall include such reimbursements in the Operating Costs. Such reimbursements will be made against the CORPORATION's invoice and shall be in U.S. Dollars computed at the rate of exchange published by the Central Bank of Nigeria on the date the expense was incurred);

d. have title to all original data resulting from Petroleum Operations including but not limited to geological, geophysical, engineering, well logs, completion, production, operations, status reports and any other data as the CONTRACTOR may compile during the term hereof, provided however, that the CONTRACTOR shall keep and use such original data during the term of this Contract and the CORPORATION shall have access to such data original data during the Term of this Contract;

e. not exercise all or any of its right or authority over the Contract Area in derogation of the rights of the CONTRACTOR;

f. the CORPORATION shall apply for conversion of the OPL to OML and shall exercise all the rights and comply with all the obligations of a Licensee or Lessee under the Petroleum Act 1969 and its amendments.[90]

The foregoing rights and obligations of the NNPC and the IOCs under the production sharing contracts are largely clear and self-explanatory. It is important to mention that the provisions on the obligations of the parties covers various issues that are not specifically covered in other clauses of the PSC.[91] It is also important to observe that whilst the IOC has sixteen (16) rights and obligations listed, the NNPC has only six (6). The reason for this wide imbalance is not indicated anywhere in the PSC. However, it may be because the IOC is the Contractor and therefore obligated to fund the exploration project and ensure ultimate exploitation of crude oil at minimal costs from the field.

2.4.9 Recovery of Operating Costs and Crude Oil Allocation under the Production Sharing Contract

This is a very important section of PSCs. It explains the IOCs entitlement to recover all operating costs out of gross sales proceeds less royalty. It further outlines the allocation of profit oil after the deduction of royalties, costs and tax oil.[92] Clause 8 of the Bonga and Agbami PSCs[93] make extensive provisions in this regards. The provisions are reproduced below for clarity.

The allocation of Available Crude Oil shall be in accordance with the Accounting Procedure (Annex B), the Allocation Procedure (Annex C) and this Clause 8 as follows:

a. Royalty Oil shall be allocated to the CORPORATION (sic) in such quantum as will generate an amount of Proceeds equal to the actual Royalty payable during each month and the Concession Rental payable annually;

[90] Clause 7.2
[91] Johnston, D. Op.cit. p. 161.
[92] Ibid. p.163.
[93] Clause 9 of the 2005 PSC has similar provisions.

b. Cost Oil shall be allocated to the Contractor in such quantum as will generate an amount of Proceeds sufficient for recovery of Operating Costs in OPL 213, 217, and 218 and any OMLs derived therefrom. All Operating Costs expended in U.S Dollars equivalent will be recovered in U.S Dollars through Cost Oil allocations.

c. Tax Oil shall be allocated to the CORPORATION (sic) in such quantum as will generate an amount of Proceeds equal to the actual PPT liability payable during each month;

d. All approved expenses incurred on the OPLs for exploration activities prior to the Effective Date of this Contract shall be recoverable as Operating Cost by the CONTRACTOR (sic) from Cost Oil under this Contract. Such cost shall be capitalized and recoverable in accordance with the PPT Act, 1959 as amended;

e. The CONTRACTOR shall for PPT purposes be entitled to consolidate OPLs 213, 217, and 218 and any OMLs derived therefrom;

f. Profit Oil, being the balance of Available Crude Oil after deducting Royalty, Tax Oil, and Cost Oil, shall be allocated to each Party pursuant to Schedule B-2 of the Accounting Procedure (Annex B) as follows:

COMULATIVE PRODUCTION MMB FROM CONTRACT AREA	**PROFIT OIL PERCENTAGES CORPORATION**	**CONTRACTOR**
0-350	20	80
351-750	35	65
751-1000	45	55
1001-1500	50	50
1501-2000	60	40

g. Above 2000 MMB Cumulative Production the CORPORATION and the CONTRACTOR shall meet to agree on the profit sharing percentage.[94]

[94] Clause 8.1, 1993 PSCs

The quantum of Available Crude Oil to be allocated to each party under this Contract shall be determined at the fiscalisation point. Each party is entitled to take in kind, lift and dispose of its allocation of Available Crude Oil (ACO) in accordance with the lifting procedure (Annex D).[95] Allocation of Royalty Oil and Tax Oil to the Corporation (NNPC) shall be applied towards the liability of the Contractor (IOC) and the NNPC for Royalty, Concession Rentals, and Petroleum Profits Tax (PPT) and the Proceeds therefrom shall be paid to the Government by the NNPC on behalf of both Parties.[96] However, either Party may at the request of the other, lift the other party's ACO and the lifting Party shall within sixty (60) days transfer to the account of the non-lifting Party the Proceeds of the sale to which the non-lifting Party is entitled. Overdue payments shall bear interest at the rate of one (1) month LIBOR[97] plus two percent (2%).[98]

It is also stipulated that the Contractor may purchase any portion of the NNPC's allocation of ACO from the Contract Area under the Corporation's terms and conditions including valuation and pricing of the Crude Oil as applicable to other third party buyers of the Corporation's Crude Oil. It is also required that both Parties shall meet on a monthly or quarterly basis as may be agreed to reconcile all Crude Oil allocated and lifted during the month or quarter.

Clause 8.1(e) above is one of the many contentious clauses in the 1993 PSCs. It was part of the issues in dispute in two of the arbitrations held regarding the PSCs. The dispute centered on whether cost incurred in petroleum explorations in OPLs 213, 217, and 218 could be consolidated and recovered from any OML derived therefrom. While the IOCs take the view that costs incurred in various OPLs are consolidated and recoverable from any OML(s) derived therefrom, the NNPC believes that costs are 'ring-fenced' and limited to a specific

[95] Clauses 8.2 and 8.3.
[96] Clause 8.4
[97] LIBOR means London Interbank Offer Rate.
[98] Clause 8.5

contract area. Unfortunately, as we shall see in chapter five (5) of this research, neither the relevant statutes nor the PSC document itself provides with certainty what the position is regarding the issue of cost consolidation of OPLs and recovery of same from any OML derived therefrom. The 2005 PSC makes a commendable improvement in this regard as it is noticeably silent on the issue of consolidation of OPLs. In other words, the 2005 PSC does not have a similar clause like clause 8.1(e) above in that it distinctly circumscribed cost recovery to an OPL and any OML derived therefrom thereby avoiding the ambiguity in the 1993 PSCs.[99]

Regarding the allocation of Profit Oil, the 2005 PSCs also makes some significant improvements in favour of the Corporation (NNPC). Whilst the 1993 PSCs begins with allocation ratio of 20% percent for the Corporation and 80% for the Contractor, the 2005 PSCs[100] begins with a 30% ratio for the Corporation and 70% for the Contractor. The profit oil allocation ratio is reproduced as follows:

[99] Ogunleye, T.A. op. cit. p. 5.
[100] Clause 9.1(d)

lause 9.2 of the 2005 PSCs also

Cumulative Production (MMB) from Contract Area	PROFIT OIL PERCENTATGES	
	CONTRACTOR	CORPORATION
0- 350	70%	30%
351 - 750	65%	35%
751 – 1000	52.5%	47.5%
1001 – 1500	45%	55%
1501 – 2000	35%	65%
Greater than 2000	Negotiable[101]	

makes a useful addition to the rights of the Parties to take in kind, lift and dispose of its allocation of Available Crude Oil in accordance with the lifting procedure. It adds that in the event of any difference arising from reconciliation, the records of the Ministry of Petroleum Resources shall be the official records.[102]

2.4.10 Valuation of available crude Oil under the production sharing contract

The valuation of ACO is often determined at the international market price or it is based on a predetermined basket of crudes. Once determined and agreed upon, the price formula then provides the basis for determining taxes and the basis of cost recovery.[103] Under the Bonga and Agbami PSCs (1993 PSCs), ACO allocated to each Party shall be valued in accordance with the following procedure:

a. on the attainment of commercial production, each Party shall engage the services of an independent laboratory of good repute to determine the assay of the new Crude Oil;

[101] Ibid.
[102] Cf: Clause 8.3 of the 1993 PSCs.
[103] Johnston, D. Op. cit. p.162

b. when a new Crude Oil Stream is produced, a trial marketing period shall be designated which shall extend for the first six (6) month period during which such new stream is lifted or for the period of time required for the first ten (10) liftings, whichever is longer. During the trial marketing the Parties shall:

(i) collect samples of the new Crude Oil upon which the assays shall be performed;

(ii) determine the approximate quality of the new Crude Oil by estimating the yield values from refinery modelling;

(iii) share in the marketing such that each party markets approximately an equal amount of the new Crude Oil and to the extent that one Party lifts the other party's allocation of ACO, payments therefore shall be made in accordance with clause 8.5;

(iv) exchange information regarding the marketing of the new Crude Oil including documents which verify the sales price and terms of each lifting;

(v) apply the actual f.o.b.[104] sales price to determine the value for each lifting which f.o.b. sales pricing for each lifting shall continue after the trial marketing period until the Parties agree to a valuation of the new Crude Oil but in no event longer than ninety (90) days after conclusion of the trial marketing period.[105]

c. as soon as practicable but in any event not later than sixty (60) days after the end of the trial marketing period (TMP), the Parties shall meet to review the assay, yield, and actual sales data. Each Party may present a proposal for the valuation of

[104] F.O.B. means Free on Board. It is a trade term that indicates whether the seller or buyer has liability for Goods that are damaged or destroyed during shipment between two parties. www.investopadia.com/terms/f/fob/asp. Retrieved on 20/11/2016 at 1:38pm.
[105] Clause 9.1 (a-e), Bonga & Agbami PSCs.

the new Crude Oil. A valuation method either spot related or net back or both or any other method acceptable to both parties shall be established for determining the price for each lifting of ACO. Such valuation method shall be in accordance with the Realizable Price provisions established by the Management Committee;

d. Upon the conclusion of the trial marketing period, the Parties shall be entitled to lift their allocation of ACO in accordance with the lifting procedure;
e. When a new crude Oil stream is produced from the Contract Area and is commingled with an existing Crude Oil produced in Nigeria which has an established Realizable Price basis, then such basis shall be applied to the extent practicable for determining the Realizable Price of the new Crude Oil. The Parties shall meet and mutually agree on any appropriate modifications to such established valuation basis which may be required to reflect any change in the market value of the Crude Oils as a result of the commingling.

However, where Crude Oil of different quality or grade is produced from the Contract Area, Parties shall apply the same valuation procedure in determining the realizable price.[106]

The summary of the forgoing provisions is that upon attainment of commercial productions, parties shall independently and differently take steps to analyses the samples in other to determine the character of the type of Crude Oil produced. The parties shall respectively lift same in other to determine the price at which the calculation of the Royalty oil, cost and tax oil will be based. That price is what is generally referred to as the realizable price.

2.4.11 Payments under the production sharing contract

[106] Clauses 9.2 & 9.3

The issue of payments arise often in a PSC. This is because there are numerous obligations and corresponding payments between the host government agencies and the Contractor.[107] Under the 1993 PSCs, the method of payments of any sum due from the IOC to the NNPC or vice versa is in accordance with the prevailing guidelines of the Federal Ministry of Finance, the Central Bank of Nigeria and the Accounting Procedure. Any payment required to be made shall be made within (thirty) 30 days following the end of the month in which the obligation to make such payment occurs. Overdue payments shall bear interests at the annual rate of one (1) month LIBOR plus 2%. However, each Party has the right of set off against the other party for sums due and payable to the other party.[108]

2.4.12 Title to Equipment under the production sharing contract

Title to equipment is another controversial aspect of the 1993 PSCs. According to Clause 11.1 of the PSC, the Contractor (IOC) shall finance the cost of purchasing all equipment to be used in Petroleum Operations in the Contract Area pursuant to the Work Programme and such equipment shall become the property of the Corporation (NNPC) on arrival in Nigeria. The Contractor and the Corporation shall have the right to use such equipment exclusively for Petroleum operations in the Contract Area. However, should the NNPC desire to use such equipment outside the Contract Area, such use shall be subject to terms and conditions agreed by the Parties provided that it is understood Petroleum Operations hereunder shall take precedence over such use by the NNPC.

The above provisions are fraught with issues. The first is the dispute arising from entitlement to investment tax credit (ITC). Investment tax is an allowance at a flat rate of 50% given to the NNPC and the Contractor (IOC) who have incurred any qualifying capital expenditure wholly, exclusively and necessarily for petroleum operations carried out under

[107] Johnston, D. Op. cit. p.163
[108] Clause 10.

terms of the PSC executed prior to 1st July 1998.[109] According to the text of clause 11.1, every equipment imported for petroleum operations becomes the property of the NNPC. That being the case, it, therefore, follows that the NNPC alone is entitled to ITC being the owners of the asset that triggers the claim to ITC. Regrettably, the IOCs claim otherwise and the provisions of section 4 of the Deep Offshore and Inland Basin Production Sharing Contracts Act is not clear in this regard. It is, therefore, submitted that the Act should be amended to reflect the true intentions of the Parties as reflected in clause 11.1.

The second issue that arises for consideration relates to the terms and conditions which applies where the NNPC desires to use such equipment outside the Contract Area. This clearly derogates from the right of ownership of the equipment on the part of the NNPC. Perhaps, it is in recognition of this uncertainty or derogation of the NNPC's right of ownership that the 2005 PSC provides that the NNPC "shall retain fifty percent (50%) equity in the ownership of such equipment on arrival in Nigeria."[110] This later provision is clearer as it makes it evident that the IOC and the NNPC have equal interest over the equipment.

Upon the termination or expiration of the Contract, the Contractor's right to use such equipment ceases. The property in equipment leased from local or foreign third parties does not pass to the NNPC and such equipment may be freely exported from Nigeria in accordance with the terms of the applicable lease.[111] It needs to be emphasized that title to all lands and all moveable property utilized in the petroleum operations shall be in the name of the NNPC and the Contractor and upon termination of the contract, the NNPC shall take possession of such lands and property and the Contractor shall handover same within thirty (30) days.[112]

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[109] Section 4(1), *Deep Offshore and Inland Basin Production Sharing Contracts Act*. CAP.D3. L.F.N. 2004.
[110] Clause 12.1 PSC between NNPC & South Atlantic Petroleum & Total Upstream Nig. Ltd covering OML 130 Offshore Nigeria made on 25th April, 2005.
[111] Clauses 11.2 & 11.3, Bonga and Agabmi PSCs of 1993.
[112] Clause 11.4, 11.5 and 11.6.

2.4.13 Employment and Training of Nigerian Personnel under the Production Sharing Contract

This section of every PSC is an agreement by the contractor to employ as many qualified nationals of the host government as is possible subject to competitive standards.[113] The Bonga and Agbami 1993 PSCs both provide that each year, the contractor shall submit a detailed programme for recruitment and training for the following year in respect of its Nigeria personnel in accordance with the Petroleum Act 1969 and its amendment and that qualified Nigerians shall be employed in all non-specialized positions.[114] Paragraph 38, first schedule to the Petroleum Act[115]provides that the holder of an oil mining lease shall ensure that-(a) within ten years from the grant of his lease – (i) the number of citizens of Nigeria employed by him in connection with the lease in managerial, professional and supervisory grades (or any corresponding grades designated by him in a manner approved by the Minister) shall reach at least 75% of the total number of persons employed by him in those grades; and (ii) the number of citizens of Nigeria in any one such grade shall be not less than 60% of the total; and (b) all skilled, semi-skilled and unskilled workers are citizens of Nigeria.

Clause 13.3(b) (i) of the 2005 PSC amplifies the provisions of the Petroleum Act in relation to the employment of Nigerians as follows:

> The CONTRACTOR shall ensure that:
>
> (i) Ten (10) years from the Effective date of this Contract the number of citizens of Nigeria employed by the CONTRACTOR in connection with the Petroleum Operation in managerial, professional and supervisory positions shall reach at least seventy five percent (75%) of the total number of persons employed by the CONTRACTOR in those positions. The CONTRACTOR shall further ensure that at the 15th and 20th Year after the Effective date of this Contract, the minimum

[113] Johnston, D. Op. cit. p. 163.
[114] Clauses 12.1 & 12.2, 1993 PSCs.
[115] Cap. P10, L.F.N., 2004

> level of the total number of Nigerian citizens engaged in Petroleum operations in managerial, supervisory and other professional positions shall reach eighty percent (80%) and eighty five percent (85%) respectively.

(ii)

The 2005 PSCs provides that the Management Committee shall agree on the organization chart of the Contractor which shall include Nigerian and non-Nigerian staff in key positions. It also makes for job security of Nigerians by ensuring that no Nigerian employed for the purpose of the contract shall be disengaged without the prior written approval by the Ministry of Petroleum Resources or other designated government agency; in accordance with applicable laws and regulations. Request for such approval shall be made through the Corporation.[116] It remains to be added that both the 1993 and 2005 PSCs provide that competent professionals of the Corporation shall be attached to work with the Contractor from time to time and such officials and the Contractor's officials shall not be treated differently with regard to salaries and other benefits. The costs and expenses incurred in the recruitment and training of Nigerian personnel are included in Operating Costs and therefore recoverable.[117]The research, however, takes the view that the recoverability of such costs is unfair. If the Petroleum Act mandates the Contractor to recruit Nigerians, there is no need for Nigeria to pay for the recruitment of her nationals. In other words, recovering costs incurred for the recruitment of Nigerians negates the very essence of the law that provides for the employment of Nigerians. Furthermore, it is a common industrial practice that employers train and re-train their employees for optimum service delivery. That being the case, what is the justification for Nigeria having to pay for the training of her citizens in the employment of the Contractor by way of cost recoverability? Perhaps, the only plausible excuse is that Nigeria is desperate to develop her manpower in the oil and gas industry and therefore, ready

[116] Clauses 13.5 & 13.6, 2005 PSC.
[117] Clauses 12.4 & 12.5, 1993 PSCs and Clause 13.4, 2005 PSC.

to pay for the requisite knowledge transfer if need be. Regardless, it is submitted that the relevant clauses should be renegotiated to address this obvious anomaly.

2.4.14 Books and Accounts, Audit and overhead charges under the Production Sharing Contract

The Bonga and Agbami 1993 PSCs as well as the 2005 PSCs variously make provisions for books and accounts, audit and home office overhead charges. Each of these are considered below albeit briefly.

2.4.14.1 Books and Accounts

In PSCs generally, this clauses stipulates who will be responsible for keeping the books and accounts and what rights the other party has for auditing and inspecting the record books.[118]The 1993 model PSCs provide that the CONTRACTOR (sic) shall be responsible for keeping complete books of accounts consistent with modern petroleum industry and accounting practices and procedures. The statutory books and accounts in the PSC shall be kept in Naira and US dollars. All other books of accounts as the operator may consider necessary shall be kept in columnar form in both Naira and U.S. Dollars. It is further provided that officials of the Corporation (NNPC) and the Contractors shall have access to such books of accounts and officials of the Corporation attached to the Contractor shall participate in the preparation of same.[119]

2.4.14.2 Audits

The PSC stipulates that the Corporation and its external auditors shall have the right to inspect and audit the books and accounts relating to this Contract for any year by giving thirty (30) days written notice to the Contractor and the Contractor shall facilitate the work of such inspection and auditing; provided, however, that the costs of such inspection and

[118] Johnston, D. Op. cit. p. 166.
[119] Clause 13.1, Bonga and Agbami 1993 model PSCs.

auditing shall be met by the Corporation, and provided also that if such inspection and auditing have not been so carried out within two (2) years following the end of the year in question, the books and accounts relating to such Year shall be deemed to be accepted by the Parties as satisfactory. Any exception must be made in writing ninety (90) days following the end of such audit and failure to give such written notice within such time shall establish the correctness of the book and accounts.[120]

The provisions for auditing of the accounting record of the Contractor in all PSC models in Nigeria has been criticized[121] and this research shares the same view. The provisions are simply that the NNPC retains the right to inspect and audit the accounting books of the Contractor without more. It is not used to determine the cost incurred in the petroleum operations before it is recovered unlike the case in Trinidad and Tobago where the audit provision is used to determine the cost that can be recovered by the Contractor.[122] It is, therefore, submitted that in subsequent PSCs in Nigeria, the audit provisions should be crafted in such a way that it will be used to determine the cost recovery limits of the Contractor. This will make the auditing of books and accounts clauses functional.

2.4.14.3 Home office overhead charges

The PSC makes some allowances for the Contractor to meet certain expenses incurred at the Home Office. This is borne out of the recognition that the operations of the IOC Contractor in Nigeria is largely directed and controlled from its foreign home office. In doing so, certain costs are incurred at the home office, which the PSC allows as reimbursable operating expenses (OPEX). Therefore, the Contractor is entitled to include the following

[120] Clause 13.2
[121] Ogunleye, T.A. Op. cit. p. 8.
[122] Ibid.

percentages on total annual capital expenditure as overhead charges in calculating total operating costs:[123]

First $200 million 1.00% of Capex (capital expenditure)

Next $200 million 0.75% of Capex

Next $100 million 0.50% of Capex

Above $500 million 0%

The 2005 PSCs limits the applicable percentages to 50% of total annual capital expenditure.[124] This is preferable rather than give the Contractor a limitless entitlement to home office overhead charges.

2.4.15 Bonuses

The 1993 PSCs make provisions for two types of bonuses namely: signature bonus and production bonus.

2.4.15.1 Signature Bonus

Signature bonus or signing bonus is simply a payment that occurs at or as a function of contract signing. It has been said that same is well known and highly unpopular within the oil industry. It is an artifact of competitive bidding, but can easily be part of negotiated deals.[125] Under the 1993 PSCs, the Contractor is required to pay to the Corporation a bonus of two million US Dollars ($2m) on the effective date of the Contract which bonus the Corporation shall pay to the Account designated by Government of Nigeria. The signature bonus is not recoverable as Cost Oil.[126] Recent PSCs such as those of 2005 do not have similar clauses on signature bonus. This is because signature bonuses are paid up front even before the PSCs are signed between the NNPC and the IOC. In most cases, payment of the signature bonus is a condition precedent to executing the Contract with the relevant

[123] Clause 13.3, Bonga and Agbami PSCs
[124] Clause 14.4, 2005 PSCs
[125] Johnston, D. op. cit. p. 161
[126] Clauses 14.1 & 14.2, Bonga and Agbami PSCs, 1993

international oil company interested in oil prospecting licenses in Nigeria. The payment of signature bonuses up front creates economic opportunity for the government to earn revenue from the oil asset even before the commencement of exploration of the contract area.

2.4.15.2 Production Bonus

Production bonuses are payable when the volume of crude produced from the field hits a certain pre-agreed threshold. The bonuses gross up government take in a production sharing contract. In the 1993 PSCs, the Contractor is required to pay the following production bonuses to the NNPC:

a. A sum in US Dollars equivalent to zero point two percent (0.2%) of cumulative production of 50 million barrels of crude oil attained in the Contract Area at the price on the due date;
b. A sum in US Dollars equivalent to zero point one percent (0.1%) of cumulative production of 100 million barrels of Crude Oil attained in the Contract Area at the price on the due date.

Production bonuses are not recoverable as Cost Oil and shall be payable within thirty (30) days of such production levels being first attained.[127]

2.4.16 Royalty and Taxes

Royalty and taxes are very crucial aspects of a PSC. The reason for this is not farfetched. This is because royalty and taxes rake in revenues for the federal government and the classical function of the tax system is the raising of revenue to meet government expenditure.[128]

2.4.16.1 Royalty

Royalty rates under the 1993 PSCs are graduated as follows:

Area	Rate[129]
In areas up to 200 metres water depth	16.67%
In areas from 201 to 500 metres water depth	12%

[127] Clauses 14.3 & 14.4, Bonga and Agbami 1993 PSCs.
[128] Abdulrazaq, M.T., (2010). *Revenue Law and Practice in Nigeria*, Malthouse Press Ltd. Lagos. p.2; Farayola, G.O. (1987). *Guide to Nigerian Taxes*. All Crowns Ltd, Lagos. p. 3
[129] Clause 15.1, Bonga & Agbami 1993 PSCs.

From 501 to 800 metres water depth 8%
From 801 to 1000 metres water depth 4%
In areas in excess of 1,001 meters water depth 0%

The 2005 PSCs[130] makes reference to the Petroleum Act, Cap. P.10, Laws of the Federation of Nigeria, 2004 as amended for applicable Royalty rates.[131] The applicable Royalty rates under the ***Petroleum (Drilling and Production) Regulations*** are segmented into onshore and offshore PSCs. For onshore PSCs, the applicable Royalty rates are as follows:

(i) for production below 2 thousand barrels of oil per day ---------- 5.0%

(ii) for production between 2 and 5 thousand barrels of oil per day ------- 7.5%

(iii) for production between 5 and 10 thousand barrels of oil per day ------- 15.0%

(iv) for production above 10 thousand barrels of oil per day ---------- 20%

For offshore PSCs, the applicable Royalty rates are further graduated according to the water depth level and the volume of oil produced per day. Accordingly, for offshore up to water depth of 100 metres, the Royalty rates are as follows.

(i) for production below 5 thousand barrels of oil per day ---------- 2.5%
(ii) for production between 5 and 10 thousand barrels of oil per day ---------- 7.5%
(iii) for production between 10 and 15 thousand barrels of oil per day --------- 12.5%
(iv) for production above 15 thousand barrels of oil per day ---------- 18.5%

Similarly, for offshore between water depth of 100 and 200 metres, the Royalty rates are as follows:

(i) for production below 5 thousand barrels of oil per day ---------- 1.5%
(ii) for production between 5 and 10 thousand barrels of oil per day --------- 3.0%

[130] Clause 15.1, 2005 PSC.
[131] The Royalty rates are contained at paragraphs 61-62, *Petroleum (Drilling and Production) Regulations of 1969*. This Regulation was made pursuant to section 9, *Petroleum Act*, Cap. P10, L.F.N., 2004.

(iii) for production between 10 and 15 thousand barrels of oil per day -------- 5.0%
(iv) for production between 15 and 25 thousand barrels of oil per day -------- 10.0%
(v) for production above 25 thousand barrels of oil per day ---------- 16.67%[132]

Suffice it to mention here that the applicable rate of Royalty in areas of uncertain water depth was one of the issues that arose for determination before the two different Arbitration Tribunals between the NNPC and the IOCs over the Bonga and Agbami PSCs. This research will dwell on the arbitrations at chapter five when the challenges in the operation of production sharing contracts in Nigeria are considered.

2.4.16.2 Taxes and investment tax credit

The applicable tax is the Petroleum Profits Tax (PPT) in accordance with the Petroleum Profits Tax Act.[133] The Petroleum Profits Tax rate is 50% for the duration of the PSC.[134]

The investment tax credit (ITC) is stated to be in accordance with the Petroleum Profits Tax Act as amended. The ITC rate applicable to the Contract Area shall be fifty percent (50%) flat rate for the duration of the PSC. In computing the PPT payable, the ITC shall be applicable in full to the Petroleum operations in the Contract Area such that the chargeable tax is the amount of the assessable tax less offsets of which ITC is item. The chargeable tax so derived shall be split between the Corporation and the Contractor in accordance with the proportion of the percentage of profit oil split.[135] It remains to be added that the Corporation (NNPC) has the responsibility to pay all Royalty, Concession Rentals[136] and PPT on behalf of itself and the Contractor out of Available Crude Oil (ACO) allocated to

[132] Ibid.
[133] CAP. P13, L.F.N., 2004.
[134] Clause 15.2, Bonga & Agbami 1993 PSCs.
[135] Ibid. Clause 15.3.
[136] Paragraph 60(a) & (b), ***Petroleum (Drilling and Production) Regulations of 1969*** fixes the Rents at US$10 on an OPL for each square mile or part thereof; on an OML, US$20 for each square kilometer or part thereof of a producing OML for the first 10 years and thereafter, US$15 for each square kilometer or part thereof until expiration of the lease and on renewal.

it. The NNPC is also required to make available to each entity constituting the Contractor copies of receipts issued by the Federal Inland Revenue Service bearing the name of each entity for payment made for PPT in accordance with each Party's Tax Oil allocation in the same proportion of the percentage of profit oil split.[137]The obligation of the NNPC to pay tax on behalf of the IOCs and make receipts available to them was also a contentious issue at the arbitrations.

2.4.17 Insurance

Both the 1993 and 2005 PSCs make similar extensive provisions for insurance of all equipment used for petroleum operations in the Contract Area. This insurance policy extends to the Contractor and the sub-contractors working in the Area. All property acquired under the PSC were to be adequately insured in an insurance company of good repute by the Contractor in consultation with the Corporation, in its name and that of the Corporation with limits of liability not less than those required under Nigerian laws and regulations. The premium for such policies shall be included in Operating Costs. All policies shall name the Corporation as a co-insurer with a waiver of subrogation rights in favour of the Corporation.[138]The extensive insurance policy is informed by the high level of risks associated with petroleum exploration particularly in the deep offshore acreages. The insurance policy is intended to mitigate the losses that may arise in the event of equipment failure, fire or any other insurable risks. It for this reason that this research believes that the provisions for insurance is commendable. It remains to be mentioned that the current position of the law is that no insurance risk in the Nigerian oil and gas industry shall be placed offshore without the written approval of the National Insurance Commission which shall ensure that Nigerian local capacity has been fully exhausted.[139]

[137] Clauses 15.4 & 15.6, Bonga & Agbami PSCs.
[138] Clause 16, Bonga, & Agbami 1993 and Clause 16 of 2005 PSCs.
[139] Section 50, Nigerian Oil and Gas Industry Content Development Act, 2010.

2.4.18 Confidentiality and Public Announcements

All PSCs in Nigeria provide for similar and very far reaching clauses on confidentiality. The full text of clause 17 of the Bonga and Agbami 1993 PSCs are reproduced hereunder for ease of reference.

> 17.1 The CONTRACTOR (sic) shall keep information furnished to it by the CORPORATION (sic) and all plans, maps, drawings, designs, data, scientific, technical and financial reports and other data and information of any kind or nature relating to Petroleum Operations including any discovery of Petroleum as strictly confidential, for all times, and shall ensure that the entire or partial contents shall under no circumstances be disclosed by the CONTRACTOR in any announcement to the public or to any third party without the prior written consent of the CORPORATION (sic).
>
> The provisions of this Clause 17 shall not apply to disclosure to:
>
> (a) Subcontractors, affiliates, assignees, auditors, legal advisers, provided such disclosures are required for the effective performance of the aforementioned recipients' duties related to Petroleum Operations;
>
> (b) Comply with statutory obligations or the requirements of any governmental agency in which case the CONTRACTOR will notify the CORPORATION of any information so disclosed;
>
> (c) Financial institutions involved in the provision of finance for the operations hereunder provided, in all such cases, that the recipients of such data and information agree in writing to keep such data and information strictly confidential;

(d) A third party for the purpose of negotiating an assignment of interest hereunder provided such third party executes an undertaking to keep the information disclosed confidential.

17.2 The CONTRACTOR shall take necessary measures in order to make its employees, agents and representatives, proxies and subcontractors comply with the same obligation of confidentiality provided in this Clause 17.

17.3 the provisions of this clause 17 shall not be avoided by the expiry or termination of this Contract on any grounds whatsoever and these provisions constitute a continuing obligation, and accordingly the restrictions arising therefrom shall be in force at all times.

17.4 The CONTRACTOR shall use its best endeavours to ensure that the CONTRACTOR's servants, employees, agents and subcontractors shall not make any reference in public or publish any notes in newspapers, periodicals or boos nor divulge, by any other means whatsoever, any information on the activities on the CONTRACTOR's responsibility, or any report, data or any facts and documents that may come to their knowledge by virtue of this Contract, without the prior written consent of the CORPORATION.

17.5 The CONTRACTOR shall submit to the CORPORATION all statutory reports and information for submission to Government and other statutory bodies.

The wide scope of the confidentiality clauses in the various PSCs perhaps borrows from the Petroleum Profits Tax Act. Section 5 of the Petroleum Profits Tax Act[140]regrettably provides for official secrecy in the petroleum industry. The section provides as follows:

> 5(1) Every person having any official duty or being employed in the administration of this Act shall regard and deal with all documents, information, returns, assessment lists and copies of

[140] CAP. P13, L.F.N., 2004; cf: section 50, FIRS (Establishment) Act, 2007.

such lists relating to the income, chargeable profits or items thereof of any company, as official secret and confidential.

(2) Every person having possession of or control over any documents, information, returns or assessment list or copies of such lists relating to tax or petroleum operations or the amount and value of chargeable oil won by any company, who at any time communicates or attempts to communicate such information or anything contained in such documents, returns, lists or copies to any person-

(a) other than a person to whom he is authorized by the Minister to communicate it; or

(b) otherwise than for the purpose of this Act or any Act or law, relating to a tax upon income, in force in any part of Nigeria,

Shall be guilty of an offence.

(3) No person appointed under or employed in carrying out the provisions of this Act shall be required to produce in any court, any return, document or assessment, or to divulge or communicate to any court any matter or thing coming under his notice in the performance of his duties under this Act except as may be necessary for the purpose of the carrying into effect the provisions of this Act, or in order to institute a prosecution, or in the course of a prosecution for any offense committed in relation to tax….

The official secrecy rule that operates in the upstream petroleum industry had until now inhibited Nigerians from freely contributing their quota in the debate around the terms and conditions of PSCs. The general opacity in the Nigerian petroleum industry also prevents the NNPC from taping into the wealth of experience that exist in the Nigerian academic community. The official secrecy rule that operates in the petroleum sector makes it impossible for Nigerians to publicly debate the terms of our petroleum fiscal systems. ***John***[141]re-echoed this position when he argued that the citizens' expression cannot be put forward where there is no awareness or to put it properly, where the people are not informed or educated on the subject matter which their expression is sought. He added that every citizen without discrimination whatsoever, must have a right to know and the right to access information held by public bodies.

[141] John, D.C. (2014). "The Right to Freedom of Information as a Basis for Global Best Practice for Democratic Governance: A Challenge for Nigeria." *Journal of Policy and Development Studies*. Vol. 1. No. 1, February, pp. 110-140.

This opacity has ceased to be of any relevance in view of the provisions of the ***Freedom of Information Act***[142] which now entitles citizens of Nigeria to freely request for information from relevant government agencies of their choice. Interestingly, under the Freedom of Information Act, one does not need to show any interest whatsoever in the information sought to be entitled to same. The provisions of Section 1 of the Freedom of Information Act is very crucial and it is reproduced below for referential ease:

> 1. (1) Notwithstanding anything contained in any other Act, law or regulation, the right of any person to access or request information, whether or not contained in any written form, which is in the custody or possession of any public official, agency or institution howsoever described, is established.
> (2) An applicant under this Act needs not demonstrate any specific interest in the information being applied for.
> (3) Any person entitled to the right to information under this Act, shall have the right to institute proceedings in the Court to compel any public institution to comply with the provisions of this Act.

ny applicant who has been denied access to information, or a part thereof, may apply to the Court for a review of the matter within 30 days after the public institution denies or is deemed to have denied the application, or within such further time as the Court may either before or after the expiration of the 30 days fix or allow and the court shall hear and determine such application summarily.[143]This guarantees that such cases are determined expeditiously by the Courts. **Igwe**[144] similarly shared his perspective on freedom of information versus secrecy when he noted thus:

> The Freedom of Information Act, 2011 changed the legal landscape on information disclosure in Nigeria. Section 1(1) confers a legal right on any person to access or request information, whether or not contained in any written form which is in the custody or possession of any public official,

[142] *Freedom of Information Act*, 2011.
[143] Ss. 20 & 21, *Freedom of Information Act*, 2011.
[144] Igwe, J.U.K. (2013). *Achieving a Competitive Tax Regime for Nigeria through Tax Transparency, Ethics and Good Governance.* A Paper presented at a 2 day Interactive Workshop on Tax Laws, Ethics and Judicial Interpretation for Superior Court Judges and Tax Appeal Commissioners at Transcorp Hilton Hotel, Abuja, from November 5 - 6, 2013 at page 32.

> agency or institution however described. Interestingly, section 1(1) of the Act enacts the applicability of this legal right, *'notwithstanding anything contained in any other Act, law or regulation'*. (sic) Accordingly, Section 1(1) of the Freedom of Information Act lays the foundation for a potential conflict between this Act and other laws on confidentiality.
> Further, by Section 1(3) of Nigeria's Freedom of Information Act, 2011, any person entitled to the right of information also has the right to institute proceedings in the court to compel any public institution to comply. Importantly, Section 2(2) of the Act obliges every public institution in Nigeria to ensure that it keeps records and keeps information about all its activities, operations and business.[145]

In view of the foregoing, it is submitted that the confidentiality clauses in the PSCs has been effectively and effectually whittled down as it affects government institutions in Nigeria but the obligation remains binding on the Contractor. The reason being that the Contractors are private firms and not publication institutions to which the Freedom of Information Act applies.

2.4.19 Force Majeure

The word Force Majeure is of French origin meaning 'an over powering force or coercive force.'[146] The Black's Law dictionary defines it as an event or effect that can be neither anticipated nor controlled. The term includes both acts of nature (eg, floods and hurricane) and acts of people (eg, riots, strikes or wars).[147]Its application to a PSC is to limit the liability of either party, Contractor or NNPC, for nonperformance of contract obligations due to war, political disturbances, an act of state, riots, earthquakes, epidemics, or other major causes beyond human control.[148]

Under the Bonga and Agbami 1993 PSCs, any failure or delay on the part of either Party in the performance of its obligation under the Contract shall be excused to the extent attributable to force majeure. Force majeure situation is described to include delays, defaults

[145] Ibid.
[146] Johnston, D. op. cit. p. 167.
[147] Garner, B.A. (ed.) Black's Law Dictionary. Thomson Reuters. Texas. 10th Edition, (2014) p. 761.
[148] Johnston, D. op.cit. pp. 167-168.

or inability to perform under the Contract due to any event beyond the reasonable control of either Party. Such event may be, but is not limited to, any act, event, happening, or occurrence due to natural causes; and acts of perils of navigation, fire, hostilities, war (declared and undeclared), blockade, labour disturbances, strikes, riots, insurrection, civil commotion, quarantine restrictions, epidemics, storms, floods, earthquakes, accidents, blowouts, lightning, and acts of or orders of Government.[149]

If operations are delayed, curtailed or prevented by force majeure, then the time for carrying out the obligation and duties thereby affected, and rights and obligations hereunder, shall be extended for a period equal to the period thus involved. The Party whose ability to perform its obligation is so affected shall promptly notify the other Party thereof not later than forty-eight (48) hours after the establishment of the start of the force majeure stating the cause, and both Parties shall do all that is necessary within their powers to remove such cause. However, the Contractor's failure or inability to find Crude Oil in Commercial Quantity for reasons other than as specified shall not be deemed as force majeure.[150]

2.4.20 Laws and Regulations

The 1993 PSCs provides that it shall be governed by and construed in accordance with the Laws of the Federation of Nigeria, and any dispute arising therefrom shall be determined in accordance with such laws.[151]

The PSC also has what industry practitioners generally refer to as Stabilization Clause at clause 19.2. A stabilization clause is an important feature of a PSC in that it gives the IOC some measure of assurance in relation to new legislation. The effect of the clause is basically that if any new laws come into effect that render the position of the IOC more onerous, then this will be addressed by some form of adjustments, usually by the IOC acquiring additional

[149] Clause 18.1, 1993 PSCs
[150] Clauses 18.2, 18.3 and 18.4.
[151] Clause 19.1

production from the government share to the extent necessary to maintain the IOC's economic position.[152] In this regard, the text of clause 19.2 of the PSC provides:[153]

> In the event that any enactment of or change in the laws or regulations of Nigeria or any rules, procedures, guidelines, instructions, directives, or policies, pertaining to the Contract introduced by any Government department or Government parastatals or agencies occurs subsequent to the Effective date of this Contract which materially and adversely affects the rights and obligations or the economic benefits of the CONTRACTOR (sic), the Parties shall use their best efforts to agree to such modifications to this Contract as will compensate for the effect of such changes. If the Parties fail to agree on such modifications within a period of ninety (90) days following the date on which the change in question took effect, the matter shall thereafter be referred at the option of either Party to arbitration under Article 21 hereof. Following arbitrator's determination, this Contract shall be deemed forthwith modified in accordance with that determination.

Shell Nigeria Exploration and Production Nigeria Ltd (SNEPCO) invoked this clause in its letter of 4th October 2010 to the NNPC in relation to the Bonga PSC covering OML 118.[154]In the letter signed by its Managing Director, Mr. Chike Onyejekwe, SNEPCO made reference to Clause 19.2 of the Bonga PSC and the pending arbitration between it and the NNPC and stated thus:

> Without prejudice to those claims, and without any admissions whatsoever as to the positions taken by NNPC in its Statement of Defence as filed in the pending arbitration proceedings on 19 August 2010 (sic), the Contractor considers that in addition to NNPC's liftings of crude oil and computation of PPT and filings of PPT Returns, the following facts and matters, individually and/or collectively, evidence a *"change in the laws or regulations of Nigeria or any rules, procedures, guidelines, instructions, directives, or policies, pertaining to the Contract introduced by any Government department or Government parastatals or agencies"*: (sic)
>
> (a) the notice of assessment for PPT in respect of OML 118 dated 15 June 2010 and received by SNEPCO on 23 June 2010; and
> (b) the letter from the FIRS Director of Tax Policy to NNPC dated 24 May 2010 exhibited to NNPC's Statement of Defence.
>
> Such change(s) *"materially and adversely affects the rights and obligations or the economic benefits of the CONTRACTOR*" (sic). In

[152] Jennings, A. op. cit. p.10.
[153] Clause 19.2, 1993, PSCs.
[154] Record of Appeal in Appeal No. CA/A/434/2015 – NNPC vs SNEPCO & 3 Ors, p. 349.

> particular, such change(s) materially and adversely affect the Contractor's rights, obligations and economic benefits in relation to the computation of PPT and the determination of Profit Oil (including, without limitation, the application of PPT, the application or investment tax credits, the consolidation of costs for the purposes of calculating PPT, the tax deductibility of certain costs and the timing of available capital allowances).
> Such change(s) have occurred subsequent to the Effective date of the Bonga PSC i.e 19 April 1993 (sic) and have therefore triggered the Contractor's rights under Clause 19.2.
> Clause 19.2 provides that the Contractor and NNPC *"shall use their best efforts to agree to such modifications to [the PSC] as will compensate for the effect of such changes."(*sic)

Flowing from the above, SNEPCO then proposed a meeting of its representatives with the NNPC to attempt to agree to such modifications to the Bonga PSC as will compensate the Contractor for the effect of the changes identified.[155] The NNPC replied SNEPCO and declined to attend the proposed negotiation meeting. In its letter of 8th November, 2010, signed by the then Secretary/Legal Adviser to the Corporation, Prof. Yinka Omorogbe, the NNPC responded as follows:

> We cannot accept the interpretation you have placed on both letters emanating from the Federal Inland Revenue (FIRS) i.e the Notice of Assessment for PPT, to OML 118 dated June 15, 2010 and a letter dated May 24, 2010 from the Director of Tax Policy to the Nigerian National Petroleum Corporation.
> Consequently, whilst we will continue negotiations with the aim of resolving matters amicably, we regret that we would have to decline the invitation to negotiate pursuant to Clause 19.2. In particular, we do not agree as expressed in your letter with certain explicit and implicit assumptions necessary for the trigger of Clause 19.2. These assumptions include:
> 1. That the said letters have given rise to a change in directive or policy;
> 2. That such a change materially and adversely affects the rights and obligations or economic benefits of the contractors.
>
> As you will appreciate, we hold the view that the contents of the letters from the FIRS are inextricably linked to the current arbitration, and negotiations in that regard are unlikely to be conducted with utmost good faith, as parties will readily seek to re-emphasise their positions against the background of the current arbitration.
> This is notwithstanding the 'without prejudice' application. Perhaps, it may be advisable for SNEPCO to consider suspending the present

[155] Ibid. pp.349-359.

> arbitration for meaningful negotiations (outside Clause 19.2) to take place.
> In summary and for the avoidance of doubt NNPC is unwilling to attend negotiations pursuant to Clause 19.2, but will be prepared to do so generally. Furthermore, NNPC considers it practical for the arbitration to be suspended to create the necessary atmosphere for any valuable negotiations.[156]

The foregoing reveals the especial importance IOCs attach to stabilization clauses in PSCs. It serves as a safeguard to their economic interest in the oil asset in the event of any policy or legal changes that adversely affects their interests. It remains to be emphasized that all affairs related to the 1993 PSC are conducted in the language in which the contract was drawn up which is English language.

2.4.21 Utilization of Natural Gas

Where the Contractor discovers a commercially viable quantity of natural Gas, the NNPC shall require the Contractors to investigate and submit proposals for the commercial development of the natural Gas for the NNPC' consideration provided that any cost in respect of such proposals or investigation shall be included in Operating Cost. For the commercial development of natural gas field, the funding arrangement and participation by the Contractor in the project shall be the subject of another agreement and the Contractor shall have the right to participate in such development projects.

Notwithstanding the foregoing, the Contractor may utilize, at no cost the associated Natural Gas produced with crude oil as fuel for production operations; gas recycling, secondary recovery by gas injection, gas lifts, or any other economic secondary recovery schemes, stimulation of wells or artificial lifts necessary in the commercial field discovered and developed by the Contractor but only with the prior written consent of the Corporation, which consent shall not be unreasonably withheld. The objective of maximum technical and economic recovery of Crude Oil shall always be paramount. However, not later than two (2)

[156] Ibid. pp. 351-352.

years after the commencement of production of crude oil from the Contract Area, the Contractor shall submit to the Minister of Petroleum Resources, a programme for the utilization of any Natural Gas whether associated with crude oil or not which has been discovered from the Contract Area.[157]

2.4.22 Consultation and Arbitration

The Bonga and Agbami PSCs of 1993 like other PSCs also have dispute resolution clauses. Dispute resolution clause is a very important provision in PSCs.[158] It describes the methods and rules by which disputes will be settled, should conflicts arise between the parties to the contract.[159] The relevant Clause in the 1993 PSCs provides as follows:

> If a difference arises between the CORPORATION and the CONTRACTOR (sic), concerning the interpretation or performance of this Contract, and if the Parties fail to settle such difference or dispute by amicable agreement, then either party may serve on the other a demand for arbitration. Within (30) days of such demand being served, each Party shall appoint an arbitrator and the two arbitrators thus appointed shall within a further thirty (30) days appoint a third arbitrator and if the arbitrators do not agree on the appointment of such a third arbitrator, or if either Party fails to appoint the arbitrator to be appointed by it, such an arbitrator or third arbitrator shall be appointed by the President of the Court of Arbitration of the International Chamber of Commerce (ICC) in Paris on the application of the other Party (notice of the intention to apply having been duly given in writing by the applicant Party to the other Party) and when appointed the third arbitrator shall convene meeting and act as chairman thereat. If an arbitrator fails or is unable to act, a successor shall be appointed by the respective or by the arbitrators in the event the chairman must be succeeded. The arbitration award shall be binding upon the Parties and the expense shall be borne by the parties in such proportion and manner as may be provided in the award. The Nigerian Arbitration and Conciliation Act Cap 19, laws of the Federation of Nigeria, 1990 shall apply to this contract. The venue of the arbitration shall be anywhere in Nigeria as agreed by the parties.[160]

[157] Clause 20.1 & 20.2, Bonga & Agbami PSCs of 1993.
[158] Jennings, A. Op.cit. p. 11.
[159] Johnston, D. op. cit, p.168.
[160] Clause 21, Bonga & Agbami 1993, PSCs.

Nwosu[161] has criticized the arbitration clause of the PSCs. In his view, the requirement for each party to appoint one nominee and for the two nominees to appoint another as the chairman tilts the scale against the NNPC particularly as the chairman will also be a foreigner. In effect, there will be two foreigners as against one Nigerian on the arbitration panel. He appraised the four arbitrations in the petroleum industry and concluded that it would be impossible for Nigeria to expect a favourable award in the circumstance. Here is how he puts it:

> The international oil companies took the Nigerian National Petroleum Corporation (NNPC) to four different arbitral tribunals, each of which comprised three persons (one black person and two white people).
> The complaint was that NNPC contrary to the Production Sharing Contract (PSC) had unilaterally computed Tax returns and filed them with the FIRS. This enabled NNPC to over lift their portion of available crude oil as tax oil. Thus, the companies lost money (actually by way of tax over payment) in total sum of $10.85 billion for which they asked the arbitration tribunals to award them 'damages'(indeed excess tax refund) in like sum, plus interests and costs. The plaints were prepared and signed by English lawyers (Hogan Lovells LLC and Clifford Chance) who got willing Nigerian law firms to counter sign the claims. The NNPC Legal Adviser remarkably consented to the "coincidences" of each of the four panels having a white chairman in addition to a white nominee of the claimant as against a lone black NNPC nominee which obviously was rather lopsided. Meanwhile, the decisions of any two of the three shall be FINAL (sic) and binding. For inexplicable reasons NNPC and indeed the Nigerian Nation was railroaded into a "Slaughter slab" and financial dismemberment. How can a cockroach expect justice in a Court of Chickens? Never.[162]

This researcher agrees in part with ***Nwosu's*** arguments above to the extent that the membership of the arbitration tribunal ought not to comprise 'two white people and one black person' that is, two non-Nigerians and one Nigerian citizen. However, this researcher does not share his views to the effect that "the NNPC Legal Adviser remarkably consented to the "coincidences" of each of the four panels having a white chairman in addition to a white

[161] Nwosu L.E. (2015). *The Need for the PIB: Imperatives for Speedy Promulgation*. A paper presented at the NBA Annual General Conference held at the International Conference Centre, Abuja from August 21 -27, 2015; Thisday Lawyer, Tuesday, September 29, 2015. p 10.
[162] Ibid.

nominee of the claimant as against a lone black NNPC nominee which obviously was rather lopsided." The principal reason for disagreeing is simply that he seems to blame the NNPC legal Adviser for consenting to the arbitration regardless of the 'lopsidedness' of the tribunal without having recourse to the terms of the arbitration clause in the PSCs. It is a universal principle of law that parties are bound by their agreement and that agreements of a party to a contract which are not fraudulent are to be observed. This is rendered in latin words as *pacta sunt servanda*.[163] Given the provisions of the arbitration clauses in the PSCs as above, it is not open to the NNPC's legal Adviser to opt out of the arbitration in the face of the clear provisions of same in the PSC which remains binding on both the IOCs and the NNPC. This is why this researcher believes that the NNPC's legal Adviser is not to blame but the poorly worded arbitration clause in the PSCs.

Therefore, it is submitted that the arbitration clauses in subsequent PSCs should be redrafted to ensure that both the IOCs and the NNPC must nominate Nigerian Citizens as arbitrators while the two Nigerian arbitrator may choose to nominate a chairman who could be of any nationality including Nigeria.

2.4.23 Effectiveness and Notices

Clauses 22 and 23 of the Bonga and Agbami 1993 PSCs provide for effectiveness of the contract and how notices thereunder were to be effected on parties thereto. It is stipulated that the Contract shall come into force and effect on the Effective date and shall not be amended or modified in any respect except by mutual consent, in writing, of the parties. Any notices required to be given by either party to the other shall be in writing and shall be deemed to have been duly given and received if sent by fax, telegraph or cable (confirmed by mail) or registered post to, or hand delivered at the registered offices indicated. However,

[163] *Attorney General,Rivers State* v. *Attorney General, Akwa Ibom State* (2011) 3 SC 1.

either party is obligated to notify the other promptly of any change in their respective addresses.

2.4.24 Other parts of the 1993 production sharing contracts

The other parts of the 1993 PSCs are the Annexures which form part and parcel of the PSC. The Annexures are:

a. The Contract Area: this outlines the exact coordinates and physical boundaries of the areas to which the PSC relates;
b. The Accounting procedure;
c. Allocation Procedure;
d. Nomination, Ship scheduling and Lifting Procedure; and
e. Procurement and Project Implementation Procedure.

The 2005 PSC also has a number of clauses which are not in the 1993 PSCs. Some of such clauses are: assignment; representation and warranties; operator; and conflict of interest.[164]

The foregoing reflects the outlines of a sample PSC in Nigeria. There are slight variations but the basic clauses in every PSC has been captured above.

2.5 Differences between Production Sharing Contracts and other Petroleum Arrangements in Nigeria

Apart from the production sharing contracts (PSCs) which has recently assumed some notoriety in the Nigerian upstream petroleum industry, there are other petroleum arrangements that has been used at one point or the other in the sector in Nigeria. Some of these arrangements are: the concession system; the joint venture contracts system; the service

[164] PSC between NNPC & South Atlantic Petroleum Ltd & Total Upstream Nig. Ltd covering OML 130 Offshore Nigeria.

contracts system and recently, the marginal fields. Each of these petroleum arrangements are discussed briefly below beginning with the concession system.

2.5.1 The Concession System

Historically, the principal contractual form in the extractive industry was the concession system. A concession essentially grants a private company the exclusive right to explore, produce and market natural resources. This contractual form has survived to this day, albeit in a vastly different form.[165] Although the traditional concessionary contract system is now a relic, concessions survive and flourish in many parts of the world, albeit sometimes as the less politically charged "license" or "lease".[166] Perhaps, this explains why ***Omorogbe***[167] describes the modern concession as the oil mining lease as stated under the Petroleum Act. ***Iloba-Aninye***[168] shares the same sentiment when he stated that:

> the modern concession has the same definition with the traditional except that it has been codified with different names such as licence or lease. The essential difference between the two is that the oil companies now own the petroleum only upon its being extracted. The duration is shorter and the taxes and royalties are higher. Furthermore, modern concession admits of the joint venture or participation by host countries through the National Oil Corporation such as the Nigerian National Petroleum Corporation (NNPC). The area is now greatly reduced as the host nation first delineates the area into blocks before granting licences and leases to cover each block.
>
> Each block has a standard measurement and, embedded in the modern concession is the obligation and right to relinquish and surrender respectively. There is also the power of revocation which was not there in the traditional concession. The concession (licence or lease) is given only in respect of one mineral either crude oil or gas.
>
> In Nigeria, Oil Mining Leases are by definition concessions and are found in existence as one of the constituent agreements underlying the joint venture. At the present state, there is no grant of licence or lease without government participation. Under the modern concession, various contracts

[165] Likosky, M. op.cit. p. 2
[166] Ibid. p. 7
[167] Omorogbe, Y. (2001). *Oil and Gas Law in Nigeria.* Malthouse Press Ltd. Lagos p. 47.
[168] Iloba-Aninye, O. Op.cit. pp. 50-51

> are entered into by the Federal Government and oil companies.[169]

Prior to the participation of Nigerian government in petroleum activities, all companies operated under this type of arrangement. In both concession and a PSC, the IOC bears all risks and cost of exploration and production, has interest over the crude oil produced and is liable for all royalty and petroleum profits tax payments. ***Garrick***[170]provided a historical perspective on Nigerian upstream petroleum concessionary system beginning from the pre 1969 era to the emergence of equity participation by the NNPC through joint operating/venture agreements. The insightful description is extensively reproduced below for referential ease.

> Concessions (Pre 1969)
>
> In 1905, the first known mineral survey was performed in present day Ondo State which is in the South West region of Nigeria. Shortly afterwards was the drilling of some exploratory wells by a German firm, Nigerian Bitumen Corporation, in 1908 which proved unsuccessful. In 1937, an Anglo-Dutch company; Shell D'Arcy Petroleum Development Company, came into Nigeria and in 1938 was granted an oil exploration license covering the entire country by the British Colonial Government under the Mineral Oils Ordinance of 1914. However, no commercial discovery was made until 1956 when the company made the first commercial discovery of oil in Oloibiri, in the present day Bayelsa State, in the South South region of Nigeria. The repeal in 1958 of Section 6(1) (a) of the Mineral Oils Ordinance of 1914 broke Shell D'arcy's monopoly and spurred on other companies to become involved in exploratory activities. The types of oil right which could be acquired by IOCs for exploration activities under the Mineral Oils Ordinance of 1914 were Oil Exploration Licences, Oil Prospecting Licences and Oil Mining Licences. Between 1960 and 1969 these concessions began to be criticised as being too colonialist and exploitative in nature. Meanwhile on the international scene, the conflict between oil producing developing countries and IOCs eventually led to the UN resolution[171]on permanent sovereignty over natural resources,

[169] Ibid.
[170] Garrick N., (2013). *The Evolution of Upstream Contracts in the Nigerian Oil and Gas Industry.* Energy Mix Report at www.energymixreport.com/the-evolution-of-contracts-in-the-nigerian- assessed on 16/10/2015 @10am. Pp. 1-2.
[171] United Nations General Assembly Resolution 1803 (XVII) of 14th December 1962.

> which shifted the balance of power from the IOCs to the developing countries.
> Concessions (Post 1969)
>
> Thus, in 1969 the first major attempt at producing a detailed and comprehensive law for the grant of rights was made through the promulgation of the Petroleum Act 1969. Through this, the Mineral Oils Ordinance of 1914 was repealed and changes were made to the license structure in existence at the time. Although it should be noted that the duration, rent and royalty terms in pre-1969 licenses were saved from the operation of the 1969 Petroleum Act. Hence, despite the changes which were made with regard to vesting the state with ownership of petroleum in situ, the reduction of primary terms of certain categories of concessions and paving the way for the introduction of equity participation by the state, the Act was criticized for the lack of fundamental changes from pre 1969 grants of oil rights and that Nigeria's financial derivations from petroleum did not appear to increase to any appreciable extent as a result. In 1971 the real opportunity for increased equity participation by the state was enhanced by Nigeria joining OPEC and with the formation of the Nigerian National Oil Corporation (NNOC) through Decree No. 18 of 1971 which was later merged with the Ministry of Petroleum Resources to form the Nigerian National Petroleum Corporation (NNPC) in 1977. Furthermore, in 1972 the Federal Government through Government Notice No. 311 of 24 February 1972, announced the assignment to NNOC of all rights to explore for and produce petroleum in Nigerian territory including concession areas which might be relinquished or surrendered to the government, except for those areas which were covered by existing licences.[172]

The fundamental difference between concessionary and contractual systems (PSC) relates to the ownership of the natural resources. Under a concessionary system, the title to hydrocarbons passes to the investor at the borehole (oil well). In other words, the investor owns the crude oil in situ. The state receives royalties and taxes in compensation for the use of the resource by the investor. Title to and ownership of equipment and installation permanently affixed to the ground and/or destined for exploration and production of hydrocarbons generally passes to the state at the expiration, or termination, of the concession (whichever is earlier). The investor is typically responsible for abandonment. However, under

[172] Ibid.

a contractual system, the investor acquires the ownership of its share of production only at the delivery point. Title to and ownership of equipment and installation permanently affixed to the ground and/or destined for exploration and production of hydrocarbons generally passes to the host state immediately. Furthermore, unless specific provisions have been included in the contract (or in the relevant legislation) the government (or the national oil company, "NOC") is typically legally responsible for abandonment.[173]

2.5.2 The Joint Venture Contract System

Until the emergence of the PSC arrangement, the joint venture arrangements have been the usual arrangements by which the NNPC enters into oil exploration and production agreements with the IOCs on behalf of the Nigerian government. Unlike the PSCs where the IOCs bear the entire cost of exploration and production of crude oil, in a JV arrangement, each party that is, the NNPC and the partner IOC contribute to the costs and shares the benefits or losses in accordance with its proportionate equity interest in the partnership. The joint venture arrangement has been utilized in both crude oil and gas industries.[174]

Omorogbe[175] offers a very illuminating explanation of the joint venture arrangement when she opined as follows:

> When the government acquired participation interests in the concessions held by oil companies, the new relationship that emerged was the joint venture.
>
> Under the joint venture arrangements in Nigeria, the relationship is defined not only by the OML, but also by two other agreements:

(a) The participation agreement

(b) The operating agreement

[173] Tordo, S. (2007). *Fiscal Systems for Hydrocarbons: Design Issues*. World Bank Working Paper No. 123. Washington DC. P.8 www.worldbank.org/elibrary retrieved on 1/7/2016 at 3:52am.
[174] Oshineye, A. (2000). "The Petroleum Industry in Nigeria: An Overview." *Modern Journal of Finance & Investment Law.* Vol.4 No. 4, Pp. 325-344, 338.
[175] Omorogbe, Y. op. cit. pp. 47-49

The joint venture is also regulated by a third agreement, the Memorandum of Understanding (MOU).

The Participation agreement

This agreement sets out the respective rights of partners to the joint venture. Such agreements vary in detail, because they were individually negotiated, but they remain the same in substance. The interest paid for and acquired by the government through the Nigerian National Petroleum Company (NNPC) (sic) is referred to as a 'participating interest in:

(i) the oil-mining lease;

(ii) the fixed and movable assets of the company in Nigeria, including without limitation, the company's exploration, development, production, transportation, storage, delivery and export operation and associated assets such as offices, housing and welfare facilities (the Assets).

(iii) The working capital applicable to the operation of the oil-mining leases, including, without limitation, materials stocks including those in asset, debts of staff, debtors and repayment (the working capital).

The operating agreement

The operating agreement spells out the legal relationships between the owners of the respective leases, and lays down rules and procedures for the joint development of the area concerned, and of the property jointly owned by the two parties.

Under these agreements 'joint property' practically all the activities and services of the oil company. In all the agreements the private company is designated operator, and is responsible for the conduct of all joint venture

operations. The operator may be changed in any one of the following circumstances:

(a) if the operator assigns or purports to assign its general powers and responsibilities and management, as operator of on-going operations;

(b) if the operator ceases or threatens to cease to carry on its business or becomes bankrupt or insolvent or commits or suffers any act of bankruptcy or insolvency or makes any assignment for the benefit of creditors;

(c) if the operator defaults in its duties or obligation or any of them and fails to commence to rectify the default within thirty days after written notice from other co-venturers specifying the default; and

(d) in some cases, if the operator ceases to own, hold or represent a specified minimum percentage interest (usually 10%) in the venture.[176]

Ajogwu and Nliam[177] identified the six joint ventures involving the NNPC and foreign owned oil companies in Nigeria together with the operator, the percentage interests and the approximate daily productions. The diagram below illustrates the six joint ventures.

S/N	Operator	Percentage Interest	Approximate Daily Production
1	Shell Petroleum Development Company of Nigeria (SPDC)	NNPC 55% Shell 30% Elf 10% Agip 5%	899, 000 bpd.
2	Chevron Nigeria Limited	NNPC 60% Chevron 40%	400,000 bpd
3	Mobil Producing Nigeria Unlimited	NNPC 60% Mobil 40%	632, 000 bpd
4	Nigerian Agip Oil Company (Agip)	NNPC 60% Agip 20% Phillips 20%	150,000 bpd

[176] ibid
[177] Ajogwu, F. and Nliam, O. op. cit. p.61.

5	Elf Petroleum Nigeria Limited (Elf)	NNPC 60% Elf 40%	125,000 bpd
6	Texaco Overseas Petroleum Company of Nigeria Unlimited (TOPCON)	NNPC 60% Texaco 20% Chevron 20%	60,000 bpd[178]

From the foregoing, Joint venture (JV) operations in the oil & gas industry are arrangements where both parties own proprietary interests that is, a joint ownership of the assets and liabilities of a business concern. In Nigeria, the position is not any different. Joint Venture operations in the oil & gas sector are arrangements between the Nigerian National Petroleum Corporation (NNPC) (on behalf of the government) and a counterpart international oil company (IOC) whereby both parties hold the OPL or OML jointly and funding for the exploration and production of petroleum, and whatever is produced are shared in proportion to the participating interest held by each party. This arrangement is typically governed by a Joint Operating Agreement (JOA) between the NNPC and its IOC joint venture partner. The IOC is the operator, with a Management Committee established to supervise operations. The participatory interest of NNPC is 60% in all JVs, except the Shell (SPDC) operated JV, where it is 55%. JVs are deployed to spreading of risks; share resources and skills. The JV model provides a basis for sharing rights and liabilities- in proportion to percentage interests and the basis for the conduct of operations. In a JV relationship, both parties are co-license holders.

Production Sharing Contract (PSC) on the other hand is a contract between one or more private companies (Contractor), a state and/or a National Oil Company (NOC) whereby the Contractor, is granted a specific period and exclusive rights to explore and/or produce

[178] Ibid.

new hydrocarbon reserves within a defined area in return for an agreed share of these reserves. A PSC contractor has a right to only that fraction of the crude oil allocated to him under the cost oil (oil to recoup production cost) and equity oil (oil to guarantee return on investment). The balance of the oil, if any (after cost, equity, and tax), is shared between the parties (profit oil).

As it is the case with JVs, Nigeria participates in PSCs through the NNPC.[179] PSCs focus on the sharing of the output of oil and gas operations in agreed proportions between the oil company, as a contractor to the government on the one hand, and the (National Oil Company) NOC in this case the NNPC, as the representative of government's interest in the venture. Under a PSC and in the event of a commercial discovery, the contractor recovers its costs fully from allocation of oil, referred to as "cost oil". Royalty is paid from the oil produced and remitted to the government and the remainder of the production, called 'profit oil", is shared in agreed proportions between the oil company and the government as represented by the NNPC[180]. In a PSC, the contractor runs the risk that there might be insufficient production or no production at all from a field from which it can recover its costs. If this happens, then the operating costs for such non-producing fields are entirely borne by the contractor, and it is usually the case that concession areas are ring-fenced; there can be no cross-cost recovery between different concession areas under a PSC.

Etikerentse[181] tabularized the basic comparisons between the Traditional Joint Venture (TJV) and Production Sharing Contract (PSC) arrangements as operated in Nigeria. The text of the table is adopted and amplified below for a vivid presentation of the

[179]The Deep Offshore and Inland Basin Production Sharing Contracts Act. It specifically provides for "An Act to, among other things, to effect to certain fiscal incentives given to the oil and gas companies operating in the Deep Offshore and Inland Basin areas under PSCs between the NNPC and other companies holding oil prospecting or oil mining leases and various petroleum exploration and production companies."
[180]Section 10, Deep Offshore and Inland Basin Production Sharing Contracts Act
[181] Etikerentse, G. (2004). *Nigerian Petroleum Law*. (2nd edn); Dredew Publishers. p. 93

fundamental differences between joint venture arrangements and the production sharing contracts.

Joint Venture (JV) Production Sharing Contract (PSC)

1. Origin: Existing 100 per cent concessionaire (foreign partner) had to accommodate the new partner (NNPC) in the venture as a participant.	NNPC and foreign partner started as co-venturers upon the execution of the PSC. No prior interest by the foreign partner in the title to the concession.
2. NNPC's Interest in the Venture: This is limited to working interest and does not affect the foreign partner's equity ownership. It is understood by the parties that the NNPC has undivided interest in the concession and in the assets and liabilities of the venture to the extent of its participating interest as evidenced in the applicable Participation Agreement and Joint Operating Agreement (JOA).	The concession ownership remains entirely in the NNPC. However, on production its interests and title attach to usually a higher percentage of the participant's interest Oil or Profit Oil. This share increases further significantly on the attainment of a level of daily production stipulated in the PSC.
3. Cash –Call Obligations: Parties to the joint-venture contribute to capital and operating costs as called by the operator in the ration of their respective participating interests; the details of which are contained in the parties JOA.	Contractor initially bears all expenses, but gets reimbursed through the allocation of 'cost oil'. The reimbursement of such costs only occurs on the discovery and production of commercial oil reserves. No contribution from the NNPC when there is no production.
4. Applicable Tax Rate and revenue earned by the NNPC: Ordinarily, 85% on Joint Venture Partner's profit. The after-tax profits to the NNPC is roughly 60 per cent of the concession's production. The commercial aspects of the agreement are covered in the memorandum of understanding (MOU).	50% flat rate of chargeable profits for the duration of the PSC. Both the Contractor's and the NNPC's profit oil are to be shared in agreed proportions in accordance with cumulative production levels.
5. Marketing Rights: Each party markets its equity or participating interest share percentage of the available crude oil production from the concession. The MOU provisions relating to the marketing of the NNPC's equity crude by the operator are simply ad hoc arrangements.	Contractor is allowed to market the portion of the production allocated to cost oil, tax oil and contractor's share of Profit Oil, but at the price fixed by the NNPC.[182]

[182] Ibid.

2.5.3 The Service Contracts System

The Service contracts arrangement was first introduced in Brazil and was intended to avoid the disadvantages of the PSCs. It has variants such as risk-service, pure service or Technical Assistant Agreement.[183] It is an arrangement between a host country and oil company whereby the oil company assumes the managerial, technical responsibility, financial and operational risks of exploring, developing and processing oil and gas resources on its own over an agreed period of time. In return, the venturing company or firm is rewarded, short of a share of ownership, with a fee.[184]The fee can be in kind or in money and can be graduated according to size of discoveries, profits, foreign exchange, savings, ventured resources or other variables.[185]

Service contracts are based on a simple formula: the contractor provides all capital associated with exploration and development of petroleum resources. In return, if exploration efforts are successful, the government allows the contractor to recover those costs through sale of the oil or gas and pays the contractor a fee based on a percentage of the remaining revenues. In a service contract, the contractor's fee is subject to taxes while all the production belongs to the government. Service contracts are being used in Saudi Arabia, Brazil, Argentina, Chile, Ecaudor, Peru, Venezuela and the Philippines.[186]

The distinction between a service contract and a PSC is minute. The nature of the payment for the contractor's service is the point of distinction. Other than that, the arithmetic and terminology are quite similar.[187]In service contracts, the contractor is paid by the host state for his services, whilst in a PSC, the contractor has equity interest in the agreed share of production arising from the exploration and development efforts.

[183] Nlerum, F.E. Op.cit. p. 161.
[184] Ajogwu, F. and Nliam, O. Op.cit. p. 72.
[185] Ibid.
[186] Johnston, D. op. cit. p. 87.
[187] Ibid. p. 88.

In Nigeria, the service contract is currently not very popular.[188] The contractor company pays Companies Income Tax unlike PSC contractor companies that pay Petroleum Profit Tax. It has been said[189] that Nigeria adopted service contracts as a reaction to the experience of other OPEC countries and from its own. It decided after the PSC with Ashland Oil (Nigeria) Company to adopt the Risk Service Contract or Service Contract arrangement in respect of the country's petroleum prospects. This was with a view to avoiding the less beneficial aspects of the PSC. Service contracts were thus signed soon after the AON/NNPC PSC, between three companies: namely: Agip Energy and Natural Resources Nigeria Limited, Elf Aquitaine Nigeria Services Ltd and Nigus Petroleum.[190] Another author summarized service contracts in Nigeria in the following terms:

> Nigerian service contracts were originally entered into by the NNPC in 1979 with the goal of avoiding the less beneficial aspects of the PSC such as high percentages of cost oil and tax oil, windfall profits accruable to IOCs during peaks in oil prices and the management and operational responsibility by the IOCs. Today, pure service or risk service contracts are all but obsolete as a major type of upstream contractual arrangement in Nigeria. However, the Nigerian Petroleum Development Company (NPDC) a fully owned subsidiary of the Nigerian National Petroleum Corporation (NNPC) recently signed a strategic agreement with Atlantic Energy Drilling Concept to provide funds for carrying out petroleum operations in OMLs 26, 30, 34 and 42 and to also support the NPDC with technical expertise. To recoup its cost in funding the NPDC part of the operations, Atlantic Energy Drilling is to receive, at the beginning of production, 60% of the volume of crude oil to which NPDC (NNPC) is entitled. This is the cost oil. When the cost is fully recovered, Atlantic's share will drop to 30% of the crude oil to which NPDC is entitled.[191]

The terms of the NNPC and Agip Energy service contract has been sumarised. The duration of the contract is initially expressed only in terms of an exploration period of 3 years plus one or two further renewal periods of two years. It automatically terminates after these

[188] Omorogbe, Y. op. cit. p. 53.
[189] Etikerentse, G. op. cit. p. 94.
[190] Ibid.
[191] Garrick, N. op. cit. p. 3.

periods if no discovery has been made. However, in the event of a commercial discovery, a contract term may be decided on by the parties. However, where an approved exploration programme does not lead to commercial discovery, fifty percent of all exploration costs shall be reimbursed out of the proceeds of sale of production from the contract area. If a commercial discovery is made in the contract area during the last five years of the contract term, NNPC and the Contractor will agree on terms which will enable the contractor to recover its costs and to earn adequate remuneration even beyond the contract. The contract reserves the right for the NNPC to take over and conduct all operations.[192]

2.5.3 (a) The risk service contract

This is another significant addition to new forms of petroleum arrangements between IOCs and the NNPC. It is also known as operation or work contract.[193]It is indeed a variant of the PSC except that the durations covered are shorter, and the operator or contractor has no title to the oil produced as exists under a production sharing contract. The risk service contract is an agreement between a state owned oil corporation and an IOC for the operation of specific aspects of petroleum exploitation by the latter. The state oil corporation holds title to the exploitation rights and concession. No right in any petroleum discovered accrues to the oil company which does however undertake exploration development and production at its own risk.[194]

Another significant difference with the Risk service contract and the PSC is that it is a non-statutory petroleum arrangement. Whereas the PSC is established by the Deep Offshore and Inland Basin Production Sharing Contracts Act, the Risk Service Contract has no statute backing it. Essentially, it is based on the premise that an oil producing state needs certain essential services such as technical, financial and commercial services from an IOC with such

[192] Omorogbe, Y. op. cit. p. 53
[193] Gidado, M.M. (1999) *Petroleum Development Contracts with Multinational Oil Firms – The Nigerian Experience.* ED-Linform Services. Maiduguri, p. 173.
[194] Ibid. p.173.

competencies and enters into contract with an IOC for the provision of the services needed by the state. The main characteristic of the Risk Service Contract that distinguishes it from the PSC and other arrangements is that the oil company provides technical services and risk capital for petroleum operations in return for remuneration in cash or in kind.[195]

2.5.3 (b) The pure service contract

This is another specie of non-statutory petroleum arrangement where the owner of the crude oil in situ (host state) contracts out the job of exploration and production to an expert company for an agreed sum of money. All risks are borne by the host state as reimbursements are made in addition to payments for the services rendered by the contractor company.[196]The pure service contract is also known as the Non-Risk Service Contract. Under this arrangement, the IOC is paid a flat fee, generally related to production for its services. The host state bears all the exploration risk unlike in a PSC. The pure service contract is commonly used by countries with excellent geological prospects such as Saudi Arabia and Venezuela.[197]

2.5.4 Marginal Fields

Marginal fields as a form of petroleum arrangement is relatively new in Nigeria. The Petroleum Act defines marginal fields to mean such field as the President may, from time to time, identify as a marginal field.[198] This definition by the Petroleum Act is scarcely of any relevance to the understanding of the concept of marginal fields. Etikerentse[199] describes the term marginal fields to mean "an oil field in a concession that is held by a major oil company not containing a significant discovery or due to certain reasons (for example, economics, low

[195] Iloba-Aninye, O. op.cit. pp.62-63; Gidado, M.M. op.cit. p.174.
[196] Iloba-Aninye, O. op.cit. p. 63.
[197] Gidado, M.M. op.cit. p.176.
[198] Para. 17 (4), first schedule, *Petroleum Act*, Cap. P10, L.F.N., 2004. (Petroleum (Amendment) Act, No. 23, 1996.)
[199] Etikerentse, G. op.cit. p. 97.

API gravity[200], high viscosity[201], the field having high and low oil reserves, etc) the field is left un-produced for a considerable length of time." The Nigerian Government and some indigenous companies were of the view that such fields can be profitably developed by small indigenous companies with relatively low overheads and therefore such fields should be farmed-out to such indigenous companies with the requisite expertise rather than being abandoned indefinitely.

The Federal Government (FG), in furtherance of its Nigerian Content agenda, encourages IOCs to surrender their marginal fields for assignment to indigenous concession holders. To provide special incentives to marginal field operators, the Federal Government promulgated the Petroleum (Amendment) Act No. 23, 1996 and the Marginal Field Operations (Fiscal Regime) Regulations 2005 on the development of marginal fields.

Generally, a marginal field is defined as any field that has reserves booked and reported annually to Department of Petroleum Resources (DPR) and has remained unproduced for a period of over 10 years.[202] These fields are reallocated to indigenous operators as part of government's policy to encourage the participation of Nigerians in the petroleum industry. The main objectives of the government for introducing Marginal Field regime include:

a. to expand the scope of participation by small (indigenous) players in Nigeria's oil industry;

b. to increase the country's oil and gas reserves base;

c. to provide opportunity for portfolio rationalization; and

[200] American Petroleum Institute gravity (API gravity) is a measure of how heavy or light a petroleum liquid is compared to water. If its API gravity is greater than 10 degrees, it is lighter and floats on water; if less than 10 degrees, it is heavier and sinks. https://en.wikipedia.org/wiki/API_gravity. Retrieved on 8/8/2016 at 5:30pm.
[201] High Viscosity (heavy crude oil). Oil of high viscosity cannot easily flow to production wells under normal reservoir conditions. Crude oil is said to be heavy where its API gravity is less than 20 degrees. https://en.wikipedia.org/wiki/Heavy_crude_oil. Retrieved on 8/8/2016 at 5:40pm.
[202] Nigeria Extractive Industries Transparency Initiative (NEITI) Oil and Gas Industry Audit Report, 2013, released in June, 2016, pp.387-388.

d. to enhance employment opportunity.[203]

Profits made from marginal fields operations are subject to Petroleum Profits Tax of 65.75% prior to the full recovery of all pre-production expenditure and 85% thereafter.[204] The applicable Royalty rates for marginal field operations are as follows:

(a) for production below 5,000 bpd[205] - - - 2.5%

(b) for production between 5,000 bpd and 15, 000 bpd - 7.5%

(c) for production between 10,000 bpd and 15,000 bpd - 12.5%

(d) for production between 15,000 bpd and 25,000 bpd - 18.5%[206]

The Petroleum Act provides that the holder of an oil mining lease may, with consent of and on such terms and conditions as may be approved by the President, farm out any marginal field which lies within the leased area. The President may cause the farm-out of a marginal field if the marginal field has been left unattended to for a period of not less than ten years from the date of the first discovery.[207] There are nine (9) of such companies involved in the marginal fields which are producing and many of the companies are partnered with international companies to provide technical expertise and finance.[208] As of 2018, the total fiscalised crude oil production from marginal fields in Nigeria stood at 22,050.46 million barrels (mbbls.) as opposed to 21,793.00 mbbls produced in 2017.[209]

In summary, production sharing contracts is a special kind of upstream petroleum arrangement that is a radical departure from the concessionary arrangements. It takes away the burden of cash-call obligations that characterizes the joint venture arrangement and at the same time affords the government the ability to secure the complex technical and huge

[203] Ibid. p. 388; Department of Petroleum Resources Guidelines for Farmout and Operation of Marginal Fields, 2020.
[204] Section 21, *Petroleum Profits Tax Act*. Cap. P13, LFN, 2004.
[205] Bopd (Barrel of crude oil per day)
[206] Section 2, Marginal Fields Operations (Fiscal Regime) Regulations 2005. This Regulation was made 30/9/2005.
[207] Para 17(1) & (2), first schedule, *Petroleum Act*. Cap. P10, LFN, 2004.
[208] NEITI Oil and Gas Industry Audit Report, 2013, pp.384-385.
[209] NEITI Oil and Gas Industry Audit Report, 2018, p.22.

financial requirements to explore untapped areas especially the deep offshore. Apart from the few pitfalls in terms of the contract itself particularly the 1993 PSCs discussed above, the PSC is a preferred upstream petroleum arrangement that will guarantee the much needed expansion of Nigeria's proven reserves across the length and breadth of the nation especially in the Benue, Chad, Bida and Sokoto basins. It is hoped that the few gray areas would be addressed urgently in subsequent PSCs to pave way for certainty and stability in the upstream petroleum industry generally.

CHAPTER THREE

FISCAL FRAMEWORK FOR PRODUCTION SHARING CONTRACTS IN NIGERIA

3.1 Introduction

Production sharing contracts is now the foremost petroleum arrangement in the upstream industry in Nigeria.[1] It has elaborate fiscal framework that generate substantial revenue for government.[2] In fact, the principal objective of production sharing contracts is to boost government revenue from petroleum operations especially in the deep offshore acreages by encouraging investments and increasing production. Therefore, the taxation of incomes derived therefrom remains the cardinal aspect of production sharing contracts in Nigeria. Historically, the fiscal framework for production sharing contracts in Nigeria were deliberately designed to attract investment in the deep offshore area which was previously unexplored because of the complexity of the terrain, the huge financial cost required and the technical know-how which were lacking on the part of the Nigerian Government. One of the reasons for making the fiscal policies attractive relates to the risk associated with production sharing contracts (PSCs) generally.

In a production sharing contract, the oil company solely invests in the exploitation of the area, and is rewarded, if a development follows, first with recovery of its costs, after Royalty is deducted and then with a share in production, such share being determined by the agreement.[3]Where the oil company fails or is unable to find oil in commercial quantity, the company loses the entire cost incurred in prospecting for oil within the licence area. The probability of drilling a dry hole (well) necessitates the grant of juicy fiscal terms to international oil companies. Another reason for attractive fiscal terms in production sharing

[1] www.napims.com/dynamic.html. Retrieved on 7/4/2016 at 5pm.
[2] *Deep Offshore and Inland Basin Production Sharing Contracts Act*. Cap. D3, L.F.N. 2004.
[3] Jennings, A., (2002) *Oil and Gas Exploration Contracts*. Sweet & Maxwell Ltd. London, p. 5

contracts in Nigeria relates to the global competition for investments in the upstream oil and gas industry. With the intense and sustained competition amongst oil producing nations, every oil producing nation including Nigeria strives to attract a fair share of global investments in the industry and this is fundamentally achieved by means of attractive and competitive fiscal terms.

It is common knowledge that Nigeria depends mainly on its oil revenues.[4] It, thus, follows that the tax revenues generated from the operation of production sharing contracts is very crucial to the health of Nigerian economy.[5] In a nutshell, the question of how to tax incomes garnered from crude oil production is an extremely important issue as incomes earned from the production and sale of a natural resource often accounts for the biggest portion of government budget. However, if the government taxes too much, it runs the danger of pushing the international oil companies out of the country to areas that offer better fiscal terms.[6]

This chapter therefore centers on the fiscal framework for production sharing contracts in Nigeria. It reviews the Deep Offshore and Inland Basin Production Sharing Contracts Act[7] focusing on the duration of oil prospecting licences (OPLs) relating to PSCs, determination and payment of applicable taxes and royalties under the Deep Offshore and Inland Basin Production Sharing Contracts Act, determination and payment of petroleum profits tax (PPT); investment tax credit (ITC) and investment tax allowance (ITA); and

[4] Ipaye, A. (2014) *Nigerian Tax Law & Administration: A Critical Review*. SCO Prime Publishers. London, p. 337.
[5] Omorogbe, Y., Fiscal Regimes. A paper presented at the Civil Society Capacity Building Workshop Organized by Nigeria Extractive Industries Transparency Initiative (NEITI), held at Presidential Hotel, Port Harcourt, Rivers State, from July 27 -28, 2005, p. 2.
[6] Radon, J., The ABCs of Petroleum Contracts: License-Concessions Agreements, Joint Ventures, and Production-Sharing Agreements. OpenOil Online Curriculum: Governance: Contracts. P. 76 http://openoil.net/wp/wp-content/uploads/2012/02/Contracts-reading -material.pdf. retrieved on 17/11/2016 at 5:40pm.; Lashidani, M.F. (2015) "Foreign Investment Contracts in Oil and Gas Sector." *DU Journal, Humanities and Social Sciences.* Vol. 8(5). p. 7. http://dujournals.eu.pn/2015-issues/May/May-48- 2015.pdf. Retrieved on 17/11/2016 at 5pm.
[7] Cap D3, L.F.N., 2004.

royalty under PSCs. Other issues considered are allocation of crude oil under PSCs, allocation of royalty oil; cost oil; tax oil and profit oil as well as adaptation of laws and periodic review of the Deep Offshore and Inland Basin Production Sharing Contracts Act. The Deep Offshore and Inland Basin Production Sharing Contracts (Amendment) Act, 2019 is also extensively reviewed, highlighting the few innovations it has introduced in the fiscal structure of PSCs in Nigeria.

This chapter also reviews the Petroleum Profits Tax Act with particular reference to the imposition of chargeable tax; ascertainment of profits, adjusted profits, assessable profits and chargeable profits. Others are allowable deductions under Petroleum Profit Tax Act; deductions not allowed and artificial transactions; assessable tax, accounting and returns of estimated tax as well as notice of assessment and objections; notice of refusal to amend and appeals. Other fiscal obligations applicable to production sharing contracts such as rents, fees, bonuses and oil terminal dues are also considered. The foregoing are discussed below beginning with the fiscal framework of production sharing contracts.

3.2 Fiscal Framework of Production Sharing Contracts

Fiscal terms are the most important terms of a natural resource contract such as a PSC as they delimit and define the amount of profits and economic rent that will accrue to each party throughout the life of the contract. In Nigeria, these terms are critically important as the country has remained dependent on the petroleum industry for the bulk of its foreign exchange earnings for over thirty years.[8] The two main legislation that govern the fiscal framework for production sharing contracts in Nigeria are the Deep Offshore and Inland Basin Production Sharing Contracts Act[9] (DOA) and the Petroleum Profits Tax Act (PPTA).[10] Each of the two legislation are reviewed below.

[8] Omorogbe, Y. op.cit. p.1
[9] *Deep Offshore and Inland Basin Production Sharing Contracts Act*. Cap. D3, L.F.N. 2004.
[10] *Petroleum Profit Tax Act*. Cap. P13, L.F.N. 2004.

3.2.1 The Deep Offshore and Inland Basin Production Sharing Contracts Act

The Deep Offshore and Inland Basin Production Sharing Contracts Act (DOA) was first enacted as a Decree on the 23rd day of March, 1999[11] with a total of nineteen sections. This Decree was subsequently amended by the Deep Offshore and Inland Basin Production Sharing Contracts (Amendment) Decree No. 26 of 1999.[12] The notable effect of the amendment was the removal of the entirety of section 16 of the first Decree[13]and the increase of the period of review of the Decree from 10 years to 15 years.[14] Thus, the extant Act now has eighteen sections only. The Act has been described as the first piece of Nigerian legislation recognizing the dichotomy between onshore and offshore exploration regimes as it gives recognition for the production sharing contracts arrangement in the deep offshore and inland basin areas of Nigeria.[15]

The intent of the Deep Offshore and Inland Basin Production Sharing Contracts Act is to, amongst other things, give effect to certain fiscal incentives given to the oil and gas companies operating in the Deep Offshore and Inland Basin areas under production sharing contracts between the Nigerian National Petroleum Corporation or other companies holding oil prospecting licenses or oil mining leases and various petroleum exploration and production companies.[16] The Act was enacted to demonstrate Government's commitment to

[11] Degree No. 9 of 1999, made at Abuja by the former Head of State, General Abdulsalami Alhaji Abubakar.
[12] Degree No. 26 of 1999 assumed the appellation of an Act being and existing Law by virtue of section 315(1) (a), Constitution of the Federal Republic of Nigeria, Cap. C23, L.F.N., 2004.
[13] Section 16 of the first decree provides thus: "(1) For the purpose of the efficient management of production sharing contracts and joint venture under this Decree, the National Petroleum Investment Management Services (in this Decree referred to as 'NAPIMS') shall be incorporated into a limited liability company under the Companies and Allied maters Decree 1990 as amended. (2) Accordingly, NAPIMS shall be vested with the exploration and production properties and assets owned by the Federal Republic of Nigeria for the purposes of this Decree."
[14]Section 17 of the first Decree only provided that the Decree shall be liable to review after a period of 10 years from the date of the commencement and every 5 years immediately thereafter.
[15]Atsegbua, L. (2012) *Oil and Gas Law in Nigeria: Theory and Practice.* Fifers Lane Publishers, Benin. Third Edition, p. 185.
[16] Long Title, *Deep Offshore and Inland Basin Production Sharing Contracts Act*. Cap. D3, L.F.N. 2004.
[16] *Petroleum Profit Tax Act*. Cap. P13, L.F.N. 2004.

the Production sharing contracts arrangements.[17]The seriousness is very well placed in view of the overwhelming contribution of petroleum to the Nigerian economy, and the imperative of the extension of operations to the offshore and inland basins.[18] The Act provides that the commencement date shall be 1st January, 1993 as opposed to 23rd day of March, 1999 when it was first made. In effect, the Deep Offshore and Inland Basin Production Sharing Contracts Act has a retroactive force and this is permissible being a civil legislation.**[19]**

The history of the PSCs especially the 1993 model PSCs necessitated the retroactive effect of the Deep Offshore and Inland Basin Production Sharing Contracts Act. As at April and May 1993 when the Federal Government through the Nigerian National Petroleum Corporation (NNPC) signed production sharing contracts with various international oil companies (IOCs) notably SNEPCO[20] and Statoil, the government merely issued side Letters to each of the IOCs wherein it stated that pursuant to Government policy, the PSC will be approved with the guarantee that the following terms which require amendments to existing Nigerian Laws are applicable and enforceable. The government held out these Side Letters as embodying the applicable fiscal terms to the PSCs. Strictu sensu, this is wrong, the reason being that fiscal terms are a matter of positive legislation and not of side Letters. It is in recognition of this obvious lapse that the Deep Offshore and Inland Basin Production Sharing Contracts Act was given retroactive effect to give proper legislative backing to the contents of the Side Letter.

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[17] Ogunleye, T.A. (2015). "A Legal Analyses of Production Sharing Contract Arrangements in the Nigerian Petroleum Industry." *Journal of Energy and Policy*. Vol.5 No. 8, p.6.

[18] Oche, P.N. (2004) Petroleum Law in Nigeria: Arrangements for Upstream Operations. Heirs Great Commission, Jos, p. 163.

[19] Imhanobe, S.O. (2002) *Understanding Legal Drafting and Conveyancing*. Secured Titles Publishers, Abuja. P.88; Hon, S.T. (2016) S.T. Hon's Constitutional and Migration Law in Nigeria. Pearl Publishers Int'l Ltd, Port Harcourt, p.167; Shell Petroleum Development Company of Nig. Ltd vs Anaro (2015) All FWLR. [Pt. 802] 1644, 1695-1696, paras H-A; University of Ilorin vs Adeniran (2007) All FWLR. [Pt. 382] 1871; (2007) 6 N.W.L.R. [Pt. 1031] 498.

[20] Shell Nigeria Exploration and Production Company Ltd (SNEPCO) signed PSC with NNPC on April 14, 1993 while Statoil Nigeria Limited signed a similar PSC with the NNPC on May 5, 1993.

Notwithstanding anything to the contrary contained in any other enactment or law, the provisions of the Deep Offshore and Inland Basin Production Sharing Contracts Act shall apply to all production sharing contracts as defined under the Act.[21] Production sharing contracts mean any agreement or arrangement made between the Corporation or the holder and any other petroleum exploration and production company or companies for the purpose of exploration and production of oil in the Deep Offshore and Inland Basins. Deep offshore means any water depth beyond 200 metres while Inland Basin refers to any of the following Basins namely, Anambra, Benin, Benue, Chad, Gongola, Sokoto and such other basins as may be determined, from time to time, by the Minister charged with the responsibility for petroleum resources.[22] The Act applies to petroleum operations conducted in all deep offshore areas and Inland basins only.[23]

It, therefore, follows that petroleum operations conducted onshore and within shallow waters are outside the ambit of the Act. **Oche**[24] shares similar view when he noted that the "definition of Production Sharing Contract implies that the arrangement is mainly, if not exclusively, available in respect of petroleum operations in the Deep Offshore and Inland Basins environment." He added that "it may thus be inferred that the arrangement is not available in respect of the onshore zones." In the same vein, **Ogunleye**[25] opines that the Act does not apply to the 1973 PSCs assigned to Addax as they are not located within the inland basins and deep offshore areas as defined in the Act.

This thesis agrees with **Oche** and **Ogunleye** and further submits that petroleum operations conducted under different upstream petroleum arrangements such as the concession arrangement; the joint venture arrangement; and the service contracts arrangement

[21] Section 1, Deep Offshore and Inland Basin Production Sharing Contracts Act.
[22] Section 17, ibid.
[23] Atsegbua, L. A. Op.cit. p. 152.
[24] Oche, P.N. Op.cit. pp. 156-157.
[25] Ogunleye, T. A. Op.cit. p. 6.

are all outside the domain of the Deep Offshore and Inland Basin Production Sharing Contracts Act. Practitioners in the upstream petroleum industry will do well to keep the exact ambit of the Act in mind as they conduct their affairs in the industry.

3.2.2 Duration of oil prospecting Licences relating to Production Sharing Contracts

The duration of an oil prospecting licence (OPL) relating to production sharing contracts in the deep offshore and Inland basin shall be determined by the Minister and shall be for a minimum period of five years and an aggregate period of ten years.[26] However, paragraph 6 of the First Schedule to the Petroleum Act[27] provides that the "duration of an oil prospecting license shall be determined by the Minister, but shall not exceed five years (including any periods of renewal)." **Atsegbua**[28] has stated that there is no conflict between the above provisions of the Deep Offshore and Inland Basin Production Sharing Contracts Act and the Petroleum Act as it relates to the duration of oil prospecting licences (OPL). This research however disagrees with **Atsegbua** in this regard. This is because, whilst the Petroleum Act limits the duration of OPL to a period 'not exceeding five years (inclusive of any renewal periods), the Deep Offshore and Inland Basin Production Sharing Contracts Act extends it to an aggregate period of ten years. This clearly reveals the conflict between the two Act.

The cheering news however, is that section 15(2) of the Deep Offshore and Inland Basin Production Sharing Contracts Act resolves the conflict in favour of the later Act. It provides that if "the provisions of any other enactment or law including but not limited to the Petroleum Act and Petroleum Profits Tax Act are inconsistent with the provisions of the Deep Offshore and Inland Basin Production Sharing Contracts Act, the provisions of the Act shall prevail and the provisions of the other enactment or law shall, to the extent of that

[26] Section 2, *Deep Offshore and Inland Basin Production Sharing Contracts Act*. Cap. D3. L.F.N., 2004.
[27] Cap. P10, L.F.N., 2004.
[28] Atsegbua, L. A. Op.cit. p. 156.

inconsistency be void." Therefore, the ten year OPL timeline under the Deep Offshore and Inland Basin Production Sharing Contracts Act overrides the provisions of the Petroleum Act, 1969[29]which limits same to a maximum period of 5 years. Another reason for the validity of the 10 year OPL time line under the Deep Offshore and Inland Basin Production Sharing Contracts Act is that the Act is a special legislation that specifically applies to petroleum operations in the Deep Offshore and Inland Basin acreages. By virtue of the rules of interpretation of statutes, a special or specific statute prevails over the provisions of a general statute.[30] Therefore, whilst the Petroleum Act is a general statute that applies to petroleum operations in Nigeria, the Deep Offshore and Inland Basin Production Sharing Contracts Act specifically applies to petroleum operations in the Deep offshore and Inland Basins areas only. The later Act being a special legislation will therefore be interpreted to override the Petroleum Act which is a general legislation.

The effect of this is simply that the duration of OPLs for onshore and shallow waters operations is 5 years whilst the duration of OPLs for deep offshore and inland basins operations is 10 years. The reason for this dichotomy is not far-fetched. It is essentially because of the difference in the terrain of operations and the equipment required. While it is relatively easier and faster to conduct oil prospecting operations at the onshore and shallow water areas, a similar activity at the deep offshore area attracts enormous complexities and challenges thus slowing the pace of work. It is due to the peculiarity of the terrain and the predictable slow pace of work at the deep offshore areas that make it commercially compelling to increase the OPL timeline to 10 years. It is thus submitted that the dichotomy in the OPL timelines between the onshore and deep offshore operations is realistic and reasonable.

[29] *Petroleum Act*. Cap. P10. L.F.N., 2004.
[30] *Martin Schroder & Co* vs *Major and Company (Nigeria) Ltd* (1989) 2 N.W.L.R. (Pt.101)1, 31-32.

3.2.3 Determination and Payment of Applicable Taxes and Royalties under the Deep Offshore and Inland Basin Production Sharing Contracts Act

The kernel of production sharing contracts as far as the Nigerian government is concerned is the tax revenues generated from the operations of the PSCs. Ever since the first commercial discovery of petroleum in 1956, at Oloibiri, in present day Bayelsa State, Nigerian economy has over time become largely dependent on petroleum. Petroleum accounts for about one-third of the country's Gross Domestic Product (GDP), 76% of government revenue, and 95% of the foreign exchange earnings.[31] It was in anticipation of the huge revenues from deep water petroleum operations that the government lavishly incentivized the PSCs with lucrative fiscal terms to attract and encourage investment especially in the deep water acreages. Thankfully, the deep water operations have now turned out to be very prolific and rewarding both for the government and the IOCs involved in the operations. This part of the thesis reviews the various taxes and allowances applicable to a production sharing contract under the Act beginning with petroleum profit tax.

3.2.3.1 Determination and Payment of Petroleum Profits Tax

The Deep Offshore and Inland Basin Production Sharing Contracts Act (DOA) provides that the petroleum profits tax payable under a production sharing contract shall be determined in accordance with the Petroleum Profits Tax Act: provided that the petroleum profits tax applicable to the contract area as defined in the production sharing contract shall be 50% flat rate of chargeable profits for the duration of the production sharing contracts. However, nothing contained in the Act shall be construed as having exempted the contractors from the payment of any other taxes, duties or levies imposed by any Federal, State or Local Government, or Area Council Authority.[32]

[31] Kachikwu, I. E., (2016) The Petroleum Industry Bill: Getting to the Yes. LPCS Limited, Lagos, p. 1.
[32] Section 3, *Deep Offshore and Inland Basin Production sharing Contracts Act.*

In effect, the DOA amended the Petroleum Profit Tax Act and pitched the chargeable tax on profits from petroleum operations conducted in the deep offshore and inland basins at a flat rate of 50% only.[33] It however, did not exempt the IOCs involved in petroleum operations in the deep offshore and inland basins from paying other taxes, duties and levies imposed by the government. One of such other taxes imposed by the Federal Government is the Tertiary Education Tax. The Tertiary Education Tax is imposed under the Tertiary Education Trust Fund (Establishment, ETC) Act, 2011.[34]The Tertiary Education Trust Fund (Establishment, ETC) Act (TETFund Act) established the Tertiary Education Trust Fund charged with the responsibility for managing and disbursing the Education Tax to Public Tertiary Education Institutions in Nigeria for the rehabilitation, restoration and consolidation of tertiary education in Nigeria.[35] The Fund is managed by the Board of Trustees established under the Act.[36]

In 2006, it was reported that the TETFund spent about ₦122 billion Naira on Tertiary Institutions in Nigeria.[37] The TETFund Act imposes a tax rate of 2% on the assessable profit of every company registered in Nigeria. The assessable profit of a company for the purpose of Education Tax shall be ascertained in the manner specified in the Companies Income Tax Act or the Petroleum Profits Tax Act as the case may be.[38] Section 1(4) of the TETFund Act provides that without prejudice to the provisions of subsection (3) [which contains the procedure for ascertainment of assessable profit], section 60 of the Petroleum Profits Tax Act shall not apply to the assessment, collection and payment of tertiary education tax and all

[33] Under section 21 of the *Petroleum Profits Tax Act*, the chargeable profits is assessed at 85% or 65.7% where the company has not yet commenced to make a sale or bulk disposal of oil under a continuous programme of production of petroleum.
[34] Act No. 16, of 2011. This Act commenced on 3rd day of June, 2011. It repealed the Education Tax Act, Cap E4, L.F.N., 2004 and Education Tax Fund (Amendment) Act No. 17, 2003.
[35] Tertiary Education in Nigeria means Universities, Polytechnics and Colleges of Education and the fund is disbursed in the ratio of 2:1:1. Section 7(3), *TETFund Act, 2011*.
[36] Section 3, *Tertiary Education Trust Fund (Establishment, ETC) Act*, 2011.
[37] Iroegbu, S. "TETFund Spends N122bn on Tertiary Institutions in 2016." In: *Thisday Newspapers*, p. 33, Wednesday, November 30, 2016.
[38] Section 2, ibid.

companies chargeable to tax under the Petroleum Profits Tax Act shall be liable to pay the full extent of the tax imposed under the Act. The effect of this provision is that it nullifies the stipulation of section 60 of the Petroleum Profits Tax Act, which would otherwise reduce the tax chargeable under the TETFund Act and other tax statutes if the relevant income or dividend paid out of any profit is taken into account in the calculation of the amount of chargeable profits.[39]

The Federal Inland Revenue Service (FIRS) is responsible for assessing and collecting education tax from companies registered in Nigeria. The FIRS pays the Education tax collected under the Act into the Fund with such information as may be required by the Fund for proper administration of the tax.[40]It is an offence to contravene the TETFund Act and same is punishable with imprisonment for a term of six (6) months or a fine of ₦ 1,000,000 or both for a first offence and a term of 12 months or ₦ 2,000,000 or both in the case of a second or subsequent offence.[41]

The Lagos zone of the Tax Appeal Tribunal was recently called upon to determine a dispute arising from the imposition and payment of education tax levied on an international oil company involved in petroleum operations under the 1993 production sharing contracts in the case of *Esso Exploration & Production Nigeria (Deep Water) Limited and SNEPCO Limited. v. Federal Inland Revenue Service.*[42]In this appeal, the crux of the appellants' complaint was that their joint-venture partner, the Nigeria National Petroleum Corporation (NNPC) filed Tax Returns with the respondent unilaterally on their behalf without taking into consideration their submissions on the Tax Returns in respect of education tax and petroleum profits tax. Unfortunately, the Tribunal did not have the opportunity to pronounce on whether or not the IOC was liable to pay education tax in addition to petroleum profits tax because the

[39] Kachikwu, I. E. (2016) *Legal Issues in the Nigerian Petroleum Industry*. LPCS Limited. Lagos. p. 48.
[40] Section 3(3), ibid.
[41] Sections 10 and 11, ibid.
[42] (2012) 8 T.L.R.N. 45

respondent brought a preliminary objection contending that the appellants (IOCs) had no locus standi to bring the appeal since they did not file any returns nor were served with any assessment notice. In effect, the case was decided on the preliminary issue of locus standi rather than on its merits. Thus the opportunity to have a clear judicial pronouncement on this issue was missed. ***Adams***[43]has extensively criticized the decision of the Tribunal especially as it relates to the approach of the Tribunal on the issue of the parties before the Tribunal. Quite a number of cases on all fours with the Esso Exploration case in relation to education tax were similarly considered by the Tax Appeal Tribunal.[44]

One of such other levies imposed by the Federal Government on IOCs involved in petroleum operations in the deep offshore and inland basins is the Industrial Training Funds levy. This levy is imposed under the Industrial Training Fund (Amendment) Act, 2011.[45] The Act provides that every employer having either 5 or more employees in his establishment or having less than 5 employees but with a turnover of ₦50, 000,000 (Fifty million naira) and above per annum, shall, in respect of each calendar year and or the prescribed date, contribute to the fund one per centum of his total payroll.[46]To enhance compliance with the Act, it is provided that every contractor or consultant bidding or soliciting contract or business from any government Ministry, Department and Agencies shall confirm with the obligation. All regulatory agencies of the Federal Government are also required to ensure compliance with the Act. In practice, government Ministries, Departments and Agencies insist on the presentation of Industrial Training Fund Certificate evidencing compliance before awarding any contract to corporate entities doing business in Nigeria.

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[43] Adams, G.R. (2015) *An Evaluation of the Rules of Practice and Procedure of Tax Appeal Tribunal in Nigeria,* LL.M Thesis (Unpublished), Faculty of Law, A.B.U., Zaria, pp.65-68.

[44] *Shell Nigeria Exploration & Production Co. Ltd & 3 Ors* vs *FIRS (2012) 8 T.L.R.N.* 59; *CNOOC Exploration and Production Nigeria Limited and South Atlantic Petroleum Corporation vs Federal Inland Revenue Service and Nigeria National Petroleum Corporation (2012) 7 T.L.R.N. 1 and (2013) 9 T.L.R.N. 28.*

[45] Act No. 19 of 3rd day of June, 2011. This Act amended the Industrial Training Fund Act, Cap. I19, LFN, 2004.

[46] Section 6(1), *Industrial Training Fund (Amendment) Act, 2011*.

There is another levy on IOCs involved in petroleum operations under the Niger-Delta Development Commission (Establishment, etc) Act (NDDC Act).[47] Section 14(1) of the NDDC Act provides that the Commission shall establish and maintain a fund from which shall be defrayed all expenditure incurred by the Commission. As part of the sources of funds for the NDDC, section 14(2) (b) provides that there shall be paid and credited to the NDDC fund three percent of the total annual budget of any oil producing company operating, on shore and off shore, in the Niger-Delta Area, including gas processing companies. In effect, all petroleum and gas processing companies operating in the Niger-Delta Area of Nigeria whether onshore or offshore are obligated to contribute three percent of their respective annual budgets to the NDDC fund.[48] There is also a levy under the Nigerian Oil and Gas Industry Content Development Act, 2010 known as the Nigerian Content Development Fund. The fund was established for the purpose of funding the implementation of Nigerian content development in the oil and gas industry. A total of one percent of all upstream petroleum contracts are deducted upfront and paid into the fund.[49]

It remains to be added that the computation and payment of estimated and final petroleum profits tax shall be made in Unites States dollars on the basis of the United States dollar returns filed.[50] The incentive in this provision is that the fortunes in the value of the investment are not affected by fluctuations in the exchange rates of the naira to the dollar. The dollar computation of tax obligations means that the international oil company's capital investment recoverable over five years as capital allowances will not be reduced or increased by fluctuations in the value of the naira.[51]Finally, the chargeable tax on petroleum operations in the contract area under the production sharing contracts are split between the NNPC and

[47] *Niger-Delta Development Commission (Establishment, etc.) Act*. Cap. N86, L.F.N., 2004.
[48] Kachikwu, I. E. Op.cit. p. 49.
[49] Section 104, Nigerian Oil and Gas Industry Content Development Act, 2010.
[50] Section 6, *Deep Offshore and Inland Basin Production Sharing Contracts Act.*
[51] Olisa, M.M. (1997) *Nigerian Petroleum Law and Practice*. Jonia Ventures Limited, Lagos, 2nd edition, pp.197-198.

the IOC in the same ratio as the split of profit oil as defined in the production sharing contract between them (the NNPC and the IOC).[52] This is pretty straightforward. Each party to the contract is taxed in accordance with its interest holding in the PSC.

3.2.3.2 Determination of Investment Tax Credit and Investment Tax Allowance

Investment tax credit or allowance is a fiscal incentive where the government allows a company to recover an additional percentage of tangible capital expenditure. For example, if an IOC (contractor) spent US$10 million on expenditures eligible for a 20% investment tax credit, then the contractor would actually be able to recover US$12 million through cost recovery.[53] In other words, the contractor would recover its principal expenditure of $10 million together with another $2 million which is 20% of its principal expenditure of $10 million. Investment tax credit/allowance is also referred to as uplift allowance[54]

The Deep Offshore and Inland Basin Production Sharing Contracts Act makes provision for the determination of investment tax credit (ITC) and investment tax allowance (ITA). The Act provides that where the NNPC or the holder and the contractor have incurred any qualifying capital expenditure wholly, exclusively and necessarily for the purpose of petroleum operations carried out under the terms of a production sharing contract in the Deep Offshore or inland Basin, there shall be due to the parties in respect of the production sharing contracts executed prior to 1st July, 1998, a credit (in the Act referred to as "investment tax credit") at a flat rate of 50 per cent of the qualifying expenditure in accordance with the production sharing contract terms for the accounting period in which that asset was first used for the purposes of such operations.[55] However, in respect of parties who executed production sharing contracts after 1st July, 1998, there shall be due to such parties an allowance (in the

[52] Section 12, *Deep Offshore and Inland Basin Production Sharing Contracts Act.*
[53] Johnston, D. (1994) *International Petroleum Fiscal Systems and Production Sharing Contracts*. Ponwell Books. Tulsa, Oklahoma, p. 305.
[54] Radon, J. op.cit. p. 77, Johnston, D. op.cit. p. 316.
[55] Section 4(1) *Deep Offshore and Inland Basin Production Sharing Contracts Act.*

Act referred to as an "investment tax allowance") at a flat rate of 50 per cent of the qualifying expenditure in accordance with the provisions of existing applicable legislation for the accounting period in which the asset was first used for the purposes of such operations.[56]

As evident, investment tax credit and investment tax allowance are substantially the same thing. While the one refers to qualifying expenditures incurred under PSCs executed prior to 1st July, 1998, the other refers to qualifying expenditures incurred under PSCs executed post 1st July, 1998. However, ITC and ITA have different fiscal implications in terms of their manner of computation. Whilst ITC is 50% less of the assessable petroleum profit tax, ITA applies to half of the 50% less of the assessable petroleum profit tax. For instance, where the assessable petroleum profit tax is $100,000, the applicable ITC would be 50% less $100,000 which equals $50,000. The ITA on the other hand would be half of $50,000 which is $25,000.[57] This is because ITC is a direct tax offset whereas ITA is a reduction in assessable profit. ITC is deducted from assessable tax to arrive at the Chargeable tax whilst ITA is deducted from Assessable profit to arrive at chargeable profit.[58] This position is consistent with section 22(3) of the Petroleum Profits Tax Act which provides that in computing the tax payable, the ITC shall be applicable in full to petroleum operations in the contract area such that the chargeable tax is the amount of the assessable tax less the ITC. In reality, the difference between ITC and ITA can result in a very significant disparity in the final amount payable as tax and that explains why ITC is a very contentious issue under the PSC regime.[59]

[56] Section 4(2) ibid.
[57] Interview with Abdulsalam Alhaji Shehu conducted on Friday, December 2, 2016 at NICON Luxury Hotels, Abuja. Shehu retired from the NNPC as General Manager, Corporate Strategy and is now the managing Partner of PCG Consulting, a tax consulting firm.
[58] Osasomi, L.; *Topical Issues in the Taxation of Oil and Gas Contracts in Nigeria.* A Paper presented at DPR Training on Oil and Gas Contracts in Nigeria organized by Habacuc Solicitors, held at Radisson Blue Anchorage Hotel, Victoria Island, Lagos, from December 7-10, 2017, p. 2.
[59] Ibid.

A combined reading of section 3 of the Deep Offshore and Inland Basin Production Sharing Contracts Act[60] and section 22(4) of the Petroleum Profits Tax Act shows that the applicable ITC is split between the NNPC and the Contractor (IOC) in accordance with their respective profit oil sharing ratio. In this regard, section 22(4) provides that the chargeable tax computed under subsection (3) of section 22 shall be split between the Nigerian National Petroleum Corporation and the Crude oil producing company in accordance with the proportion of the percentage of profit oil split.[61] This raises a fundamental question as to who, between the NNPC and the Contractor, owns the assets that triggers ITC. In other words, is it the NNPC or the Contractor that incurred the qualifying capital expenditure (QCE) that triggered the entitlement to investment tax credit? The answer to this question is critical because, ideally, it is the party who ultimately incurred the QCE (owns the asset) that is entitled to ITC as a tax rebate for the expenditure incurred.

Unfortunately, section 4 of the Deep Offshore and Inland Basin Production sharing Contracts Act is nebulous and unhelpful in answering this important question particularly when read side by side with the text of clause 11.1 of the 1993 PSCs. Clause 11.1 of the 1993 PSCs stipulates that every equipment imported for petroleum operations becomes the property of the NNPC once such equipment arrives Nigerian shores. This is so even though the contractor (IOC) is required to fund the purchase of the equipment fully. That being the case, it, therefore, follows that the NNPC alone is entitled to investment tax credit being the owners of the asset that triggers the claim to investment tax credit. Unfortunately, part of the disputes arising from the 1993 PSCs relates to the IOC's claim for investment tax credit. The IOCs claim that because they incurred the capital expenditure on equipment which triggered investment tax credit and therefore same entitles them to claim investment tax credit by virtue

[60] Section 3 of the *Deep Offshore and Inland Basin Production Sharing Contracts Act* provides that the payment of petroleum profits tax shall be in accordance with the Petroleum Profits Tax Act.

[61] Clause 15(3) (b) of the 1993 PSCs also make provision for the split of ITC between the NNPC and the Contractor in accordance with the proportion of the percentage of Profit Oil Split.

of paragraph 6 of the Memorandum to the 1993 PSCs. The text of paragraph 6 of the Memorandum is as follows:

> It is understood and agreed that notwithstanding clause 11.1 of the PSCs which provides that all equipment purchased under the PSCs shall become the property of the CORPORATION (sic) on arrival in Nigeria, such equipment shall become the pro1perty of the CORPORATION on the earlier of either the termination of the relevant PSC or when the cost thereof is fully recovered under the Accounting Procedure to the PSC.[62]

A closer look at the text of the memorandum above discloses that it merely creates a lien over the assets (equipment) in favour of the Contractor (IOC). A lien is a legal right or interest that a creditor has in another person's property, lasting usually until a debt that it secures is satisfied.[63] In the words of the Supreme Court, "a lien, broadly speaking is a right to retain that which is in one's possession belonging to another till certain demands of the person in possession are satisfied."[64] A lien in its primary or legal sense means a right at common law in one man to retain that which is rightfully and continuously in his possession belonging to another until the present and accused claims of the person in possession are satisfied.[65] The Contractor's right of lien over the qualifying equipment by virtue of the memorandum to the PSCs does not in any way imply that the equipment does not belong to the NNPC. At best, it merely delays the full transfer of the title to the NNPC until the cost is fully recovered. In other words, the lien over the equipment will be completely lifted as soon as the Contractor fully recovers his expenditure through cost oil. This research submits that paragraph 6 of the Memorandum is not such that would entitle the contractor (IOCs) to investment tax credit as claimed.

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[62] Paragraph 6, Production Sharing Contracts for OPLs 213, 217, and 218 Memorandum signed between NNPC and Statoil & BP Exploration Nig. Ltd dated May 18, 1993.
[63] Adebiyi, O.; *Topical Issues on the Taxation of Oil and Gas Contracts in Nigeria.* A Paper presented at DPR Training on Oil and Gas Contracts in Nigeria organized by Habacuc Solicitors, held at Nicon Luxury Hotel, Abuja, from December 2-4, 2016, p. 26.
[64] Afrotech Technical Services (Nig) Ltd vs MIA & Sons Ltd. (2000) 15 N.W.L.R. [pt. 692] 730, 786.
[65] Livestock Feeds Plc vs Okezie (2000) 10 N.W.L.R. [Pt. 775] 341, 354, per Abdullahi, P.C.A.

Regrettably, section 4 of the Deep Offshore and Inland Basin Production Sharing Contracts Act which ought to have been a final statutory arbiter is not clear in this regard. The Act rather takes an uncertain middle course position that both the NNPC and the IOC (contractor) are entitled to investment tax credit once any of the parties have incurred any qualifying capital expenditure wholly, exclusively and necessarily for the purposes of petroleum operations. Section 22(1) of the Petroleum Profits Tax Act also has a similar provision to the effect that a "crude oil producing company which executed a Production Sharing Contract with the Nigeria National Petroleum Corporation in 1993 shall, throughout the duration of the Production Sharing Contract, be entitled to claim investment tax credit allowance as an offset against tax in accordance with the provision of the Production Sharing Contract." The IOCs have interpreted this uncertainty in the Deep Offshore and Inland Basin Production Sharing Contracts Act to mean that they (IOCs) are entitled to claim ITC in proportion to their share of profit oil to the disadvantage of the NNPC.

Adebiyi[66] explained it when he emphasized as follows:

> Although the Contractor finances the purchase of the equipment, ownership of the equipment is vested in the NNPC. Therefore, only the owner of the assets should be allowed to claim ITC.
> ITC is based on qualifying capital expenditure incurred and not simply based on petroleum operations. Oil companies that finance petroleum operations under a PSC have arguably not incurred such cost as the cost are recoverable. Can a finance corporation that finances the purchase of an asset be said to have incurred the cost of the asset?
> Oil companies have, together with the NNPC, continued to claim ITC as a tax offset to reduce PPT (sic) – because they are involved in petroleum operation relying on section 22 of the PPTA, rather than Section 4 of the DOA (sic), even though the provisions of the PPTA must be read in conformity with the DOA. In essence, NNPC's credits have been used to reduce the tax payable by the Contractor.

[66] Adebiyi, O.; op.cit. p. 27.

Clearly, the framers of the provisions of section 4 of the Deep Offshore and Inland Basin Production Sharing Contracts Act appear to be under a misconception of the operation of a PSC. In practice, the parties in a PSC (NNPC and IOC) work together as a single team. The IOCs is usually appointed as the operator of the oilfield (largely because of their expertise and resources) who undertakes petroleum operations on the understanding that upon attaining commercial quantity in production, the IOC's cost will be fully reimbursed through the allocation of cost oil and an agreed portion of the profit oil will also be allocated to the IOC as a reward for its efforts. In effect, the equipment giving rise to investment tax credit would either be jointly owned or owned by either of the parties, in this case, the NNPC by virtue of the agreement of the parties under the 1993 PSCs. If the equipment belongs to the NNPC by virtue of the agreement of the parties, it is therefore awkward for the Act to state that both parties are entitled to investment tax credit.

Another issue arising from the provisions of section 4 of the Deep Offshore and Inland Basin Production Sharing Contracts Act and the 1993 PSCs in particular is whether it makes any economic sense for the IOC to be entitled to investment tax credit when the IOC's costs incurred in acquiring the qualifying equipment (assets) are fully repaid through the allocation of cost oil. In other words, does it not amount to over payment where an IOC (contractor) would be given tax rebate of 50% of the cost of qualifying capital expenditure as investment tax credit after the same contractor has been fully reimbursed of its expenditures? The benefit in this regard clearly weighs in favour of the contractor as against the NNPC. Akinosho[67] offered a graphical explanation of this issue and the reason behind same when he noted as follows:

> These contracts were generous agreements signed around 1993, at a time of poor knowledge of the working of the deepwater

[67] Akinosho, T., "Baru's Triumphant Return: Be Afraid! Be very Afraid!" In: *Thisday Newspapers*, p. 48 Tuesday, August 16, 2016.

> petroleum system, and against a backdrop of oil prices of less than $20 per barrel.
>
> A laymen's example of how sweet these contracts were goes thus: ….The law also prescribed an investment tax credit (ITC) as of 50% of the qualifying expenditure, in accordance with the applicable accounting period. This is set off against tax liabilities. In layman's terms, this means that if a PSC contractor spends $1 billion on the asset, when production commences, the tax it would have paid on the crude oil produced is reduced by a whopping 50% of its $1 billion investment i.e. $500 million. And it would in the meantime also be entitled to receive a quantity of the crude oil proceed as cost oil to compensate it fully for the $1 billion he has invested. In other words, for every dollar spent on a field that reached production, the contractor in effect receives crude oil worth $1.50.

The generosity of the 1993 PSCs in relation to ITC as shown above is quite high. Beyond the problem of inexperience or limited knowledge of the operation of production sharing contracts petroleum system, it is submitted that the desperation of the Nigerian government at the time to explore its deep offshore acreages and thereby expand its proven crude oil reserves may have been a contributory factor as well. Furthermore, it may not be unconnected with the fact that Nigeria has one of the world's highest risk ratings and is therefore, not a place that readily attracts investment capital.[68]

In view of the foregoing, this research takes the view that section 4 of the Deep Offshore and Inland Basin Production Sharing Contracts Act is a reflection of legislative inelegance which could have been drafted differently if the framers had adverted their minds to the actual nature and operation of a PSC. It is, therefore, submitted that section 4 of the Act should be amended to reflect the true intentions of the parties as reflected in clause 11.1 of the 1993 PSCs to make for a better economic benefit for the government.

3.2.3.3 Determination and payment of royalty under production sharing contracts

[68] Omorogbe, Y., *Fiscal Regimes*. A paper presented at the Civil Society Capacity Building Workshop Organized by Nigeria Extractive Industries Transparency Initiative (NEITI), held at Presidential Hotel, Port Harcourt, Rivers State, from July 27 -28, 2005, p. 8.

Royalties are dues or payments made to a land owner for mining rights. The payment is not for the value of the land, but for the importance of the oil beneath it.[69] Royalties are amounts paid to the owner of a resource as compensation for the exploitation of a renewable and irreplaceable natural resource. Royalties are the earliest types of payments in the oil industry and traditionally, have usually been based on the volume of production, and not on profitability.[70] The conventional royalty payments have advantages and disadvantages. From a host government perspective, royalties are extremely simple to administer, and through them revenue is earned as soon as production commences. In addition, these revenues are predictable since they are not related to profits.[71]

On the negative side, such royalties can encourage premature abandonment by the IOC since the level of production is the only parameter. That being the case, a high cost field will be subject to the same royalty payments as a low cost field with the same level of production. The conventional royalty is inflexible and unresponsive to the economic situation. In fact, a flat-rate royalty can produce a situation whereby the percentage of the government take goes up when prices fall, and falls when prices rise. This means that when prices fall, the burden of royalty payments to the IOCs increases sharply, and therefore, encourages abandonment. Conversely, when prices rise the government take is decreased percentage wise, and the economic rents accrue mainly to the IOCs.[72] It is for this reason that a variety of devices have been designed which attempt to reduce or eliminate negative aspects of the conventional royalties. These are mainly through the use of progressive royalty rates.[73]

In Nigeria, royalties are calculated and paid based on volume of crude oil produced and decreases as water depth levels increases. Thus, the amount of royalty payable in the

[69] Kachikwu, I.E. op.cit. p. 30.
[70] Omorogbe, Y. (1997) *The Oil and Gas Industry: Exploration and Production Contracts*. Florence & Lambard Limited, Lagos, p. 82.
[71] Ibid.
[72] Ibid.
[73] Ibid.

deep offshore petroleum operations of a production sharing contract is graduated and determined by reference to the Deep Offshore and Inland Basin Production Sharing Contracts Act. Section 5(1) of the Act provides that the payment of royalty in respect of the Deep Offshore production sharing contracts shall be graduated as follows, this is –

	Area	**Rate**
(a)	In areas from 201 to 500 metres water depth	12 per cent
(b)	From 501 to 800 metres water depth	8 per cent
(c)	From 801 to 1000 metres water depth	4 per cent
(d)	In areas in excess of 1000 metres depth	0 per cent

However, the royalty rate payable under the production sharing contracts in the inland Basin shall be 10 per cent.[74]As it relates to payment of royalties, the Act provides that the Corporation (NNPC) or the holder, as the case may be, shall pay all royalty, concession rentals and petroleum profit tax on behalf of itself and the contractor out of the allocated royalty oil and tax oil.[75]

Another factor that is instrumental to the determination of the amount of royalty and petroleum profits tax payable is the realizable price. In this regard, section 13(1) of the Deep Offshore and Inland Basin Production Sharing Contracts Act provides that the realizable price as defined in the production sharing contract established by the Corporation or the holder in accordance with the provisions of the production sharing contract, shall be used to determine the amount payable on royalty and petroleum profit tax in respect of crude oil produced and lifted pursuant to the production sharing contract. The parameters for new

[74] Section 5(2), *Deep Offshore and Inland Basin Production Sharing Contracts Act*.
[75] Section 11(1), *Deep Offshore and Inland Basin Production Sharing Contracts Act*.

crude oil streams produced from the contract area shall also be determined in accordance with the provisions of the production sharing contract.[76]

Upon attainment of commercial productions, parties to the production sharing contract will independently and differently take steps to analyse the crude oil samples in other to determine the assay (character) of the type of crude oil produced from the field. Thereafter, the parties will respectively lift same and sell for a period of about six (6) months known as Trial Marketing Period (TMP). At the end of the TMP, not later than 60 days, parties will then come together to review the assay, yield, actual sales data and agree on the actual pricing of the crude oil. Upon such agreement, the amount so agreed is relied upon to determine the price at which the calculation of the Royalty oil, cost oil and tax oil will be based. That agreed price is what is generally referred to as the realizable price.[77] It remains to be added that the NNPC is now proposing a new royalty regime in which the calculation of what will be due to the government shall be based on production and price of crude oil to guarantee fairness and balance between the PSC contractors and the government.[78]

3.2.4 Allocation of crude oil under production sharing contracts

One hallmark of a production sharing contract is the cascading allocation of crude oil produced from the field amongst the contracting parties. The percentages and the hierarchy of the allocations are usually agreed in the production sharing contract signed by the parties.[79] The production sharing contracts signed between the NNPC and the various IOCs as well as the Deep Offshore and Inland Basin Production Sharing Contracts Act prioritizes crude oil allocations as follows:

[76] Section 13(2), *Deep Offshore and Inland Basin Production Sharing Contracts Act.*
[77] Clause 9, PSC signed between the NNPC & Statoil Nig. Ltd and BP Exploration Nig. Ltd dated 18th May, 1993; Clause 10, PSC between NNPC & South Atlantic Petroleum Ltd and Total Upstream Nig. Ltd covering OML 130 Offshore Nigeria dated 25th April, 2005.
[78] Okafor, C. "NNPC Seeks More Royalty on Deep Offshore, Inland Basin PSCs." In: *Thisday Newspapers*, p. 11, Friday, January 13, 2017.
[79] Clause 8 of the 1993 PSCs and Clause 9 of the 2005 PSC.

a. Royalty Oil;

b. Cost Oil;

c. Tax Oil; and

d. Profit Oil.

3.2.4.1 Allocation of Royalty Oil

Royalty oil comes top just as usual in a concessionary system.[80] Therefore, section 7 of the Deep Offshore and Inland Basin Production Sharing Contracts Act provides that royalty oil shall be allocated to the Corporation (NNPC) or the holder, as the case may be, in such quantum as shall generate an amount of proceeds equal to actual royalty payable during each month and the concession rental payable annually in accordance with the production sharing contracts terms.[81] In practical terms, where for instance the petroleum operations under a PSC is conducted within an area with a water depth from 201 to 500 metres, the NNPC will be allocated 12% of available crude oil (ACO) as royalty oil. The NNPC is entitled to lift and dispose off the 12% of the ACO to equal the actual amount of royalty payable under the operation of the PSC.

3.2.4.2 Allocation of Cost Oil

Section 8(1) of the Deep Offshore and Inland Basin Production Sharing Contracts Act provides that cost oil shall be allocated to the contractor (IOC) in such quantum as shall generate an amount of proceeds sufficient for the recovery of operating costs in oil prospecting licenses as defined in the production sharing contracts and any oil mining lease derived therefrom. All operating costs shall be recovered in U.S. dollars through cost oil

[80] Johnston, D. op.cit. p. 40.
[81] Clause 8.1(a) of the 1993 PSCs; Clause 9.1(a) 2005 PSCs.

allocations in accordance with the terms of the production sharing contract.[82]One core feature of a production sharing contract is the recovery of costs by the IOCs through the allocation of cost oil. Cost oil is a term commonly applied to production sharing contracts which refers to the oil (or revenue) used to reimburse the contractor for exploration costs, development capital costs and operating costs.[83] Before sharing of profit production, the contractor is allowed to recover costs out of the net revenues by way of allocation of cost oil.

At least two PSC experts unanimously share the view that most PSCs will place a limit on cost recovery.[84] Unfortunately, the 1993 PSCs has no limits whatsoever on the amount of costs recoverable in a given year. The implication of this is that it is possible for the Nigerian government to earn nothing for the initial years of production from PSC contract areas. In this regard, **Omorogbe**[85] expressed the view that how the provision omitting a limit to costs recoverable in a given year in the 1993 PSCs in Nigeria came about is anyone's guess but certainly a very rare provision worldwide. Regardless of the failure to provide for a limit for cost recoverable per year, paragraph 6(4) of the second schedule to the Petroleum Profits Tax Act provides that capitalized assets shall be amortized (repaid) in five equal instalments less 1% retained in the books by virtue of paragraph 6(2).[86] Therefore, the IOC recovers its total cost of qualifying capital expenditure in five years divided as follows:

first year - 20%;

second year - 20%;

third year - 20%;

fourth year - 20% and

[82] Section 8(2), *Deep Offshore and Inland Basin Production Sharing Contracts Act.*
[83] Johnston, D. op.cit. p. 297.
[84] Johnston, D. op.cit. p. 42; Omorogbe, Y., op.cit. p. 8.
[85] Omorogbe, Y., *Fiscal Regimes*. A paper presented at the Civil Society Capacity Building Workshop Organized by Nigeria Extractive Industries Transparency Initiative (NEITI), held at Presidential Hotel, Port Harcourt, Rivers State, from July 27 -28, 2005, p. 8.
[86] Paragraph 6(2), 2nd Schedule, Petroleum Profits Tax Act. Cap P13, L.F.N. 2004.

fifth year - 19%.

In practice, the 20% recoverable each year is further spread out and recovered on monthly instalments. This cost recovery pattern[87] ensures that the NNPC is not totally left with nothing (by way of tax and profit oil allocation) on any month on account of allocation of cost oil to the IOC. Apart from the failure to provide for a limit on the amount of costs recoverable per year, the 1993 PSCs also did not make provision for the NNPC to review and audit to confirm that the sunk costs (total expenditure) declared to have been incurred by the IOC were actually incurred on petroleum operations within the contract area. A number of difficulties may arise from this omission. First, the IOC may become needlessly wasteful and extravagant knowing that whatever cost declared will be recovered perhaps, on a first charge basis. Secondly, the IOC may as well fraudulently declare a bogus cost which it will eventually recover to the disadvantage of the government.[88]Either of the two scenarios is evidently against government interest and more importantly, avoidable.

Unlike the 1993 PSCs, the 2005 PSCs fortunately introduced annual cost recovery limits of 50% together with the right of the NNPC to review and audit the past costs to confirm that the past costs declared were actually incurred for purposes of petroleum operations within the contract area.[89] It is for this reason that this thesis submits that the 1993 PSCs should be renegotiated to introduce annual cost recovery ceiling to make for clarity. It is further submitted that regulatory institutions for production sharing contracts should do well to enhance their capacity and capability for effective costs monitoring to check the

[87] Article 5(b) (ii), Annex B to the PSC between NNPC and Statoil Nig. Ltd & BP exploration Nig. Ltd dated 18th May, 1993.

[88]A typical example of this drawback is the 1993 PSC, where the Nigerian Senate Committee on Upstream Petroleum Sector discovered that Shell incurred the sum of NGN 602 billion naira in the development of the Bonga Oil field and recommended that Shell should pay the amount to the Federal government. Ogunleye, T.A. Op. cit. p.6.

[89] Clause 9.1(b), PSC between NNPC & South Atlantic Petroleum Ltd and Total Upstream Nig. Ltd covering OML 130 Offshore Nigeria dated 25th April, 2005.

propensity of unrealistic and arbitrary costs declarations by the IOCs. This will assist the nation to earn more from its petroleum reserves.

3.2.4.3 Allocation of Tax Oil

Section 9 of the Deep Offshore and Inland Basin Production Sharing Contracts Act provides that tax oil shall be allocated to the Corporation or the holder, as the case may be, in such quantum as shall generate an amount of proceeds equal to the actual petroleum profit tax liability payable each month. As with royalties, the NNPC or holder is responsible for payment of petroleum profit tax on behalf of the parties to the PSC.[90]However, separate tax receipts in the names of the Corporation or the holder and the contractor for the respective amounts of petroleum profit tax paid on behalf of the Corporation or the holder and contractor shall be issued by the Federal Inland Revenue Service (FIRS) in accordance with the terms of the Production Sharing Contract.[91]The Corporation or the holder, as the case may be, shall make available to the contractor copies of the receipts issued by the FIRS bearing the names of each party as defined in the production sharing contract in accordance with each party's tax oil allocation for the payment of petroleum profits tax under the provisions of the production sharing contract.[92]

3.2.4.4 Allocation of Profit Oil

Profit oil, being the balance of available crude oil after deducting royalty oil, tax oil and cost oil, shall be allocated to each party in accordance with the terms of the production sharing contract.[93] Under the 1993 and 2005 PSCs, profit oil is shared between the NNPC

[90] Etikerentse, G. (2004) *Nigerian Petroleum Law*. Dredew Publishers, Lagos, 2nd Edition. p. 91.
[91] Section 11(2), *Deep Offshore and Inland Basin Production Sharing Contracts Act*.
[92] Section 14, *Deep Offshore and Inland Basin Production Sharing Contracts Act*; Clause 15.6, 1993 PSCs; Clause 15.5, 2005 PSC.
[93] Section 10, *Deep Offshore and Inland Basin Production Sharing Contracts Act.*

and the contractor at varying levels of production; favouring the contractor at lower levels of production and gradually shifting in NNPC's favour as production increases.[94]

The percentage of profit oil allocated to the contractor (contractor's take) is part of the contractor's compensation for bearing the risk of petroleum operations in the contract area (oil field). It is an issue of negotiation between the host government and the contractor and therefore, there is no universal percentage of profit oil marked out for the contractor. It is an item that is largely influenced by a combination of the negotiating capabilities of the international oil company involved, the desperation or willingness of the host government to explore and expand its proven reserves and the degree of risk involved in the operations in the contract area. Regardless, it is submitted that the percentage sharing of 80/20 in favour of the IOCs for the first 0-350 thousand barrels of oil produced per day under the 1993 PSCs is highly weighted in favour of the IOCs and should be reviewed forthwith to boost the nation's earnings from the projects.

3.2.5 Adaptation of Laws and Periodic Review of the Deep Offshore and Inland Basin Production Sharing Contracts Act

Given the importance of and priority attached to production sharing contracts as a prime petroleum arrangement in the upstream industry, the Deep Offshore and Inland Basin Production Sharing Contracts Act was enacted with a peremptory authority over other existing legislation in the petroleum industry including the Petroleum Act and the Petroleum Profits Tax Act. In this regard, the Act provides that the "relevant provision of any other enactment or law, including but not limited to the Petroleum Act, and the Petroleum Profits Tax Act, shall be read with such modifications as to bring them into conformity with the provisions of this Act."[95] The Act further provides that "if the provisions of any other

[94] Etikerentse, G. op.cit. p. 92; Clause 8.1(f), 1993 PSCs and Clause 9.1(d), 2005 PSC.
[95] Section 15(1), *Deep Offshore and Inland Basin Production Sharing Contracts Act.*

enactment or law, including but not limited to the enactments specified in subsection (1) of this section, are inconsistent with the provisions of this Act, the provisions of this Act shall prevail and the provisions of that other enactment or law shall, to the extent of that inconsistency, be void."[96]

One of the innovative and strategic provisions of the Deep Offshore and Inland Basin Production Sharing Contracts Act is section 16 which provides as follows:

> 16 (1) The provisions of this Act shall be subject to review to ensure that if the price of crude oil at any time exceeds $20 per barrel, real terms, the share of the government of the Federation in the additional revenue shall be adjusted under the production sharing contracts to such extent that the production sharing contracts shall be economically beneficial to the government of the Federation.
>
> (2) Notwithstanding the provisions of subsection (1) of this section, the provisions of this Act shall be liable to review after a period of fifteen years from the date of commencement and every five years thereafter.

The provisions of section 16 is clear and unambiguous. In simple terms, it provides that where the price of crude oil exceeds $20 per barrel, the production sharing contracts will be reviewed to ensure that the Federal government benefits from the additional revenue. This being the case, it is therefore safe to infer that as at the time the Nigerian National Petroleum Corporation (NNPC) was negotiating the 1993 PSCs in particular, with the various international oil companies (IOCs), the price of oil per barrel was less than $20. It is also safe to infer that as at the time of the negotiations, the parties never envisaged that the price of crude oil per barrel will increase to $20 per barrel anytime soon. In other words, the parties (NNPC & the IOCs) did not contemplate that the price of crude oil could rise up to $20 per barrel let alone go beyond it in the near future during their negotiations leading to the signing of the 1993 PSCs. In fact, it has been said that crude oil was then sold at about $9 to $12 per

[96] Section 15(2), *Deep Offshore and Inland Basin Production Sharing Contracts Act.*

barrel.[97] This inference is inescapable having regard to the provisions of section 16(2) to the effect that "notwithstanding the provisions of subsection (1), the provisions of the Act shall be reviewed after a period of fifteen years from the date of commencement and every five years thereafter." The effect of section 16(2) is simply that in the event that the price of crude oil is not able to rise to $20 per barrel in line with section 16(1), the Act will regardless, be reviewed after fifteen (15) years from the date it entered into force and thereafter, the Act will subsequently be reviewed every five (5) years.

The entirety of section 16 of the Deep Offshore and Inland Basin Production Sharing Contracts Act contains renegotiation clauses. The idea is that parties can return to the negotiation table upon the occurrence of any of the identified factors namely: (a) price of crude oil rising to $20 per barrel; (b) the Act being in force for the first 15 years; and (c) after every 5 years of the operation of the Act. The objective of the renegotiation is also expressed: "the share of the government of the federation in the additional revenue shall be adjusted under the production sharing contracts to such extent that the production sharing contracts shall be economically beneficial to the government of the federation." In effect, the government inserted this renegotiation trigger so that it can earn more in the event of a sudden rise in crude oil prices. It is, therefore, submitted that this provision is not only ingenious but also commendable.

It is common knowledge that crude oil prices in the global market has long exceeded $20 and had remained so for many years. It is also obvious that the Deep Offshore and Inland Basin Production Sharing Contracts Act has been in operation for more that fifteen (15) years now. In fact, as at the 23rd day of March, 1999 when the Act was made, the Act was already six (6) years given that it was made to take effect from 1st January, 1993. Going by the

[97] Nwosu L.E., *The Need for the PIB: Imperatives for Speedy Promulgation*. A paper presented at the NBA Annual General Conference held at the International Conference Centre, Abuja from August 21 -27, 2015; Thisday Lawyer, Tuesday, September 29, 2015. pp. 8, 9, 10 & 13.

commencement date of the Act, the first fifteen years of its operation lapsed in the year 2008. After the first fifteen years that ended in 2008, the Act ought to have been reviewed after the next five (5) years. This lapsed in 2013. The next five (5) years for the Act to be reviewed is 2018.

The question therefore is: has the government of the federation utilized or invoked this provision of the law to renegotiate the PSCs or amend the Deep Offshore and Inland Basin Production Sharing Contracts Act? The answer is regrettably in the negative. The failure on the part of the government of the federation to renegotiate the PSCs and to review the Act, no doubt, has led to a massive shortchanging of the government in the PSCs. The IOCs have continued to derive huge allocations regardless of the upsurge in crude oil prices that has remained above $20 for several years. It is hard, if not impossible, to explain or excuse the failure or inability of the petroleum regulatory authorities in Nigeria to initiate a renegotiation of the 1993 production sharing contracts in the light of the express provisions of section 16 of the Deep Offshore and Inland Basin Production Sharing Contracts Act. **Okon**[98] examined the amount of revenue losses on account of failure to review each of the four producing 1993 PSCs namely, ***Bonga***, ***Erha, Abo*** and ***Agbami*** fields and concluded that:

> The size of economic opportunity created by the rise in price above $20/bbl (RT 1993) is estimated at $31.25Bln (sic) as at 2013. This is the incremental cash flow that has been generated to the IOC. This means that a significant portion of the price upside in Bonga, Erha, Abo and Agbami have been retained by the IOC despite the provisions of the law.

As at 2010, the lost economic opportunity to government from three deep offshore fields (Bonga, Erha and Abo) under the 1993 PSCs was estimated at $15 billion. The government merely received $2.32 billion as against $15 billion lost to the IOCs as a result of

[98]Okon, T. E.; *Nigerian Petroleum Sector Reforms- Fiscal Rules of General Application*. A Paper presented at DPR Training on Oil and Gas Contracts in Nigeria organized by Habacuc Solicitors, held at Nicon Luxury Hotel, Abuja, from December 2-4, 2016, p. 104.

the failure to review the PSCs pursuant to the provisions of the Act.[99]This much was recently corroborated by Ibe Kachukwu[100] who stated that Nigeria lost close to $60 billion due to non -enforcement of the terms of the PSCs signed between the Federal Government and the IOCs in 1993.[101] Rather than resort to the express provisions of the Act, the NNPC sought to enforce its own interpretation of the PSCs and this opened a floodgate of Arbitrations and litigations which are pending in various hierarchy of Nigerian Courts.[102] **Akinosho[103]** captured it precisely when he noted as follows:

> The government, however, included three re-opener clauses which could have given the Nigerian state far more take than was granted in the contract, if the deepwater projects ever turned more profitable than envisaged. The clauses were:
>
> A re-examination of the fiscal terms, if oil prices reached $20, as the profitability of the licencees would be greater and the need to equitably have more government revenue would be established.
>
> A re-examination and re-negotiation of the fiscal terms, for more equity in favour of government, should there be discoveries above 500 million barrels.
>
> An overall review of the contract, after 15 years.
>
> By 1997, the Bonga and Erha oil fields, each with reserves exceeding 500 million barrels, had been discovered by Shell and ExxonMobil respectively. By 2001, oil prices had surged far ahead of $20 per barrel. Oil prices have hovered around $100 and more for the past six years, up until late 2014 when they began to decline sharply. Bonga and Erha were both in production by 2006. In 2007, each of them was producing in excess of 150,000BOPD (sic). NNPC called for a review of the agreements and the PSC contractors responded. Several

[99] Okon, T. E.; *Achieving Sustainable Reforms in the Oil Industry: Short to Medium Term Funding.* A Paper presented at DPR Training on Oil and Gas Contracts in Nigeria organized by Habacuc Solicitors, held at Nicon Luxury Hotel, Abuja, from December 2-4, 2016, p. 26.
[100] Dr. Ibe Kachikwu was Nigeria's Minister of State for Petroleum Resources.
[101] Alike, E. "Kachukwu: Nigeria Lost $60bn to Non-enforcement of PSCs with Oil Majors." In: *Thisday Newspapers*, pp.1, 12, Monday, August 7, 2017.
[102] *Federal Inland Revenue Service vs NNPC & 4 Ors*. **(**2012) 6 T.L.R.N. 1; *SNEPCO & 3 Ors. vs NNPC*. Suit No. FHC/ABJ/CS/282/13; *FIRS vs ESSO E & P (Exxon Mobil)* Appeal No. CA/A/402/2012; *FIRS vs SNEPCO (SHELL) & Ors.* Appeal No. CA/A/208/2012; NNPC vs Statoil Nigeria Ltd & 4 Ors. Suit No. SC/432/2013; Statoil & Anor. vs NNPC. Suit No. FHC/L/CS/1275/2016.
[103] Akinosho, T. Op.cit. p. 48.

> meetings were held between the parties but NNPC showed no seriousness to resolve the issues through negotiation. Instead it went ahead to unilaterally enforce its own interpretation of the PSCs.

It is NNPC's unilateral enforcement of its interpretation of the PSCs and the fiscal regimes that gave rise to the sustained dispute between the NNPC and the IOCs over the productions sharing contracts.[104]This is in addition to the huge losses in revenues that would have accrued to the government. As **Nwosu**[105] stated, if they (the NNPC) had re-negotiated it (the PSCs), "the Country's earnings from the prolific deep offshore fields, if back-dated in terms of the monetary losses to this country, a recovery of just one third thereof, should get Nigeria out of economic doldrums." This research shares a similar view and it is therefore submitted that the NNPC should take steps, as a matter of urgency, to renegotiate the PSCs and to persuade the National Assembly to review the Deep Offshore and Inland Basin Production Sharing Contracts Act to ensure that the government derives more revenues from the offshore fields which have now turned out to be amazingly prolific. If this is done, Nigeria will recover from the present economic recession faster than anticipated.

Recently, the Attorneys General of Rivers, Bayelsa and Akwa Ibom States took out an originating summons against the Attorney General of the Federation at the Supreme Court.[106] The plaintiffs' claim in the main, was that the Federal Government was under a statutory obligation under section 16(1) of the Deep Offshore Act to adjust the share of the Federal Government in the additional revenue accruing from the various PSCs from the time crude oil prices exceeded $20 per barrel and that the failure of the Federal Government to do so has affected the total revenue accruing to the federation and consequently, the total statutory allocation accruing to the plaintiffs by virtue of section 162 of the Constitution of

[104] These disputes are discussed in chapter five.
[105] Nwosu, L.E., op.cit. p.13.
[106] A.G. Rivers State & 2 Ors vs A.G. Federation (2019) 1 N.W.L.R. [Pt. 1652] 53. judgment delivered on 20th July, 2018, pp. 2-5. Per Inyang Okoro, JSC.

the Federal Republic of Nigeria, 1999 as amended.[107]Interestingly, the parties settled the dispute and filed terms of settlement which the Supreme Court adopted as its judgment. Following the judgment, the Federal Government quickly initiated the process and successfully amended the Deep Offshore Act as conceded in the suit.

3.3.1 Deep Offshore and Inland Basin Production Sharing Contracts (Amendment) Act, 2019

Prior to the recent amendment, the principal Act for the operation of the Production Sharing Contracts (PSCs) in Nigeria was the Deep Offshore and Inland Basin Production Sharing Contracts Act, enacted in 1999.[108] The initial Act had a number of provisions that directly impacted on the size of revenue accruable to the Nigerian Government from the crude oil extracted pursuant to the PSCs. For instance, the former Act tied the amount of Royalty payable to the volume of production instead of the prevailing price of crude oil at any given point in time.[109] Furthermore, the former Act had ample provisions for self-review mechanisms under section 16 thereof and these mechanisms were never invoked for over a period of more than 25 years for some unknown reasons. One of such mechanisms was that where crude oil prices rises above US$20, the Nigerian Government and the international oil companies (IOCs) would renegotiate the PSCs to make for more revenue for the Government.

The failure on the part of the government of the federation to renegotiate the PSCs and to review the Act, no doubt, has led to a massive shortchanging of the government in the PSCs. The IOCs have continued to derive huge allocations regardless of the upsurge in crude oil prices that has remained above $20 for several years. It is hard, if not impossible, to explain or excuse the failure or inability of the petroleum regulatory authorities in Nigeria to initiate a renegotiation of the 1993 production sharing contracts in the light of the express

[107] A.G. Rivers State & 2 Ors vs A.G. Federation (2019) 1 N.W.L.R. [Pt. 1652] 53.
[108] Cap D3, L.F.N., 2004. First enacted on 23rd of March, 1999.
[109] Ibid. Section 5.

provisions of section 16 of the Deep Offshore and Inland Basin Production Sharing Contracts Act.[110]

Piqued by the patent revenue losses, the 9th National Assembly of the Federal Republic of Nigeria quickly initiated the process of amending the Act on 3rd October, 2019. On 15th October, 2019, the amended version of the Bill was passed whilst the President signed it into law on 4th November, 2019.[111] It is important to highlight that the amendment to the principal Act was limited to only section 5; section 16 of the principal Act was deleted while new sections 17 and 18 were inserted. In other words, other parts of the principal Act that were not amended are still applicable.

3.3.1.1 Determination and payment of royalty under the Deep Offshore and Inland Basin Production Sharing Contracts (Amendment) Act, 2019

Royalties are amounts paid to the owner of a resource as compensation for the exploitation of a renewable and irreplaceable natural resource. Royalties are the earliest types of payments in the oil industry and traditionally, have usually been based on the volume of production, and not on profitability.[112]The conventional royalty is inflexible and unresponsive to the economic situation. It is for this reason that a variety of devices have been designed which attempt to reduce or eliminate negative aspects of the conventional royalties. These are mainly with progressive royalty rates[113]which is what the amended Deep Offshore Act now adopts.[114]

In Nigeria, under the principal Act, royalties were calculated and paid based on volume of crude oil produced and decreases as water depth levels increases. Thus, the amount

[110] *Deep Offshore and Inland Basin Production Sharing Contracts Act*. Cap. D3, L.F.N. 2004.
[111] Dare, S.; "The New Offshore Act Offers Nigeria a New Vista." In The Cable on-line Newspaper, Front page, Wednesday, November 6, 2019. www. thecable.ng/the-new-deep-offshore-act- offers-nigeria-a-new- vista. Retrieved on 23/12/2019 at 11:45am.
[112] Omorogbe, Y. (1997) *The Oil and Gas Industry: Exploration and Production Contracts*. Florence & Lambard Limited, Lagos, p. 82.
[113] Ibid.
[114] Section 5, *Deep Offshore and Inland Basin Production Sharing Contracts (Amendment) Act, 2019*.

of royalty payable in the deep offshore petroleum operations of a production sharing contract is graduated and determined by reference to the Deep Offshore and Inland Basin Production Sharing Contracts Act. However, under the 2019 amendment to the Deep Offshore Act, it is provided that "Royalties shall be calculated on field basis. The royalty shall be at a rate per centum of the chargeable volume of the crude oil and condensates produced from the relevant area in the relevant period as follows:

a. In Deep offshore: greater than 200m water depth ----- 10 per cent;

b. In Frontier/Inland basin: 7.5 per cent.[115]

The amended Deep Offshore Act also enacts a progressive royalty regime by tying it to price of crude oil at any given time. In this regard, section 5(2) provides:

Royalty by Price

> (2) Royalty by price is adopted in order to allow for royalty reflexivity based on changing prices of crude oil, condensates and natural gas. This also replaces the necessity for section 16 of the principal Act.
>
> (3) The royalty based on price shall be identical for the various water depths in Deep Offshore (beyond 200m water depth) including the frontier acreages for crude oil and condensates.
>
> (4) The royalty rates shall be based on increase that exceeds US$ 20 per barrel, and shall be determined separately for crude oil and condensates as follows:
>
> (a) from US$ 0 and up to US$ 20 per barrel: ---------- 0 percent
>
> (b) above US$ 20 and up to US$ 60 per barrel ---------- 2.5%
>
> (c) above US$ 60 and up to US$ 100 per barrel --------- 4%
>
> (d) above US$ 100 and up to US$ 150 per barrel --------- 8%

[115] S.5(1), *Deep Offshore and Inland Basin Production Sharing Contracts (Amendment) Act*, 2019.

(e) above US$ 150: ---------- 10%

The amendments to section 5 of the principal Act as set out above is a complete departure from the former conventional royalty regime that was inflexible and unresponsive to the economic situations in terms of the prevailing oil price. Under the principal Act, royalties were calculated and paid based on volume of crude oil produced and decreases as water depth levels increases. In fact, the royalty rate at a water depth level in excess of 1000 metres was 0% and all the prolific deep offshore assets are all in excess of over 1000 metres water depth levels. The evident implication of this is that the Nigerian Government had, for many years, earned nothing in royalties from those deep offshore assets. This manifestly lopsided royalty regime triggered the NNPC to propose a new royalty regime as far back as 2017 in which the calculation of what will be due to the government shall be based on production and price of crude oil to guarantee fairness and balance between the PSC contractors and the government.[116] With the recent amendment, the water depth level has become immaterial. What is now material is the prevailing price of crude oil or condensate at any given point in time.[117] This is winsome and commendable and meets the aspirations of the NNPC.

Another landmark achievement of the amendment of section 5 of the principal Act is the clear distinction between crude oil and condensate[118]and insistence that royalty will be determined and chargeable separately on each in relation to price. Section 5(4) of the amended Deep Offshore Act enacts this without peradventure in the following terms: "The

[116] Okafor, C. "NNPC Seeks More Royalty on Deep Offshore, Inland Basin PSCs." In: *Thisday Newspapers*, p. 11, Friday, January 13, 2017.
[117] Ola, V.; Amadi, A.H.; Et'al (2021) Comparative Analyses of Nigeria and Malaysia's Production Sharing Contract (PSC). *European Journal of Business and Management Research.* Vol. 6 Issue 1, p. 16.
[118] Condensate is a mixture of light liquid hydrocarbons similar to a very light (high API) crude oil. It is typically separated out of natural gas stream at the point of production when the temperature and pressure of the gas is dropped to atmospheric conditions. www.https://www.mckinseyenergyinsights.com/resources/refinery-reference-desk/condensate/.

royalty rates shall be based on increase that exceeds US$ 20 per barrel, and shall be determined separately for crude oil and condensates as follows:..."[119] In the former regime, crude oil and condensate were lumped together and treated as a single unit for the purpose of royalty and to the detriment of the government.

The third benefit of the amendment in section 5 of the principal Act is that it replaces the necessity for section 16 of the principal Act.[120] Section 16 of the principal Act[121] provided as follows:

> 16 (1) The provisions of this Act shall be subject to review to ensure that if the price of crude oil at any time exceeds $20 per barrel, real terms, the share of the government of the Federation in the additional revenue shall be adjusted under the production sharing contracts to such extent that the production sharing contracts shall be economically beneficial to the government of the Federation.
> (2) Notwithstanding the provisions of subsection (1) of this section, the provisions of this Act shall be liable to review after a period of fifteen years from the date of commencement and every five years thereafter.

The provisions of section 16 is clear and unambiguous. In simple terms, it provides that where the price of crude oil exceeds $20 per barrel, the production sharing contracts shall be reviewed to ensure that the Federal government benefits from the additional revenue. In fact, it has been said that crude oil was then sold at about $9 to $12 per barrel at the time the PSCs were being negotiated in 1993.[122] The effect of section 16(2) is simply that in the event that the price of crude oil is not able to rise to $20 per barrel in line with section 16(1), the Act will regardless, be reviewed after fifteen (15) years from the date it entered into force and thereafter, the Act will subsequently be reviewed every five (5) years.

[119] S. 5(4) *Deep Offshore and Inland Basin Production Sharing Contracts (Amendment) Act, 2019*.
[120] Ibid. S. 5(2).
[121] Section 16 is now deleted under the Amended Deep Offshore Act.
[122] Nwosu L.E., *The Need for the PIB: Imperatives for Speedy Promulgation*. A paper presented at the NBA Annual General Conference held at the International Conference Centre, Abuja from August 21 -27, 2015; Thisday Lawyer, Tuesday, September 29, 2015. pp. 8, 9, 10 & 13.

The entirety of section 16 of the Deep Offshore and Inland Basin Production Sharing Contracts Act contains renegotiation clauses. The idea is that parties can return to the negotiation table upon the occurrence of any of the identified factors namely: (a) price of crude oil rising to $20 per barrel; (b) the Act being in force for the first 15 years; and (c) after every 5 years of the operation of the Act. The objective of the renegotiation is also expressed: "the share of the government of the federation in the additional revenue shall be adjusted under the production sharing contracts to such extent that the production sharing contracts shall be economically beneficial to the government of the federation." In effect, the government inserted this renegotiation trigger so that it can earn more in the event of a sudden rise in crude oil prices. Unfortunately, despite the number of years that oil prices exceeded $20 and remained so for many years, the Federal Government failed to initiate the renegotiation of the PSCs. The failure on the part of the government of the federation to renegotiate the PSCs and to review the Act, no doubt, has led to a massive shortchanging of the government in the PSCs.

As at 2010, the lost economic opportunity to government from three deep offshore fields (Bonga, Erha and Abo) under the 1993 PSCs was estimated at $15 billion. The government merely received $2.32 billion as against $15 billion lost to the IOCs as a result of the failure to review the PSCs pursuant to the provisions of the Act.[123]This much was recently corroborated by Ibe Kachukwu[124] who stated that Nigeria lost close to $60 billion due to non -enforcement of the terms of the PSCs signed between the Federal Government and the IOCs in 1993.[125] Given this background of the huge losses trailing the failure of the government to

[123]Okon, T. E.; *Achieving Sustainable Reforms in the Oil Industry: Short to Medium Term Funding.* A Paper presented at DPR Training on Oil and Gas Contracts in Nigeria organized by Habacuc Solicitors, held at Nicon Luxury Hotel, Abuja, from December 2-4, 2016, p. 26.
[124] Dr. Ibe Kachikwu is Nigeria's former Minister of State for Petroleum Resources.
[125] Alike, E. "Kachukwu: Nigeria Lost $60bn to Non-enforcement of PSCs with Oil Majors." In: *Thisday Newspapers*, pp.1, 12, Monday, August 7, 2017.

renegotiate the PSCs over the years, it becomes very glaring that the amendment is long overdue.

3.3.1.2 Periodic review of production sharing contracts under the Deep Offshore and Inland Basin Production Sharing Contracts (Amendment) Act, 2019.

Section 3 of the amended Deep Offshore Act deleted section 16 of the principal Act which, hitherto, made provision for its 5-year periodic review. However, section 4 of the amended Deep Offshore Act enacted a new section 17 which provides that the "Minister shall cause the Corporation to call for a review of the production sharing contracts every eight years." Unlike the principal Act, the amended Deep Offshore Act puts the responsibility to cause a review of PSCs after every eight years on an identified officer of government - the Minister. This is impressive in that, should there be a failure to review the PSCs as expected, it will be easier to point at who is responsible. In other words, it will be easy to name and rebuke the government officer that neglected to ensure a review of the PSCs.

In the interpretation section of the principal Act, the Minister refers to the Minister charged with the responsibility for matters relating to Petroleum and the Corporation refers to the Nigerian National Petroleum Corporation[126](NNPC). The implication of the new section 17, therefore, is that the Minister of Petroleum Resources is obligated to direct the NNPC to initiate the process of reviewing the PSCs every eight years.

A number of issues arise from a keen consideration of the provisions of the new section 17 of the amended PSC Act. First, it increases the length of time for the review of the PSCs from 5 years[127] to 8 years. This is appreciable given the rigours and the man-hours it will require for the negotiations between the NNPC and IOCs to be concluded. Second, and quite

[126] Section 17, Deep Offshore and Inland Basin Production Sharing Contracts Act, 1999.
[127] As it was under the deleted section 16 of the principal Act.

unfortunately, the new section 17 suffers two major lacuna: the one is that it fails to state the objective of the review of the PSCs unlike the former section 16 (1) of the principal Act[128] which clearly states the objective of the review to the following effect:

> 16 (1) The provisions of this Act shall be subject to review to ensure that if the price of crude oil at any time exceeds $20 per barrel, real terms, the share of the government of the Federation in the additional revenue shall be adjusted under the production sharing contracts to such extent that the production sharing contracts shall be economically beneficial to the government of the Federation.

The Act itself leaves no one in doubt as to the essence of the review: so that "the share of the government of the Federation in the additional revenue shall be adjusted under the production sharing contracts to such extent that the production sharing contracts shall be economically beneficial to the government of the Federation." Unlike the former section 16 of the principal Act, the new section 17 is loudly silent on the objective of the review of the PSCs after every 8 years. This lacuna leaves a room for some unpatriotic or compromised government officials to undertake the review of the PSCs in such a way that the PSCs will become economically less beneficial to the Federal Government. Should that happen, such officers will be absolved from any liability because the amended Act merely says that the "… Corporation should call for a review of the production sharing contracts every eight years." A review could be upward or downward. It is for this reason that this writer holds the view that omitting to state the objective of the review is a significant gap in the amendment that calls for a further amendment of the Deep Offshore Act to cure the anomaly. The danger here becomes glaring, if it is remembered that for over 25 years, the same Act was never reviewed despite the clear provisions of section 16 and oil prices exceeding US$ 20. If, for whatever reason previous successive Nigerian Governments were unable to call for a review of the PSCs despite the extant law, the same reason could also motivate other government officials

[128] Section 16 is now deleted under section 3 of the Amended Act.

to review the PSCs in such a way that they will become less beneficial to the Federation in the absence of any clear objective as it is currently under the new section 17 of the amended Deep Offshore Act.

The second lacuna in the new section 17 relates to the failure of the Act to state what should happen in the event that the Minister, for whatever reason or persuasion, fails "to cause the Corporation to call for the review" of the PSCs after any eight year. This leaves room for a number of uncertain options. First, it may be that the NNPC will not call for the review until the Minister "causes" them to do so as provided by the Act. Secondly, it may be that the NNPC will unilaterally proceed to call for the review of the PSCs and thirdly, it may be open for any member of the public to apply for a writ of Mandamus to compel the Minister to cause the NNPC to call for the review of the PSCs. These options can hardly be dismissed with a wave of the hand. Every player in the commercial world seeks to minimize his tax liabilities as much as he can. A situation like this is capable of providing a leeway for the IOCs to continue to make excessive profits from the operation of the PSCs at the expense of the Federation. This writer holds the view that a commercially sensitive piece of legislation like the Deep offshore and Inland Basin Production Sharing Contracts (Amendment) Act should be certain enough not to leave room for such uncertainties. This is more so, given the infamous attitude of the IOCs to rip off oil producing nations at the least opportunity.[129] Therefore, it is submitted that the Act should be further amended to address this massive oversight to forestall a situation where an unscrupulous IOC will take advantage of the lacuna to short change the government.

One more problem with the new section 17 under section 4 of the amended Deep Offshore and Inland Basin Production Sharing Contracts (Amendment) Act is the fact that the principal Act already has section 17 which is the interpretation section. Unfortunately, the

[129] This is not intended to demonise the IOCs but to highlight their natural craving for profits.

amended Act did not expressly state that section 17 of the principal Act is either repealed, amended or deleted as the case with section 16 of the principal Act. The unintended implication of the state of affairs is that the Deep Offshore and Inland Basin Production Sharing Contracts Act now has two sections 17 existing side by side, the one (which is earlier in time) providing for the interpretation of terms used in the Act, the other (which is later) providing for the procedure for the periodic review of the Act. As a general rule, the presumption is that the new section 17 has impliedly repealed section 17 of the principal Act.[130] However, it is submitted that this presumption may not be tenable in the instant case, the reason being that both provisions are not repugnant to each other that effect cannot be given to both at the same time.[131] It is trite law that the court will lean against implying the repeal of an existing legislation, if both the earlier and the latter statutes can reasonably be construed in such a way that both can be given effect to.[132] Even though it is conceded that both sections 17 of the Deep Offshore Act can exist side by side, it cannot be gainsaid that the existence of two sections 17 in the same Act, which provisions are mutually exclusive (albeit not repugnant) is a case of avoidable legislative inelegance. A further amendment is, therefore, needed to rectify this problem.

3.3.1.3 Penalty regime for non-compliance with the Deep Offshore and Inland Basin Production Sharing Contracts (Amendment) Act, 2019

Section 5 of the amended Deep Offshore Act provides that the principal Act is amended by inserting a new section 18 as follows:

(1) Any person, who fails or neglects to comply with any obligation imposed by any provision of this Act commits an offence and is liable on conviction to a fine not below ₦

[130] Akintokun vs L.P.D.C. (2014) 13 N.W.L.R [Pt. 1423] 1, 85, paras E-H. per I.T. Muhammad, J.S.C.(as he then was).
[131] Ibid.
[132] State vs Governor, Osun State (2007) All FWLR. [Pt. 380] 736, 754, Paras. F-B.

500, 000, 000.00 (Five Hundred Million Naira) or to imprisonment for a period not less than five years or both."

This is a unique provision of the amendment that was totally absent in the principal Act. By this new section 18(1), it means that where, at the instance of the Minster, the NNPC calls on the IOCs for a review of the PSCs, any IOC which declines or fails to comply with the call for a review of the PSCs can be prosecuted and if convicted, be made to pay the stipulated fine or be jailed for a period of not less than five years or both. This provision obviously, puts the IOCs under some pain of punishment should they fail to comply with any obligation imposed on them by any provision of the Act. It has been said that a combination of complicity by Nigerian politicians and foot-dragging by oil companies has, for more than a quarter-century conspired to keep taxes to the barest minimum above $20 per barrel-even as now the price is some three times the value.[133] It is submitted that the penalty provision in the amended Act will go a long way in checkmating the incidence of foot-dragging on the part of the IOCs when the NNPC calls them for a review of the PSCs.

It is, however, doubtful whether the penalty provision will apply to the Minister where he fails or neglects to cause the NNPC to call for the review of the PSCs after eight years as expected of him under section 4 of the amended Deep Offshore Act. It can be argued that the penalty section applies to "Any person…" and therefore, that includes the Minister. Whilst it is conceded that this argument is plausible, it cannot stand having regard to the fundamental principle of law to the effect that an agent of a disclosed principal does not personally bear liability.[134] The Minister of Petroleum Resources is an appointee of the President, and therefore, an agent of the Government of Nigeria. If the Minister fails or neglects to cause the NNPC to call for a review of the PSCs after eight years, it is not him but

[133]Asadu, C.; "Buhari Signs '$ 1.4 billion PSC bill into law." In The Cable on-line Newspaper, Front page, Monday, November 4, 2019. www. thecable.ng/the-new-deep-offshore-act- offers-nigeria-a-new-vista. Retrieved on 24/12/2019 at 1:45pm.
[134] Guaranty Trust Bank Plc vs Noble (2019) 14 N.W.L.R. [Pt. 1693] 389., 413, paras A-B.

his disclosed principal (the President) that takes responsibility. In other words, it is the President (the disclosed principal) who will be prosecuted under the Act, and that automatically triggers the operation of the immunity clause which inures in favour of the President.[135] It is, therefore, submitted that the penalty clause in the amended Act targets the IOCs exclusively and no one else.

The other interesting aspect of the penalty regime is the imposition of a whooping fine of ₦ 500, 000, 000 (Five Hundred Million Naira) on conviction for failing or neglecting to comply with any obligation imposed by any provision of the amended Deep Offshore Act. A fine of such amount of money (Five Hundred Million Naira) is explicitly excessive and oppressive particularly, when considered against the prison term of just 5 years. The patent disparity between a jail term of 5 years and the monetary fine of ₦ 500, 000, 000 (Five Hundred Million Naira) is such that makes it reek of a calculated attempt on the part of the legislature to coerce the IOCs into compliance. A law made with such thinly veiled animosity against a contractual and strategic partner like the IOCs is commercially uninstructive and capable of scaring them away from the industry.

It is important for Nigeria to maintain attractive fiscal terms in production sharing contracts because of the global competition for investments in the upstream oil and gas industry. With the intense and sustained competition amongst oil producing nations, every oil producing nation, including Nigeria, strives to attract a fair share of global investments in the industry and this is fundamentally achieved by means of attractive and competitive fiscal terms. It is common knowledge that Nigeria depends mainly on its oil revenues.[136] The danger that this oppressive penalty regime poses is that, if the government taxes too much, it runs the risk of pushing the international oil companies out of the country to areas that offer

[135] Section 308, Constitution of the Federal Republic of Nigeria. Cap C23, Laws of the Federation of Nigeria, 2004.
[136] Ipaye, A. (2014) *Nigerian Tax Law & Administration: A Critical Review*. SCO Prime Publishers. London, p. 337.

better fiscal terms.[137] Should the IOCs pull out from our offshore assets today, the entire operations will collapse because of lack of man-power and technological know-how on the part of Nigeria. This is why this writer advocates that the IOCs should be treated with respect and fairness knowing that it took their risk-it-all determination to carryout oil prospecting activities in the deep offshore that gave rise to the prolific offshore fields that the nation has today. It is, therefore, submitted that the oppressive fine should be reduced to give it a humane outlook.

Furthermore, section 6 of the amended Deep Offshore Act inserted a new section 18(1). The implication, therefore, is that the earlier section 18 of the principal Act having not been expressly repealed must be implied to read as section 18(2) of the Deep Offshore and Inland Basin Production Sharing Contracts Act. This is consistent with the position of the law to the effect that the court will lean against implying the repeal of an existing legislation if both the earlier and the latter statutes can reasonably be construed in such a way that both can be given effect to.[138] The provisions of section 18(1) of the amended Act and section 18 of the principal Act are such that each can be given effect to independent of each other. They must, therefore, be taken to remain in force seeing that the legislature has not indicated any intention to the contrary. Another very noticeable problem is that the limited amendment of the principal Act, that is, the Deep Offshore and Inland Basin Production Sharing Contracts (Amendment) Act, 2019 did not address the problem of cost consolidation as opposed to cost ring-fencing for cost recovery purposes in the operation of PSCs in Nigeria. The issue of cost consolidation as opposed to cost ring-fencing were among the many issues that fell for

[137] Radon, J. The ABCs of Petroleum Contracts: License-Concessions Agreements, Joint Ventures, and Production-Sharing Agreements. OpenOil Online Curriculum: Governance: Contracts. P. 76 http://openoil.net/wp/wp-content/uploads/2012/02/Contracts-reading -material.pdf. retrieved on 17/11/2016 at 5:40pm.; Lashidani, M.F. (2015) "Foreign Investment Contracts in Oil and Gas Sector." *DU Journal, Humanities and Social Sciences.* Vol. 8(5). p. 7. http://dujournals.eu.pn/2015-issues/May/May-48- 2015.pdf. Retrieved on 17/11/2016 at 5pm.

[138] State vs Governor, Osun State (Supra).

determination in the Arbitration between Statoil Nig. Ltd and NNPC over the operation of one of the 1993 PSCs.[139]

The weaknesses in the amended Deep Offshore Act may not be unconnected with the hurried nature in which it was considered, passed and eventually signed into law by the President. The Bill for an Act to amend the Deep Offshore Act was presented before the Senate for first reading on Thursday, 3rd October, 2019. A week after, on Thursday, 10th October, 2019, the Bill came up for second reading. Just five days after, on Tuesday, 15th October, the Bill came up for third reading and was unanimously passed.[140] In a similar speed with the Senate, the President signed the Bill in to an Act of the National Assembly on Monday, 4th November, 2019[141] within a period of about two weeks. There is no evidence that the Bill was subjected to any public hearing to garner the imputes of the members of the public before it was passed. All of this makes it easier to appreciate the reason for the poor quality of the amended Deep Offshore Act and its regrettable inability to address the many challenges in the operation of PSCs in Nigeria.

The foregoing discussions have revealed the huge gains from the amendment to the Deep Offshore Act, especially section 2 thereof which, radically amended section 5 of the principal Act by introducing a more reflexive royalty regime tied to prices of crude oil. The amendment to section 5 has dealt a death knell to the outdated conventional royalty regime that was tied to the volume of production with its attendant losses to the government when prices increased as had been the case over the last 25 years. Given this new royalty regime, it is expected that the government will derive relatively more economic benefit from the operation of the PSCs. It has also shown that the amendment has gone a step further to specify the government official (the Minister of Petroleum) who should initiate the process of

[139] This is discussed elaborately in Chapter 5.
[140] The Deep Offshore and Inland Basin Production Sharing Contract Act Cap D3 L.F.N. 2004 (Amendment) Bill, 2019. (Senate Bill. 21) passed by the Senate on Tuesday, 15th October, 2019.
[141] Dare, S., Op.cit.

reviewing the PSCs every eight years unlike the principal Act. However, the discussions have also revealed a serious lacuna as it relates to the object of the review of the PSCs and what should be the case if the Minister fails or neglects to cause the NNPC to call for the review of the PSCs. It has also been shown that the penalty regime is way too much and that the limited amendment did not address the entire problems associated with operation of PSCs.

In summary, it is now abundantly clear, that despite the gains of the recent amendment to the Deep Offshore Act, there remains a number of challenges arising from the Act as constituted. The limited amendment to the principal Act as highlighted has merely addressed a minute portion of the problems associated with the operation of PSCs in Nigeria. In fact, the amendment, commendable as it may seem is not free from problems. It is, therefore, important for the National Assembly to rise to the occasion once again, to address the challenges highlighted in this Thesis. When that is done, there will be a significant improvement in the operation of PSCs in the upstream petroleum industry in Nigeria.

3.4.1 Petroleum Profits Tax Act

Another important fiscal framework for production sharing contracts in Nigeria is the Petroleum Profits Tax Act[142] (PPTA). Since 1956, when crude oil was first discovered in commercial quantity in Nigeria, the most important contribution to the nation's economy has come in the form of petroleum profits tax, royalties and profits made from sale of crude oil. Petroleum yields about 95% of the nation's foreign exchange earnings.[143]Petroleum profits tax is a tax applicable to upstream petroleum operations and it is particularly related to rents, royalties and profit sharing elements associated with Oil mining lease, Oil prospecting and exploration licenses. It is the most important tax in Nigeria in terms of its share of total

[142] Cap. P13, Laws of the Federation of Nigeria, 2004.
[143] Ipaye, A. (2014) *Nigerian Tax Law & Administration: A Critical Review*. SCO Prime Publishers. London, p. 337.

revenue contributing the highest source of foreign exchange earnings and government revenues respectively.[144]

The present Petroleum Profits Tax Act is divided into eleven parts with a total of sixty-three sections and four schedules. The principal Act took effect from 1st January, 1958 and have since undergone several amendments.[145]All the several amendments[146]have however been incorporated into the Petroleum Profits Tax Act, Cap P13, Laws of the Federation of Nigeria, 2004 which is the focus of this research. The objective of the Act is to impose a tax upon profits from the winning of petroleum in Nigeria, to provide for the assessment and collection thereof and for purposes connected therewith.[147]

The Act basically governs the taxation of the profits of any company in Nigeria carrying on 'petroleum operations.' Therefore, the Act does not apply to the income from seismic work, drilling, logging, well service or similar services rendered by service companies for or on behalf of petroleum exploration and production companies as well as to income from transportation of petroleum products.[148]In other words, incomes derived from operations in the petroleum industry other than petroleum operations are taxed under the Companies Income Tax Act.[149]The Petroleum Profits Tax Act defines petroleum operations to mean:

> the winning or obtaining and transportation of petroleum or chargeable oil in Nigeria by or on behalf of a company for its own account by any drilling, mining, extracting or other like operations or process, not including refining at

[144] Ogbonna, G.N. and Ebimobowei, A. (2012) 'Petroleum Profits Tax and Economic Growth: Cointegration Evidence from Nigeria.' *Asian Journal of Business Management*. Vol. 4 No. 3, pp. 267-274.
[145] Ipaye, A. op.cit, p. 337; Kalu, V. E. *Nigeria's Petroleum Profits Tax Act: An Assessment*. www.nigerianlawguru.com/articles/oil%20and%20gas/NIGERIA%92S%20PETROLEUM %20PROFITS%20TAX%20ACT, AN%20ASSESSMENT.pdf, p. 1 retrieved on 16/12/2016 at 4:30pm.
[146] Acts No. 15 of 1959, No. 21 of 1991, No. 30 of 1996, No. 31 of 1996, No. 32 of 1996, No. 18 of 1998, and No. 30 of 1999. (The long Title to the Petroleum Profits Tax Act, Cap. P13, L.F.N., 2004)
[147] Long Title to the Petroleum Profits Tax Act, Cap. P13, L.F.N., 2004
[148] Olisa, M.M. (1997) *Nigerian Petroleum Law and Practice*. Jonia Ventures Limited, Lagos, 2nd edition, pp.183.
[149] Section 23(1) (h), Companies Income Tax Act, Cap C21, L.F.N., 2004.

a refinery, in the course of a business carried on by the company engaged in such operations, and all operations incidental thereto and any sale of any disposal of chargeable oil by or on behalf of the company.[150]

Petroleum on the other hand means any mineral or relative hydrocarbon and natural gas existing in its natural condition in Nigeria but does not include liquefied natural gas, coal, bituminous shales or other stratified deposits from which oil can be extracted by destructive distillation.[151]Petroleum is generally used interchangeably with crude oil. However, in the words of the Petroleum Profits Tax Act (PPTA), Crude oil means any oil (other than oil extracted by destructive distillation from coal, bituminous shales or other stratified deposits) won in Nigeria either in its natural state or after the extraction of water, sand or other foreign substance therefrom but before any such oil has been refined or otherwise treated.[152]

The Federal Inland Revenue Service (FIRS) is responsible for the due administration and management of petroleum profits tax and all other tax legislation in Nigeria.[153]In doing so, the FIRS takes into account the proceeds of sale of all chargeable oil disposed of by the company during the accounting period, the value of the chargeable oil, the adjusted profits, the assessable profit as well as the chargeable profit. Whenever it considers necessary with respect to any tax due, the FIRS may acquire, hold and dispose of any property taken as security for or in satisfaction of any tax or any judgment debt due in respect of any tax and shall account for any such property and the proceeds of sale thereof in a manner to be prescribed by the Minister of Petroleum Resources.[154]

3.4.1.1 Imposition of chargeable tax

[150] Section 2, Petroleum Profits Tax Act, Cap. P13, L.F. N., 2004.
[151] Ibid.
[152] Ibid.
[153] Section 25(1) and 1st Schedule to the Federal Inland Revenue Service (Establishment) Act, 2007. Section 68 provides that all other tax legislation in Nigeria are to be read with such modifications to bring them in conformity with the FIRS (Establishment) Act.
[154] Section 3(1) (b), Petroleum Profits Tax Act.

The Petroleum Profits Tax Act provides that there shall be levied the profits of each accounting period of any company engaged in petroleum operations during that period, a tax to be charged, assessed and payable in accordance with the provisions of this Act.[155] It is instructive to note that the Act uses the word '**accounting period'** as opposed to **'accounting year.**' This underscores a notable difference between companies involved in petroleum operations and other companies in Nigeria. While the later are assessed according to any 'year of assessment', the former are assessed with reference to 'accounting periods.' The definition of accounting period is, therefore, indispensable in the determination of the tax liability of any company involved in petroleum operations.

Accounting period in relation to a company engaged in petroleum operations means:

> (a) a period of one year commencing on 1 January and ending on 31 December of the same year; or
>
> (b) any shorter period commencing on the day the company first makes a sale or bulk disposal of chargeable oil under a programme of continuous production and sales, domestic, export or both, and ending on 31 December of the same year; or
>
> (c) any period of less than a year being a period commencing on January 1 of any year and ending on the date in the same year when the company ceases to be engaged in petroleum operations.[156]

Envisaging that dispute may arise as to the date of first sale of chargeable oil or with respect to the date on which the company ceases to be engaged in petroleum operations, the PPTA provides that the Minister of Petroleum Resources shall determine the same and no appeal shall lie therefrom.[157] This research holds the view that this is not good enough in that it amounts to a usurpation of the powers of the courts. It is elementary under Nigerian constitutional jurisprudence that disputes are determined by

[155] S. 8, Petroleum Profits Tax Act.
[156] S.2, PPTA
[157] Ibid.

the Judiciary as encapsulated in the Constitution.[158] **Ogbuinya**[159]reaffirmed this position when he emphasized that "in the configuration of powers in democratic governance, the Constitution usually bestows judicial powers on the courts, which are warehoused in the Judiciary."[160] A situation where the Minister of Petroleum Resources is vested with the power to determine with finality on such critical issues as the first date of sale of chargeable oil and the date a company ceases to be engaged in petroleum operations is a clear usurpation of judicial powers by the Executive. It is therefore submitted that the Act should be amended to safeguard the powers of the courts.

3.4.1.2 Ascertainment of Profits, Adjusted Profits, Assessable Profits and Chargeable Profits

The concept of profit is indispensable in taxation generally. In fact, petroleum profits tax is imposed on the profit of the company for the relevant accounting period. This explains why this aspect of the research focusses on ascertainment of profits, adjusted, assessable and chargeable profits.

3.4.1.2 (a) Ascertainment of profits

The profits of an accounting period of a company engaged in petroleum operations shall be taken to be the aggregate of the following:

(a) the proceeds of sale of all chargeable oil sold by the company in that period;

(b) the value of all chargeable oil disposed of by the company in that period;

(c) all income of the company of that period incidental to and arising from any one or more of its petroleum operations.[161]

[158] Section 6, C.F.R.N., 1999, C.A.P. C23, L.F.N., 2004
[159]Ogbuinya, F. O., Understanding the Concept of Jurisdiction in the Nigerian Legal System: Snaap Press Ltd, Enugu, (2008) P. 3.
[160]Ibid.
[161] Section 9(1), Petroleum Profits Tax Act.

However, for the purpose of ascertaining the value of all chargeable oil disposed of by the company in that period, the value of any chargeable oil so disposed of shall be taken to be the aggregate of:

(a) the value of that oil as determined, for the purpose of royalty, in accordance with the provisions of any enactment applicable thereto and any financial agreement or arrangement between the Federal Government of Nigeria and the company;

(b) any cost of extraction of that oil in determining its value, and

(c) any cost incurred by the company in transportation and storage of that oil between the field of production and the place of its disposal.[162]

3.4.1.2 (b) Ascertainment of adjusted profit

It is typical of tax legislation to make provisions for deductions (allowances)[163] of certain expenses in computing the profits of a taxable person. The Petroleum Profits Tax Act is no exception.[164]In arriving at the adjusted profits of a company engaged in petroleum operations, all the expenses incurred in the production of the profit shall be deducted. This deduction is akin to the deductions allowable in the assessment of personal income tax where the duties of the employment make it necessary for the employee to incur the expenses.[165]The adjusted profit of an accounting period shall be the profits of that period after the deduction allowed by subsection (1) of section 10 of the Petroleum Profits Tax Act and any adjustments to be made in accordance with the provisions of section 14 of the Act.[166]

Section 10(1) of the Act provides that in computing the adjusted profit of any company of any accounting period from its petroleum operations, there shall be deducted all

[162] Ibid. Section 9(2).
[163] Section 24, Companies Income Tax Act, Cap. C21, L.F.N., 2004; Section 20, Personal Income Tax Act, Cap. P8, L.F.N., 2004 and Section 14, Capital Gains Tax Act, Cap. C1, L.F.N., 2004.
[164] Ipaye, A.op.cit. p. 341.
[165] John, D.C., General Principles of Taxation, (Unpublished) Lecture Notes, First Semester, Faculty of Law, ABU, Zaria, (2012), Pp. 29-33. Section. 20, Personal Income Tax Act (as amended), CAP. P8, L.F.N., 2004.
[166] Section 9(3), Petroleum Profits Tax Act.

outgoings and expenses wholly, exclusively and necessarily incurred, whether within or without Nigeria, during that period by such company for the purpose of those operations. Section 10(1) of the PPTA is slightly different from section 20 of the Personal Income Tax Act. This is because it does not allow apportionment as the phrase "or any part thereof" is not included in section 10(1) of the PPTA. It also does not include the word 'reasonably' unlike section 20 of the Personal Income Tax Act. The effect of this is that the FIRS has no discretion as to which outgoing and expenses are deductible or not.[167]

The meaning of "wholly, exclusively and necessarily" (the WEN test) in section 10(1) of the PPTA fell for determination in the case of *Shell Petroleum Development Company Limited v. Federal Board of Inland Revenue*.[168]The facts of the case were that sometime in 1972, there was an agreement between the federal government and oil companies to the effect that the companies should pay all petroleum profits tax to the Central Bank of Nigeria through the Bank of England with a formula for determining the currency exchange rate to be applied by the companies in making their payments into the nominated foreign account. In the 1973 operating year, the appellant sought to deduct the expenses incurred on exchange losses on payment of petroleum profits tax in Pounds Sterling instead of Naira; Central Bank of Nigeria Commission for payment of petroleum profit tax into the foreign account nominated by Government, scholarship expenses, gifts and donations expenses. The appellant had sought to deduct these expenses from its taxable profits pursuant to section 10(1) of the Act. The respondent disallowed the deductions on the ground that they were not deductible for the purpose of computing chargeable tax. The appellant appealed unsuccessfully to the Body of Appeal Commissioners, the Federal High Court and the Court of Appeal. On a further appeal to the Supreme Court, the court allowed the appeal holding that losses incurred

[167]Ipaye, A.op.cit. pp. 341-342.
[168] [1996] 8 NWLR (pt. 466) 256

to acquire foreign exchange, CBN commission and scholarship expenses were expenses incurred wholly, exclusively and necessarily for petroleum operations since the appellant was under a statutory obligation to incur the select expenses.

A similar question arose in the case of *Gulf Oil Company Nigeria Limited v. Federal Board of Inland Revenue.*[169]The court relied on the decision in *Shell Development Company Limited case* and found in favour of Gulf Oil Company Nigeria Limited. Whilst this research agrees with the reasoning in these two cases, it is, however, submitted that the issue of losses in exchange rate will no longer arise in payment of petroleum profits tax arising from profits earned under production sharing contracts. This is because section 6 of the Deep Offshore and Inland Basin Production Sharing Contracts Act provides that the "computation and payment of estimated and final petroleum profits tax shall be made in US dollars on the basis of the US dollar returns filed." Section 40 of the Petroleum Profits Tax Act also provides that the computation of the tax chargeable shall be made in the currency in which the transaction was effected. This effectively leaves no room for shortfalls or windfalls on account of the fluctuations in exchange rate between the US dollar and the naira.

3.4.1.2 (c) Ascertainment of assessable profit

The assessable profit of an accounting period shall be the adjusted profit of that period after any deduction allowed by section 20 of the Act.[170]The assessable profit of any company for any accounting period is the amount of the adjusted profit of that period after the deduction of the amount of any loss incurred by that company during any previous accounting period.[171]To compute the assessable profits of a company, unrelieved losses sustained in previous years are deducted. By virtue of section 16(3), losses that cannot be fully deducted in one accounting period may be carried forward until they are totally

[169] [1997] 7 NWLR (pt.514) 698.
[170] Section 9(4), Petroleum Profits Tax Act.
[171] Ibid. section 16(1)

absorbed. The implication of this is that a petroleum company may elect to carry forward its losses to the next accounting period even though such losses could be relieved by the profits made in the current accounting period.[172]

3.4.1.2(d) Ascertainment of chargeable profits

Section 9(5)[173] provides that the chargeable profits of an accounting period shall be the assessable profits of that period after the deduction allowed by section 20 of the Act. In joint venture petroleum arrangement which is what the Petroleum Profits Tax Act primarily governs, the assessable tax for any accounting period is 85% of the chargeable profit of the company.[174] However, under a production sharing contract arrangement in the deep offshore and Inland Basins, the assessable petroleum profits tax is 50% flat rate for the duration of the contract.[175]This is one of the incentives introduced by the government to attract investments in the deep offshore acreages. Another incentive is that for production sharing contracts arrangements in the deep offshore and inland basins, the chargeable tax applicable to a contract area is the amount of the company's assessable tax after the deductions (50% investment tax credit) in section 22 of the petroleum Profits Tax Act. Section 22 provides that:

> (1) A crude oil producing company which executed a Production Sharing Contract with the Nigerian National Petroleum Corporation in 1993 shall, throughout the duration of the Production Sharing Contract, be entitled to claim an investment tax credit allowance as an offset against tax in accordance with the provisions of the Production Sharing Contract.
> (2) The investment tax credit rate applicable to the contract area shall be 50% flat rate of chargeable profit for the duration of the Production Sharing Contract.

[172] Ipaye, A. op.cit. p. 345.
[173] Petroleum Profits Tax Act.
[174] Section 21, Petroleum Profits Tax Act.
[175] Section 3, Deep Offshore and Inland Basin Production Sharing Contracts Act.

There is an obvious conflict between section 22(1) of the Petroleum Profits Tax Act and section 4(1) of the Deep Offshore and Inland Basin Production Sharing Contracts Act. The provisions of the later Act are reproduced below for ease of reference:

> 4(1) Where the NNPC or the holder and the contractor have incurred any qualifying capital expenditure wholly, exclusively and necessarily for the purpose of petroleum operations carried out under the terms of a production sharing contract in the Deep Offshore or inland Basin, there shall be due to the parties in respect of the production sharing contracts executed prior to 1st July, 1998, a credit (in the Act referred to as "investment tax credit") at a flat rate of 50 per cent of the qualifying expenditure in accordance with the production sharing contract terms for the accounting period in which that asset was first used for the purposes of such operations.

An objective consideration of the two provisions reproduced above discloses that whilst section 4(1) of the Deep Offshore and Inland Basin Production Sharing Contracts Act links 'incurring any qualifying capital expenditure wholly, exclusively and necessarily for petroleum operations' as the trigger for claiming ITC, section 22(1) of the Petroleum Profits Tax Act merely links a claim for ITC to "a crude oil producing company which executed a Production Sharing Contract with the Nigerian National Petroleum Corporation in 1993." This conflict has created enormous challenges in the operation of the 1993 PSCs. The IOCs have capitalized on this manifest ambiguity to lay claim to ITC on the ground that they are involved in petroleum operations. It is not enough to be engaged in petroleum operations to be entitled to ITC. Beyond that, the company must show that it actually incurred any qualifying capital expenditure. Furthermore, by section 15(2) of the Deep Offshore and Inland Basin Production Sharing Contracts Act, its provisions overrides the provisions of the Petroleum Profits Tax Act in the event of a conflict as in the instant case. It is, therefore, submitted that the entirety of section 22 of the Petroleum Profits Tax Act is void to the extent

of its inconsistency with the Deep Offshore and Inland Basin Production Sharing Contracts Act.

3.4.1.3 Allowed deductions under Petroleum Profits Tax Act

The foregoing compels an examination of the relevant provisions of sections 10, 14 and 20 of the Petroleum Profits Tax Act in other to determine the deductions allowed. This will put the concepts of adjusted, assessable and chargeable profits in proper perspective and further clarify them.

The relevant text of section 10(1)[176] provides as follows:

> (1) In computing the adjusted profit of any company of any accounting period from its petroleum operations, there shall be deducted all outgoings and expenses wholly, exclusively and necessarily incurred, whether within or without Nigeria, during that period by such company for the purpose of those operations, including but without otherwise expanding or limiting the generality of the foregoing-
>
> (a) rents incurred by the company for that period in respect of land or buildings occupied under an oil prospecting licence or an oil mining lease for disturbance of surface rights or for any like disturbance;
>
> (b) all non-productive rents, the liability for which was incurred by the company during that period;
>
> (c) all royalties, the liability for which was incurred by the company during that period in respect of natural gas sold and actually delivered to the Nigerian National Petroleum Corporation, or sold to any other buyer or customer or disposed of in any other commercial manner;
>
> (d) all royalties the liability for which was incurred by the company during that period in respect of crude oil or of casinghead petroleum spirit won in Nigeria;
>
> (e) all sums the liability for which was incurred by the company to the Federal Government of Nigeria during that period by way of customs or excise duty or other like charges levied in respect of machineries, equipment and goods used in the company's petroleum operations; and

[176] Petroleum Profits Tax Act.

(f) all sums incurred by way of an interest upon any money borrowed by such company, where the Board is satisfied that the interest was payable on capital employed in carrying on its petroleum operations;

(g) all sums incurred by way of interest on any inter-company loans obtained under terms prevailing in the open market, that is the London inter-bank offer Rate, by companies that engage in crude oil production operation in the Nigerian oil industry….[177]

Section 10(2) provides that where the deductions has been allowed to a company under this provision in respect of any liability of the company and such liability or any part thereof is waived or released the amount of the deduction or the part thereof corresponding to such part of the liability shall, for the purposes of subsection (1) (c) of section 9 of the Act, be treated as income of the company of its accounting period in which such waiver or release was made or given. In simple terms, every deductions allowed under section 10(1) of the Act are assumed to be part of the profits of the company for the accounting period in which such deductions were allowed in favour of the company.

Section 14 of the Act excludes certain profits of a company. It provides that where a company engaged in petroleum operations is engaged in the transportation of chargeable oil by ocean going oil-tankers operated by or on behalf of the company from Nigeria to another territory then such adjustments shall be made in computing an adjusted profit or a loss as shall have the effect of excluding therefrom any profit or loss attributable to such transportation.[178]In other words, section 14 excludes profits of a company in petroleum operations where such profits or loss, as the case may be, are made from other transactions such as transportation of oil by ocean going oil tankers from Nigeria to any other country in the world. All that is intended here is to guarantee a distinction between profit or loss (as the case may be) arising from sea transportation of crude oil and core petroleum operations.

[177] Section 10 (1), Petroleum Profits Tax Act.
[178] Ibid.

Whilst the latter is assessable under the PPTA, the former is assessable under the Companies Income Tax Act.[179]

In computing the adjusted profits of a company for any accounting period, the deductions allowed under section 10(1) and the profits excluded under section 14 are deducted from the ascertained profits of the company for any accounting period under consideration. To determine the assessable profit, the adjusted profit is further subjected to the deductions allowed under section 20 of the PPTA. Section 20 generally refers to the allowances specified under paragraphs 2, 5 and 6 of the Second Schedule to the Petroleum Profits Tax Act. They are:

(i) Provisions relating to qualifying petroleum expenditure;

(ii) Petroleum investment allowance; and

(iii) Annual Allowance.

The chargeable profit is the assessable profit after the deductions allowed under section 20 of the Act. In arriving at the chargeable profit, there shall be computed the aggregate amount of all allowances due to the company under the provisions of the second schedule for the accounting period.[180]However, in calculating the amount of the deductions to be allowed under section 20 for the accounting period, the limitation imposed by subsection (4) shall be applied to ensure that the amount of any tax chargeable on the company for that period shall not be less than fifteen percent (15%) of the tax which will be chargeable on the company for that period if no deduction were to be made under section 20 for that period.[181]

The amount to be allowed as deductions under subsection (1) in respect of the said allowances shall be -

(a) the aggregate amount computed under subsection (2) of section 20; or

[179] Cap C21, L.F.N. 2004.
[180] Section 20(2), Petroleum Profits Tax Act.
[181] Ibid. section 20(3).

(b) a sum equal to 85% of the assessable profits of the accounting period less 170% of the total amount of the deduction allowed as petroleum investment allowance computed under the second schedule for that period, whichever is the less.[182]

The 85% limit on assessable tax imposed on the deductions under section 20 may give rise to a situation where certain deductions due under a particular accounting period may not be allowed on account of insufficiency of funds. In such instance, the act provides that where the total amount of the allowances computed cannot be deducted owing to there being an insufficiency of or no assessable profits of the accounting period or to the limitation imposed by subsection (4), such total amount or the part thereof which has not been deducted as the case may be, shall be added to the aggregate amount to be computed, and thereafter shall be deemed to be an allowance due to the company, under the provisions of the second schedule to the Act for the following accounting period.[183]The effect of this is that any allowable deduction that is not accommodated in a particular accounting period on account of paucity of funds or assessable profits will be carried over to the next accounting period until they are fully recovered. The object of the provision is to ensure that government is not totally denied of tax revenue in any accounting period because of the obligations of deductions allowed. It guarantees that at least 15% of the company's profit must be taxed in every accounting period. This provision is commendable given the pride of place that tax revenues from petroleum operations occupies in the economic wellbeing of Nigeria.

It is, however, important to re-emphasize that under the pre- July 1, 1998 production sharing contracts, the company is not entitled to petroleum investment allowance but investment tax credit of 50% flat rate by virtue of section 22 of the PPTA.

3.4.1.4 Deductions not allowed and artificial transactions

[182] Ibid. Section 20(4).
[183] Ibid. Section 20(5).

(a) Deductions not allowed under Petroleum Profit Tax Act

One fundamental principle of tax law is that it is a matter of positive law and there is no room for intendment or inference. Therefore, the Petroleum Profits Tax Act makes express provisions for deductions that are not allowed under the Act. Consequently, section 13 thereof provides that:

(1) Subject to the express provisions of this Act, for the purpose of ascertaining the adjusted profit of any company of any accounting period from its petroleum operations, no deductions shall be allowed in respect of-

(a) any disbursements or expenses not been money wholly and exclusively laid out or expended, or any liability not being a liability wholly or exclusively incurred for the purpose of those operations;

(b) any capital withdrawn or any sum employed or intended to be employed as capital;

(c) any capital employed in improvements as distinct from repairs;

(d) any sum recoverable under an insurance or contract of indemnity;

(e) rent of or cost of repairs to any premises or part of premises not incurred for the purposes of those operations;

(f) any amount incurred in respect of any income tax, profits tax or other similar tax whether charged in Nigeria or elsewhere;

(g) the depreciation of any premises, buildings, structures, works of a permanent nature, plant, machinery or fixtures;

(h) any payment to any provident, savings, widows or orphans or other society scheme or fund, except such payments as are allowed under subsection (1) (g) of section 10 of this Act;[184]

(i) any customs duty on goods (including articles or any other thing) imported by the company-

(i) for resale or for personal consumption of employees of the company or

(ii) where goods of the same quality to those so imported are produced in Nigeria and are available, at the time the imported goods were ordered by the company for sale to the public at the prices less or equivalent to the cost to the company of the imported goods;

(j) any expenditure for the purchase of information relating to the existence and extent of petroleum deposits.

Subsection (2) of section 13 is also very instructive. It provides for a potent safeguard against tax avoidance predator companies from perpetrating their unscrupulous aim by merely citing interest incurred from loans obtained from their parent companies or subsidiaries. The subsection reads as follows:

13 (2) notwithstanding the provisions of subsection (1) (d)[185] of section 10 of this Act, in computing the adjusted profit of any company of any accounting period no deductions shall be allowed in respect of sums incurred by way of interest during that period upon any borrowed money where such money was borrowed from a second company if during that period-

[184] It is submitted that what is intended is section 10 (1) (k) and not (g). This is probably the draftsman's oversight and it is submitted that it should be amended to reflect the correct intention of the Act.
[185] It is submitted that S.10 (1) (g) is the one intended.

(a) either company has an interest in the other company; or

(b) both have interests in another company either directly or through other companies; or

(c) both are subsidiaries of another company.[186]

The Act went further to say that "a company shall be deemed to be a subsidiary of another company if and so long as an interest in it is held by that other company either directly or through any other company or companies. An interest in this regard means a beneficial interest in issued share capital by whatever name called. However, the Board shall disregard any such last-mention interest which in their opinion is insignificant or remote, or where in their opinion that interest arises from a normal market investment and the companies concerned have no other dealings or connection between each other.[187]

The opening provisions of section 13(2) of the Act makes reference to subsection 10(1) (d). This enacts a violent conflict between section 10 (1) (g) and section 13 (2) of the Petroleum Profits Tax Act regarding the issue of deductibility of interest on inter-company loans obtained under terms prevailing in the open market, that is the London Inter-Bank offered Rate (LIBOR) by companies engaged in crude oil production and operation in Nigeria. Whilst section 10(1) (g) allows deductions of such expenses, section 13(2) in attempting to limit the operation of section 10(1) (g) grievously makes reference to section 10(1) (d) which has nothing to do with inter-company loans but royalty. This error is avoidable and therefore, it is submitted that section 10(1) (g) is the proper subsection intended hence the urgent need for the amendment of the Act to address this obvious inconsistency.

(b) Artificial transactions

[186]Section 13 (2), Petroleum Profits Tax Act.
[187] Ibid. Section 13 (3).

Another safeguard against tax avoidance schemes relates to artificial or fictitious transactions. Where the Board[188]is of the opinion that any disposition is not in fact given effect to or that any transaction which reduces or would reduce the amount of any tax payable is artificial or fictitious, the Board may disregard any such disposition or direct that such adjustments shall be made as represents liability to tax as the Board considers appropriate so as to counteract the reduction of liability to tax effected, or reduced which would otherwise be effected, by the transaction and the companies concerned shall be assessable accordingly. The term disposition includes any trust, grant, covenant, agreement or arrangement.[189]

Transactions deemed to be fictitious include transactions between persons one of whom has control over the other or between persons both of whom are controlled by some other person which, in the opinion of the Board, have not been made on the terms which might fairly have been expected to have been made independent by persons engaged in the same or similar activities dealing with one another at arm's length.[190]

The preceding admittedly vests discretionary powers on the Federal Inland Revenue Service (FIRS) to scrutinize transactions using the 'ordinary man on the street' test to determine whether or not they are fictitious or artificial and intended to lower tax liability of the select company. This being the case, it is expected that the FIRS may be wrong in the exercise of this wide discretionary powers. This explains why its decision in this regard is expressly open to being challenged by way of an appeal before the Tax Appeal Tribunal.[191]

3.4.1.5 Assessable tax

[188] Federal Board of Inland Revenue (now Federal Inland Revenue Service) Section 67, FIRS (Establishment) Act, 2007.
[189] Section 15(1), Petroleum Profits Tax Act.
[190] Section 15(2), Petroleum Profits Tax Act.
[191] Section 15(3). Note that Section 41 of the Petroleum Profits Tax Act has been repeal by Section 59 of the Federal Inland Revenue Service (Establishment) Act, 2007 which established the Tax Appeal Tribunal.

The assessable tax for any accounting period of a company shall be an amount equal to 85% of its chargeable profits of that period.[192]This is however applicable to petroleum concessions and joint venture operations within the onshore and shallow water areas. For petroleum operations conducted at the deep offshore and inland basin acreages under production sharing contracts, the assessable petroleum profit tax is 50% flat rate.[193]

3.4.1.6 Accounting and returns of estimated tax

Not later than two months after the commencement of each accounting period of any company engaged in petroleum operations, the company is required to submit its estimated tax returns for the entire accounting period to the FIRS.[194]However, if at any time during any such accounting period, the company becomes aware that the estimate in such return requires revision then it shall submit a further return containing its revised estimated tax for such period.[195] The tax for any accounting period is payable in equal monthly instalments.[196]The first monthly payment is due and payable not later than the third month of the accounting period and shall be in an amount equal to the one-twelfth or, where the accounting period is less than a year, in an amount equal to equal monthly proportion, of the amount of tax estimated to be chargeable for such accounting period.[197]

Each of the reminder of the monthly payments to be made subsequent to the first monthly payment becomes due and payable not later than the last day of the month in question and shall be an amount equal to the amount of tax estimated to be chargeable for such period by reference to the latest returns submitted by the company less so much as has already been paid for such accounting period divided by the number of such of the monthly

[192] Section 21(1), Petroleum Profits Tax Act.
[193] Section 3, Deep Offshore and Inland Basin Production Sharing Contracts Act.
[194] Section 33(1), Petroleum Profits Tax Act.
[195] Section 33(2), Op.cit.
[196] Section 45(1), Op.cit.
[197] Section 45(2), Op.cit.

payments remaining to be made in respect of such accounting period.[198]A final (13th month tax instalment) statement of tax shall be due and payable within 21 days after the service of the notice of assessment of tax for such accounting period, and shall be the amount of the tax assessed for that accounting period less so much thereof as has already been paid.[199]

A petroleum company is under obligation to furnish the FIRS with its accounts and particulars within five months of the expiration of the accounting period.[200] The FIRS may, however, extend the time within which the company my deliver its accounts and particulars to it upon good reason shown for the failure to do so within the prescribed time. Such extension of time must be in writing.[201] The FIRS may by notice in writing to any company to furnish within such reasonable time as may be specified in such notice fuller or further information relating to its accounts or particulars.[202] The FIRS may also call for the examination of any books, documents, accounts and particulars which it deems necessary provided that the notice calling for same must not be less than 21 days.[203]

3.4.1.7 Notice of assessment and objections

It is the prerogative of the FIRS to assess the tax liability of every company for any accounting period. Where the company has delivered its accounts and particulars to the FIRS for any accounting period, the FIRS may-

(a) accept the same and make assessment accordingly; or

(b) refuse to accept the same and proceed to estimate an amount to be paid by such company for that accounting period and make an assessment accordingly.[204]

[198] Section 45(3), Op.cit.
[199] Section 45(4)
[200] Section 30(2), Petroleum Profits Tax Act.
[201] Section 34, Op.cit.
[202] Section 31, Op.cit.
[203] Section 32, Op.cit.
[204] Section 35, Op.cit.

It remains to be added that the FIRS has the powers to make additional assessments where it is of the view that the company has been under assessed.[205] The FIRS is under obligation to personally serve a notice of assessment on the company or any person whose name appears on the assessment. Any petroleum company so served may also object to the assessment contained thereon. In doing so, it will apply to the FIRS in writing by way of a notice of objection to review and revise the assessment. The notice of objection must be filed within 21 days and must state the following:

(a) the amount of chargeable profit of the company;

(b) the accounting period in which the assessment was made;

(c) the amount of the assessable tax made by the FIRS; and

(d) the tax which it claims should be stated on the notice of assessment.[206]

The FIRS may however extend the 21days time within which to file notice of objection where reasonable cause is shown by the applicant.[207]

3.4.1.8 Notice of refusal to amend

Where the company and the FIRS fail to agree on the exact tax payable for the accounting period, the FIRS may issue NORA to the company and give the company notice of tax payable together with the NORA.[208] The point need be made quickly that no assessment, warrant, proceedings purporting to be made in accordance with the provisions of the PPTA shall be quashed, or deemed to be void or voidable, for want of form, or be affected by reason of mistake, defect or omission therein, if the same is in substance and effect in conformity with or according to the intent and meaning of the Act.[209]This provision

[205] Section 36
[206] Section 38
[207] Section 38(3)
[208] Section 38(6)
[209] Section 39

is intended to guard against unwarranted objections as to form. That explains why it places emphases on substance.

3.4.1.9 Appeals

Prior to the establishment of the Tax Appeal Tribunal (TAT) under the Federal Inland Revenue Service (Establishment) Act, 2007 (FIRS Act), appeals against the decision of the FIRS go to the Body of Appeal Commissioners.[210] As at today, such appeals go to the Tax Appeal Tribunal.[211]The notice of appeal must be filed at the Tribunal within 30 days from the date on which a copy of the order or decision which is being appealed against was made, or deemed to have been made by the FIRS.[212] The notice of appeal usually states the following:

i. the official number of the assessment and the accounting period for which it was made;
ii. the amount of the tax charged by the assessment;
iii. the ground of appeal against the assessment; and the address for service of any notice, or other document to be given by the secretary to the Tribunal to the appellant.

It must be noted that the Tax Appeal Tribunal may entertain an appeal after the expiration of the said 30 days if it is satisfied that there was sufficient cause for the delay.[213]This is done by filing Motion on Notice for extension of time within which to appeal before the Tribunal.[214]One of the key innovations of the TAT is the abolition of the issuance of NORA as a condition precedent to filing an appeal against the decision of the FIRS as was the case in the defunct Body of Appeal Commissioners. This position has however changed for good and aggrieved taxpayers can access justice faster than it used to be under the defunct Body of

[210] Abdulrazaq, M.T. (2010) *Revenue Law And Practice In Nigeria*, Malthouse Press Ltd. Lagos, p.325.
[211]Section 59, FIRS (Establishment) Act and paragraph 11, 5th Schedule to the FIRS (Establishment) Act, 2007.
[212]Paragraph 13(2), 5th Schedule, FIRS Act.
[213]Ibid.
[214]Order X, Rule 3 and Order XI Rules 1 & 2 of the Tax Appeal Tribunal (Procedure) Rules, 2010. In practice, the Notice of Appeal will be filed alongside the motion and then a deeming order will be sought to regularize same.

Appeal Commissioners.[215] It remains to be added that appeals lie further to the Federal High Court, the Court of Appeal and the Supreme Court, as a last resort.

3.5. Other Fiscal Obligations Applicable to Production Sharing Contracts

Apart from the fiscal obligations set out in the Deep Offshore and Inland Basin Production Sharing Contracts Act and the Petroleum Profits Tax Act, there are other applicable fiscal obligations under production sharing contracts that generate income for government. These obligations are Rents, Fees, Bonuses and Oil Terminal Dues. Each of them are discussed below beginning with Rents.

3.5.1 Rents

Rents are annual payments or fees paid as consideration for the use of the ground upon which petroleum operations may be conducted under oil prospecting licences and oil mining leases. Regulation 60 of the Petroleum (Drilling and Production) Regulations 1969 makes provisions for the rent payable. Regulation 60(1) provides that a rent of ₦ 500 shall be payable for each calendar year for which an oil exploration licence is in force; and, when the licence is in force for only a part of a calendar year, that part shall be regarded as a calendar year for the purposes of the rents.[216] Regulation 60(2) provides that the annual rent payable on an oil prospecting licence or oil mining lease shall be –

(a) on an oil prospecting licence, for each square mile or part thereof - US$10

(b) on an oil mining lease –

(i) for each square kilometer or part thereof of a producing oil mining lease for the first ten years - - - - - - US$20

(ii) thereafter for each square kilometer or part thereof until expiration of the lease and on renewal - - - - - - US$15.

[215] *Oando Supply & Trading Limited v. Federal Inland Revenue Service* (2011) 4 TLRN 113.
[216] Kachikwu, I. E., (2016) Legal Issues in the Petroleum Industry. LPCS Limited, Lagos, p. 33.

3.5.2 Fees

Applicable regulations in the Petroleum industry in Nigeria prescribe the payment of certain fees for authorizations to carry out specified activities in the industry. For instance, Regulation 60A of the Petroleum (Drilling and Production) Amendment regulations 1988 provides that no company shall render or be engaged to render technical services to the petroleum industry without first being registered and issued a permit to carry out such services by the Director of Petroleum Resources (DPR). The fees payable are categorized into three and set out accordingly. The table below reflects the categories and the fees payable:[217]

Number	Category	Fee for New Application	Fee for Renewal
1.	General Purpose Category	N 5,000	N5,000
2.	Major Category	N25,000	N25,000
3.	Special Category	N250,000	N250,000[218]

Other fees are as follows:

(a) on an application for oil prospecting licence - - $10

(b) for a processing fee - - - - - $10

(c) on an application for an oil mining lease - - - $500,000

(d) on an application for a renewal of an oil mining lease - $1,000,000

(e) on an application to withdraw any of the applications specified in paragraphs (a), (b), (c), and (d) of this regulation. - - - $20

(f) on an application to assign or sublet on contract an oil prospecting licence or an oil mining lease - - - - - $500,000

(g) on an application to terminate or effect a partial surrender of an oil prospecting licence or an oil mining lease - - - - $50,000

[217] Kachikwu, I. E., op.cit. p. 34.
[218] Ibid.

(h) on an application for a licence to operate a drilling rig - $20,000

(i) for a licence to operate a drilling rig - - - - $100,000

(j) for a permit to export samples for analysis - - - $10,000

(k) for renewal of a permit to export samples for analysis - - $20,000[219]

3.5.3 Bonuses

These are payments made by companies in petroleum operations to the government for the exploration, development, and production of petroleum. It is a payment that is made in addition to royalties and rent as an incentive for a lessor to sign an oil and gas lease.[220] Bonuses are usually paid annually and they are grouped into signature bonuses, discovery bonuses and production bonuses.[221]Signature bonuses are paid at the time when the production sharing contract is signed with the government. Payment of signature bonuses by the IOCs are usually made a condition precedent to the execution of the PSC. Signing bonus, as it is also called is well known and highly detested in the oil industry by the IOCs. It is an artifact of a competitive bidding, but it can easily be part of negotiated deals. Signature bonus is simply a payment that occurs at or as a function of contract signing.[222]

Discovery bonuses are paid upon the discovery of crude oil perhaps in commercial quantity subject to the agreement of the parties. Production bonuses are payable when the volume of crude produced from the field hits a certain pre-agreed threshold. The bonuses gross up government take in a production sharing contract.

3.5.4 Oil Terminal Dues

Oil terminal dues are another source of revenue to the Government from petroleum operations. Oil terminal dues are levied under the Oil Terminal Dues Act.[223]The Act provides

[219] Regulation 59, Petroleum (Drilling and Production) Regulations, 1969.
[220] Garner, B.A. (ed.) Black's Law Dictionary. Thomson Reuters. Texas. 10th Edition, (2014) p. 217.
[221] Kachikwu, I. E., op.cit. p. 35.
[222] Johnston, D. op.cit. 161.
[223] Oil Terminal Dues Act, Cap. O8, Laws of the Federation of Nigeria, 2004.

for the levying and payment of the terminal dues on any ship evacuating oil in any port in Nigeria and in respect of any services provided at those ports.[224]The government agency responsible for collecting the dues is the Nigerian Ports Authority and in doing so, the Authority may: (a) enter a ship to ascertain the dues payable; (b) determine the quality of oil in respect of which terminal dues are to be paid; and (c) detain the ship until the dues have been ascertained or the quantity of oil has been determined.[225]The amount of the dues payable is two (2) United States cents per barrel of oil loaded into any ship for export.[226]

In conclusion, discussions so far have revealed that although the Deep Offshore and Inland Basin Production Sharing Contracts Act and the Petroleum Profits Tax Act are the two principal fiscal regimes for production sharing contracts in Nigeria, the two legislation are both contradictory and uncertain in many respects. As seen from the provisions of the two legislation in relation to investment tax credit, it is regrettably uncertain as to whether or not the IOCs are entitled to investment tax credit in the light of the express provisions of the PSC which vest title over the petroleum equipment on the NNPC. What this means is that the IOCs are claiming and continues to lay claim to investment tax credit thereby leading to sustained dispute in the Nigeria petroleum industry. These disputes would have been minimal if not totally avoided were it not for the several gaps in the two fiscal legislation. It is therefore suggested that each of the legislation should be carefully and extensively amended to address the gaps highlighted in this research. This is one way the twin objectives of building confidence and attracting investment in the oil gas industry can be achieved.

[224] Long Title, Oil Terminal Dues Act; Kachikwu, I. E., op.cit. p. 36.
[225] Section 1(4), Oil Terminal Dues Act.
[226] Regulation 1, Oil Terminals (Terminals Dues) Regulations of 1971.

CHAPTER FOUR

AN APPRAISAL OF THE LEGAL FRAMEWORK FOR REGULATION OF PRODUCTION SHARING CONTRACTS IN NIGERIA

4.1 Introduction

Revenues accruing from petroleum operations under production sharing contracts is a key contributor to the economy of Nigeria. Therefore, there exists a wide range of legal and regulatory institutions in the petroleum industry aimed at guaranteeing maximum government take in petroleum resources exploited from Nigerian soil. These institutions which are largely statutory ensure that government's interest is protected, the international oil companies operate within the confines of the regulations as well as ensuring a smooth and safe conduct of petroleum operations that is both sustainable and environment friendly. The importance of regulations in any sector cannot be overemphasized. In the absence of a properly structured regulatory regime, petroleum operations may be conducted in a chaotic manner to the ultimate disadvantage of the government in terms of poor revenue receipts and the environment. It is in view of the foregoing that this chapter centers on the legal framework for the regulation of production sharing contracts in Nigeria. It extensively reviews the Petroleum Act[1]and the powers of the Minister of Petroleum Resources. It also considers the Ministry of Petroleum Resources, the role of the Department of Petroleum Resources (DPR) as an arm of the Ministry of Petroleum Resources, the Nigerian National Petroleum Corporation (NNPC), its establishment, powers and general duties of the NNPC and the role of the National Petroleum Investment Management Services (NAPIMS) as the directorate arm of the NNPC. Other issues considered relates to the Nigerian Content Development and Monitoring Board, its establishment, functions as well as offences and penalties under the Nigerian Oil and Gas Industry Content Development Act. Chapter four further discusses the

[1] Cap. P10, Laws of the Federation of Nigeria, 2004.

Nigerian Extractive Industries Transparency Initiative (NEITI), its establishment, objectives, functions as well as offences and penalties under the NEITI Act. Lastly, the Federal Inland Revenue Service (FIRS); its establishment, functions and tax administration by the FIRS are discussed.

4.2 The Petroleum Act and the Minister of Petroleum Resources

The Petroleum Act[2] is the principal legislation in the Petroleum Industry in Nigeria. The intent of the Petroleum Act (PA) is to provide for the exploration of petroleum from the territorial waters and continental shelf of Nigeria and to vest the ownership of all on-shore and off-shore including the revenue from the petroleum resources derivable therefrom, in the Federal Government and for all other matters incidental thereto.[3]Its provisions cover issues relating to upstream and downstream spectrums of the petroleum industry. In specific terms, it covers issues such as oil exploration, prospecting, mining licences, and establishment of petroleum refineries, control of petroleum products, offences in connection with the marketing of petroleum products, rights of pre-emption and price control.[4]This research however limits itself to the sections of the Act relating to the upstream sector only which is our primary focus. The Petroleum Act vests the entire ownership and control of all petroleum in, under or upon any lands on the Federal Government of Nigeria. This includes land covered by water which is in Nigeria or is under the territorial waters of Nigeria or forms part of the continental shelfs or forms part of the Exclusive Economic Zone of Nigeria.[5] Section 44(3) of the Nigerian Constitution also proclaims ownership of all

[2] The Act took effect on 27th November, 1969. The Act repealed the Mineral Oils Ordinance of 1914, S. 14 and 3rd Schedule, Petroleum Act. It has a total of 16 sections and four Schedules.
[3] Fagbohun, O. (2010) *The Law of Oil Pollution and Environmental Restoration: A comparative Review*. Odade Publishers, Lagos. p.287.292.
[4] Iloba-Aninye, O. (2015). *An Examination of the Legal Framework for the Marketing of Petroleum Products in the Downstream Sector of the Oil and Gas Industry in Nigeria*. PhD Thesis (Unpublished), Submitted to the School of Postgraduate Studies, Ahmadu Bello University, Zaria, p.78.
[5] Section 1, Petroleum Act, Cap P10, L.F.N., 2004.

petroleum resources within all lands in Nigeria, the seabed and sub-soil of Nigeria's territorial waters and her continental shelfs in the following words:

> Notwithstanding the foregoing provisions of this section, the entire property in and control of all minerals, mineral oils and natural gas in, under or upon any land in Nigeria or in, under or upon the territorial waters and the Exclusive Economic Zone of Nigeria shall vest in the Government of the Federation and shall be managed in such manner as may be prescribed by the National Assembly.[6]

The foregoing provisions of the Petroleum Act and the Constitution make it abundantly clear that the ownership of petroleum resources in Nigeria does not belong to individuals, communities or state governments. This explains why the regulation of production sharing contracts, and indeed, the entire petroleum industry in Nigeria are managed at the federal government level.

The Minister of Petroleum Resources is the 'regulator in-chief' of petroleum activities in Nigeria. The Minister grants interest in petroleum resources in the form of licences and leases. In the case of PSCs, the initial interest granted to an IOC is an oil prospecting license (OPL). This license entitles the IOC to exclusively prospect for petroleum in the select contract area specified in the OPL. Upon a successful discovery of crude oil in commercial quantity,[7] the OPL, on the application of the IOC and payment of the prescribed fees[8], is converted to oil mining lease (OML). The OML entities the IOC to search for, win, work, carry away and dispose of petroleum found in Nigeria.[9] OPLs and OMLs are only granted to

[6] Section 44(3), *Constitution of the Federal Republic of Nigeria*, Cap C23, L.F.N., 2004.
[7] Oil is deemed to have been discovered in commercial quantities by the holder of an oil prospecting licence if the licensee is producing at least 10,000 barrels per day of crude oil from the licensed area. Paragraph 9, First Schedule, *Petroleum Act*. Cap P10, L.F.N. 2004.
[8] The prescribed fee is US$500,000. Regulation 59(c), Petroleum (Drilling and Production) Regulations, 1969.
[9] Section 2, *Petroleum Act*. Cap P10, L.F.N., 2004.

corporate entities incorporated in Nigeria under the Companies and Allied Matters Act[10] or any corresponding law.[11]

4.2.1 The right of pre-emption and the powers of the Minister of Petroleum Resources

The Petroleum Act provides that in the event of a state of national emergency or war, the Minister shall have the right of pre-emption of all petroleum and petroleum products obtained, marketed or otherwise dealt with under any licence or lease granted under the Act.[12] This provision is calculated to ensure that in the event of any national emergency or war, there will be sufficient supply of petroleum and petroleum products to service the smooth functioning of the federal government and to prevent petroleum and its huge revenues from falling into wrong hands or the hands of the enemy. It is, therefore, submitted that this provision makes significant economic and political sense. The Minister is, however, obligated to pay a fair price to the licensee or lessee for the petroleum or petroleum products taken by the Minister in the exercise of his rights of pre-emption.[13]

The Minister may, for the purpose of exercising the rights of pre-emption, advise the President to declare a state of national emergency if the Minister is satisfied that, as a result of the low level of availability of petroleum and petroleum products-

(a) there is an actual breakdown of public order and public safety in the Federation or any part thereof; or

(b) there is a clear and present danger of actual breakdown of public order or public safety in the Federation or any part thereof.[14]

The President may, on receiving such advice from the Minister declare a state of national emergency under the provisions of the Constitution of the Federal Republic of

[10] Cap C20, L.F.N., 2004.
[11] Section 2(2), Petroleum Act.
[12] Section 7(1), Petroleum Act
[13] Paras. 6 & 7, 2nd Schedule, Petroleum Act.
[14] Section 7(5), Petroleum Act

Nigeria[15] if he is satisfied that it is necessary to do so.[16]In effect, the President is not obligated to declare a state of national emergency upon receipt of such advice from the Minister. The President will only do so if he is satisfied that it is necessary to do so. In other words, the discretion to declare a state of emergency remains that of the President to exercise.

The Minister of Petroleum Resources wields enormous powers in the petroleum industry generally. Some of his powers and duties under the Act are that the Minister-

a. shall exercise general supervision over all operations carried on under licences and leases granted under the Act;
b. shall report annually to the Federal Government on the progress of the oil industry in Nigeria;
c. shall have access at all times to areas covered by oil exploration licenses, oil prospecting licences and oil mining leases, and to all refineries and installations which are subject to the Act, for the purpose of inspecting the operations conducted therein and enforcing the provisions of the Act and any regulations made thereunder and the conditions of any licence or leases granted under the Act or under any corresponding law for the time being in force in Nigeria;
d. may arrest without warrant any person whom he finds committing, or whom he reasonably suspects of having committed, any offence under the Act or any regulation made thereunder, and shall hand over any person so arrested to a police officer with as little delay as possible;
e. may by notice in writing require the holder of a licence or lease granted under this Act or any contractor working for the holder (or any servant or agent of the holder or the contractor) to appear before him at reasonable time and place to give such

[15] Section 305, CFRN provides for the procedure for declaration of a state of emergency.
[16] Section 7(6), Petroleum Act.

information as he may require about the operations being conducted under the licence or lease, and every person so required to appear shall be legally bound to comply with the notices and give the information;

f. may direct in writing that operations under a licence or lease granted under the Act shall be suspended in any area until arrangements have been made which in his opinion are necessary to prevent danger to life or property;

g. may direct in writing the suspension of any operations which in his opinion are not being conducted in accordance with good oil filed practice; and

h. may direct in writing the suspension of any operations where in his opinion a contravention of this Act or any regulations made thereunder has been or may have been or is likely to be committed.[17]

The Minister also has powers to make regulations prescribing anything requiring to be prescribed for the purposes of the Act and providing generally for matters relating to licences and leases and operations carried on under the Act.[18] Whilst the PSCs allow the IOC contractors to assign their rights, powers or interest or any part thereof in any OPL or OML, such assignment cannot be effective without the prior consent of the Minister.[19] Application for assignment of an interest in OPL or OML attracts a fee of ₦500, 000 only.[20]An applicant for an assignment must provide the deed of assignment, the copy of the existing PSC, farm-in Agreement between the Assignor and Assignee, the Assignee's incorporation documents, Assignee's technical and financial track records in exploration and production operations,

[17] Section 8, Petroleum Act.
[18] Section 9. The Petroleum (Drilling and Production) Regulations, 1969 was made pursuant to section 9, Petroleum Act.
[19] Paragraph 14, 1st Schedule, Petroleum Act.
[20] Para. 59 (f), Petroleum (Drilling and Production) Regulations, 1969.

technical service Agreements, Sales/purchase Agreements, catalog of applicant's exploration and production activities carried out in the asset to date, amongst others.[21]

Furthermore, the Minister may by writing under his hand delegate to another person any power conferred on him by or under the Act except the power to make orders and regulations.[22]It is submitted that the person to whom the Minister delegates his powers must be a public officer and not just 'another person' as section 12(1) of the Act suggests.[23]This inference is glaringly clear if section 12(1) & (2) of the Petroleum Act are read together. In practice, the Minister delegates his powers in this regard to the Director of the Department of Petroleum Resources (DPR).

The extensive powers of the Minister, as above, makes him the prime regulatory authority of production sharing contracts in Nigeria. This research holds the view that the powers of the Minister are too extensive and therefore, susceptible to abuse. A situation where an appointee of the President is vested with such huge powers to almost, solely regulate such vital industry as petroleum is potentially dangerous given the inclination of man to abuse powers. It is, therefore, suggested that the Act should be amended to whittle down the powers of the Minister by introducing substantial checks and balances for effective management of the petroleum industry.

4.2.2 Offences under the Petroleum Act

The Petroleum Act specifies certain conducts as offences together with their punishments. For instance, any person who, without reasonable excuse (the burden of proof of which shall lie on him), fails to comply with a requisition made by or on behalf of the Minister in the exercise of the Minister's rights of pre-emption or fails to conform to or obey

[21] Guidelines and Procedures for obtaining Minister's Consent to the Assignment of Interests in Oil and Gas Assets issued on 11th August, 2014; Kachikwu, I. E. (2016) *Legal Issues in the Nigerian Petroleum Industry*. LPCS Limited. Lagos. pp. 241-247.
[22] Section 12(1), Petroleum Act.
[23] Section 12(2), Petroleum Act.

a direction issued in that regard by the Minister shall be guilty of an offence and on conviction shall be liable to a fine not exceeding ₦2,000.[24] Any person who obstructs or interferes with the Minister or his servants or agents in the exercise of the powers conferred on the Minister (pursuant to the rights of pre-emption) to take control of any works, plants or premises of the licensee or lessee shall be guilty of an offence and on conviction shall be liable to a fine not exceeding ₦200 or to imprisonment for a period not exceeding six months, or to both.[25] Reasonable compensation shall however, be paid to the licensee or lessee for any loss or damage caused to him by reason of the exercise of the Minister's powers in this regard. The amount of the compensation shall be settled by agreement between the Minister and the affected licensee or lessee, or in default of agreement, by arbitration.[26]

It is equally an offence for any person to interfere with or obstruct the holder of a licence or lease granted under the Act (or his servants or agents) in the exercise of any rights, powers or liberty conferred by the licence or lease and on conviction, such a person shall be liable to a fine not exceeding ₦200 or to imprisonment for a period not exceeding six months, or to both.[27] The penalties for the offences are too weak to serve as a deterrent to potential offenders. No wonder they are observed more in breach especially in the Niger Delta area of Nigeria.[28] It is common knowledge that the Niger Delta people disrupt the operations of the IOCs every now and then in clear violation of section 13(1) of the Petroleum Act. These disruptions have always been hinged on alleged neglect of the welfare of the people and the degradation of the environment.[29] Plausible as these reasons may appear, it does not however,

[24] Section 7(3), Petroleum Act.
[25] Section 7(4), and Paragraph 8, 2nd Schedule, Petroleum Act.
[26] Paras. 9 & 10, 2nd Schedule, Petroleum Act.
[27] Section 13(1), Petroleum Act.
[28] Okhumode, H.Y. (2017) *Addressing Environmental Health Problems in Ogoniland through Implementation of United Nations Environmental Program Recommendation*: Environmental Management Strategies. Environments. Vol. 4, No. 28. P. 2. www.mdpi.com/2076-3298/4/2/28pdf retrieved on 24/1/2018 at 11:50am.
[29] Ibid.

detract from the fact that it is an offence for any person to interfere or obstruct a licensee or lessee from exercising his rights under the license or lease.

Therefore, this research suggests two pronged approaches to addressing this problem. First, the government should ensure that the genuine concerns of the Niger Delta people such as infrastructure and other social amenities are addressed. Government should also compel the IOCs to pay due regard to the environment in the conduct of their operations and to fulfil their corporate social responsibilities to their host communities. ***Usman***[30] has argued in this regard, that though it may not be legally correct to say that the Nigerian state should not protect the investment of the IOCs for their failure to fulfil their corporate social responsibility, it may not be morally incorrect. Here is how he poignantly put it:

> Because the relationship between corporate social responsibility with protection of foreign investment is not a consequential one, it is legally incorrect to say that the Nigerian state should not protect foreign investment in the nation's oil industry if foreign oil corporations with such investments do not perform their corporate social responsibility to host communities in the Niger Delta. Be this as it may, though it may be legally incorrect to make such a case, it may not be morally incorrect. If corporations are entitled to the protection of their investment, then they should be under some obligation to the host communities they operate in. They may be the goose that laid the golden eggs and therefore should be protected. But it should also be within the legitimate expectation of the gander that provides the patch for the eggs to be laid to receive recompense from the goose.[31]

This research entirely endorses the above submissions and further submits that the incidence of disruptions in the Niger Delta will be brought to a significant minimal level if the IOCs genuinely fulfill their corporate social responsibility obligations to the people of the Niger Delta. The second pronged approach is for the Petroleum Act to be amended to provide for stringent punishments to serve as deterrents for obstinate criminals who, regardless of the

[30] Usman, A.K. (2014 & 2015) "Corporate Social Responsibility vs. Protection of Foreign Investment: The Experience of Niger Delta Communities and International Oil Corporation in Nigeria." *Ahmadu Bello University Journal of Commercial Law* (ABUJCL). Vol. 7, No.1. pp. 38-55.
[31] Ibid. p. 39.

efforts of the government and the IOCs to better the lives of the people, may want to disrupt operations on account of their illicit proclivities. The few persons who are so inclined can be punished effectively under the improved punishment regimes that will be sufficient to make them pay for their wrongful deeds. It is also necessary to state that there are other stipulated offences and punishments for any person who constructs or operates refinery in Nigeria without licence or any person who contravenes the provisions of an order made by the Minister for the control of the prices of petroleum products.[32]

4.3 Regulatory Institutions for Production Sharing Contracts

Apart from the Minister of Petroleum Resources, production sharing contract arrangement in Nigeria is also regulated by the following institutions:

i. Ministry of Petroleum Resources;

ii. Department of Petroleum Resources (DPR);

iii. Nigerian National Petroleum Corporation;

iv. National Petroleum Investment Management Services (NAPIMS);

v. Nigerian Content Development and Monitoring Board;

vi. Nigeria Extractive Industries Transparency Initiative (NEITI); and

vii. Federal Inland Revenue Service (FIRS).

Each of the foregoing institutions are briefly discussed below beginning with the Ministry of Petroleum Resources.

4.3.1 The Ministry of Petroleum Resources

The Ministry of Petroleum Resources is responsible for formulating and implementing government policy in the oil and gas industry. It is in charge of overseeing and coordinating federal government policies on petroleum operations in Nigeria. It is the Ministry that formulates and implements general policy directives of the government as it

[32] Section 13(2) & (3), Petroleum Act.

relates to oil and gas resources. Historically, in 1977, the Ministry of Petroleum Resources was merged with the defunct Nigerian National Oil Corporation to form the NNPC. However, in 1985, the Ministry of Petroleum and Energy was established and subsequently renamed the Ministry of Petroleum Resources in 1986 which name has remained till date.[33] Generally, the Ministry of Petroleum Resources has the following responsibilities:[34]

a. overall supervision of the Nigerian petroleum industry including the Nigerian National Petroleum Corporation and its subsidiaries to ensure compliance with applicable statutes;
b. issuing permits, licences, leases and giving authorizations and approvals prescribed by statutes for a whole range of petroleum activities from seismic surveys to drilling, production, construction and operation of process plants like refineries, petrochemicals and liquefied natural plants and for the marketing of petroleum products;
c. policy matters on the granting of petroleum rights and the marketing of crude oil, natural gas and their derivatives;
d. monitoring and control of environmental pollution associated with oil and gas and the administration and enforcement of environmental protection statutes and statutory provisions affecting such operations;[35]
e. fixing of production allowables and prices for crude oil, natural gas, petroleum products and their derivatives;
f. enforcement of oil and gas conservation laws and practices monitoring petroleum activities to ensure proper conservation of oil and gas;

[33] Olisa, M.M. (1997) *Nigerian Petroleum Law and Practice*. Jonia Ventures Limited, Lagos, 2nd edition, p. 227.
[34] Assignment of Responsibilities: Federal Government of Nigeria Official Gazzette No. 15, Volume 70, 3rd March, 1989.
[35] The Government Agency that now collaborates with the Ministry directly in performing this role is the National Oil Spill Detection and Response Agency (NOSDRA) established by the NOSDRA (Establishment) Act, 2006.

g. giving such assistance to the petroleum industry as would enhance the industry in the overall interest of Nigerians; and

h. duties relating to the following bodies –

(i) Nigerian National Petroleum Corporation;

(ii) Organization of Petroleum Exporting Countries;

(iii) Petroleum Equalization Fund,

(iv) Petroleum Technology Development Fund;

(v) Petroleum Training Institute, Effurun, and

(vi) African Petroleum Producers Association.[36]

The Ministry of Petroleum Resources is the supervisory Ministry of the NNPC. In fact, the Ministry of Petroleum Resources is located within the premises of the NNPC Towers in Abuja. It performs its roles through various agencies, departments and parastatals. It is headed by a Minister of Petroleum Resources who is appointed by the President of the Federal Republic of Nigeria subject to the confirmation of the Senate.[37] The Minister co-ordinates the affairs of the Ministry on behalf of the President.

4.3.2 The Role of the Department of Petroleum Resources (DPR) as an arm of the Ministry of Petroleum Resources.

The Ministry of Petroleum Resources performs its functions through agencies, departments and parastatals. One of such key departments of the Ministry is the Department of Petroleum Resources (DPR). The DPR is the technical, supervisory and enforcement arm of the Ministry of Petroleum Resources. The DPR, under powers delegated to the director by the Minister or as approved by the Minister, may impose sanctions prescribed by law on

[36] Olisa, M.M. op.cit. Pp.227-228.
[37] Section 147(1) & (2), Constitution of the Federal Republic of Nigeria. Cap C23, Laws of the Federation of Nigeria, 2004.

offending licensee or lessee.[38] The DPR has a long history that dates back to the colonial era when it was a mere Hydrocarbon Section of the Ministry of Lagos Affairs which reported directly to the Governor-General. It eventually went through a number of metamorphoses between 1970 and 1985 until 1988 when the DPR was, once again established as the technical arm of the Ministry of Petroleum Resources.[39] The Petroleum Inspectorate Department which was once a Department in the NNPC structure has since been excised from the NNPC and transferred to the DPR with a reporting link to the Ministry of Petroleum Resources. The DPR functions mostly as the regulatory authority of the entire petroleum industry, including the regulation of the operations of the business in which the NNPC is a major partner.[40] In practice, the DPR details its officials to all the oil fields operated by international oil companies under PSC arrangements to ensure effective monitoring of petroleum operations at such oil fields. The DPR has the statutory responsibility of ensuring compliance to petroleum laws, regulations and guidelines in the oil and gas industry. The discharge of these responsibilities involves monitoring of operations at drilling sites, producing wells, production platforms and flow stations, crude oil export terminals, refineries, storage depots, pump stations, retail outlets, any other locations where petroleum is either stored or sold, and all pipelines carrying crude oil, natural gas and petroleum products.[41] Generally, the DPR carries out the following functions, among others:

(i) supervising all Petroleum Industry operations being carried out under licences and leases in the country;

(ii) monitoring the Petroleum Industry operations to ensure that they are in line with national goals and aspirations including those relating to Flare down and Domestic Gas Supply Obligations.

[38] Olisa, M.M. op.cit. pp.228-229
[39] http://dpr.gov.ng/index/history-of-dpr/. Retrieved on 15/7/2016 at 2:30pm.
[40] Etikerentse, G. (2004) *Nigerian Petroleum Law*. Dredew Publishers, Lagos, 2nd Edition. p. 21.
[41] http://dpr.gov.ng/index/functions-of-dpr/. Retrieved on 15/7/2016 at 2:30pm.

(iii) ensuring that Health Safety and Environment regulations conform with national and international best oil field practice.

(iv) maintaining records on petroleum industry operations, particularly on matters relating to petroleum reserves, production/exports, licences and leases.

(v) advising Government and relevant Government agencies on technical matters and public policies that may have impact on the administration and petroleum activities.

(vi) processing industry applications for leases, licences and permits.

(vii) ensure timely and accurate payments of Rents, Royalties and other revenues due to government .

(viii) maintain and administer the National Data Repository (NDR).[42]

In specific terms, the DPR performs the following roles in the upstream petroleum industry in Nigeria:

1. regulates oil and gas activities;
2. conserves Nigeria's Hydrocarbon Resources;
3. optimizes government take in oil and gas activities;
4. ensures compliance with Health Safety and Environment standards;
5. maintain and administer the National Data Repository (NDR);
6. administers oil and gas acreages and concessions; and
7. implements government policies on upstream oil and gas matters.[43]

One major drawback of the DPR is the lack of capacity on the part of the personnel to effectively supervise the operations of the IOCs. Another challenge is that the DPR lacks the requisite equipment and facilities to be able to promptly access the difficult terrain of the oil fields on their own and at their instance for effective monitoring. On account of this

[42] Ibid.
[43] http://dpr.gov.ng/index/roles-of-dpr-upstarem. Retrieved on 14/3/2016 at 5:22pm.

weakness, the DPR has had to rely on the IOCs to provide needed equipment, vessels and Helicopters to access the terrain of the oilfields. Worst still, the DPR has had to make do with information given to it by these IOCs without being able to verify same.[44]Another problem with the DPR is the broad and varied nature of its functions which cuts across the entire value chain of the petroleum industry. The varied nature of its roles clearly predisposes it to roles conflict. For instance, the DPR is required to optimize government's take in petroleum activities (commercial role) and, at the same time, it is required to enforce health, safety and environment standards (HSE role). These two roles are poles apart and often conflict. In other words, commercial interests and HSE interest are almost always in conflict. In the event of such conflict, Fagbohun[45] has said that the DPR panders to commercial interests. He notes that this is particularly so bearing in mind that the mainstay of the Nigerian economy is oil. Not surprising, therefore, the concern of many is that in the exercise of DPR's power, environmental quality will occasionally be sacrificed for commercial interests. This research shares this view. This is because, in recent times, notwithstanding the environmental problems in the Niger Delta region and the attendant disturbances and militancy activities, the government has always harped on the need to achieve production threshold of over two million barrels of oil per day to be able to effectively fund the budget. Given the government's obsession with producing a benchmarked number of barrels per day, it is easily foreseeable that health, safety and environmental concerns would naturally be sacrificed for commercial interests. It is, therefore, submitted that the role of the DPR should be streamlined for efficiency. It is also important for its manpower capacity to be developed to be able to match with the technical expertise of the IOCs. Lastly, it is important for the DPR

[44]Fagbohun, O. op.cit. p. 350.
[45] Ibid.

to be fully equipped so that it does not have to depend on the resources of the IOCs to be able to pay unscheduled inspection visits to oil fields.

In summary, the DPR is a key regulatory institution for production sharing contracts in Nigeria. This is because, no petroleum operations can be carried out in Nigeria without the requisite approval of the DPR, be it in the upstream, midstream or downstream petroleum sectors.

4.3.4 The Nigerian National Petroleum Corporation

The Nigerian National Petroleum Corporation (NNPC) was established under Decree No. 33 of 1977, now the Nigerian National Petroleum Corporation Act.[46] The Act dissolved the Nigerian National Oil Corporation and established the Nigerian National Petroleum Corporation empowered to engage in all commercial activities relating to the Petroleum industry and to enforce all regulatory measures relating to the general control of the Petroleum sector through its Petroleum Inspectorate department.[47]The NNPC was formed as a result of a merger between the Ministry of Petroleum Resources, and the Nigerian National Oil Corporation (NNOC) which was established in 1971.[48] The NNOC was established by Decree No. 18 of April 1977 to engage in prospecting for, mining and marketing oil and all other activities with the petroleum oil Ministry. The NNOC was an offshoot of the Ministry of Mines and Power, and from the outset, it had problems centered around the fact of its dependency on the Ministry. The initial efforts at state participation in Nigeria's oil industry were done through the NNOC. [49]

Historically, it is to the credit of the Organisation of Petroleum Exporting Countries (OPEC) that Nigeria set up its first state oil company, the NNOC to participate in petroleum activities. Right from its inception, OPEC had enjoined all its member states to, inter alia,

[46] Nigerian National Petroleum Corporation Act, Cap. N123, L.F.N. 2004.
[47] Preamble to the NNPC Act. The Act came into force on April 1, 1977.
[48] Omorogbe, Y. (2001) *Oil and Gas Law in Nigeria*. Malthouse Press Limited. Lagos. p. 99.
[49] Ibid.

participate in the activities of the concessionaires in their respective countries. OPEC formerly endorsed state participation policy in its Declaratory Statement of Policy of 1968.[50] Consequently, Nigeria, like all other OPEC members complied with the Resolution and established the NNOC. The NNOC was the fore-runner of the present day NNPC. The NNOC was established to engage in all the spectrums of the oil and Gas industry, from exploration to marketing but in practice, its operations had been restricted to exploration and drilling activities only. Due to lack of finance and technical expertise, the other spectrums such as refining, distribution and marketing were largely carried out by the IOCs.[51] The NNOC had other weaknesses. ***Gidado***[52] explained some of the weakness leading to the formation of the NNPC in the following words:

> NNOC had no statutory duty to regulate and supervise the operations of the oil industry in Nigeria. The regulatory and supervisory functions of the government, as they affected the oil industry, were the responsibilities of the former Ministry of Petroleum Resources. Since the NNOC at the time operated alongside the Federal Ministry of Petroleum Resources, - with the latter limiting its functions to regulating the operation of the foreign oil companies, and because of the dichotomy created by their existence and seemingly independent operations, administrative conflicts and ineffective control characterized the oil industry. The government then thought that the higher standard of the goals and policies set for the petroleum industry would be better achieved is a single body was put in charge of this important sector of the economy. Thus in April 1977, a fully integrated agency of government to engage in oil and gas operations as well as regulate the operations of the industry, - the NNPC – was established through the amalgamation of the former NNOC with the then Ministry of Petroleum Resources.

In effect, the NNPC as presently constituted is the government agency for engaging in petroleum activities as well as regulating the operation of the IOCs. It is in this capacity that the NNPC now enters into production sharing contracts with the IOCs on behalf of the

[50] Gidado, M.M. (1999) *Petroleum Development Contracts with Multinational Oil Firms – The Nigerian Experience.* ED-Linform Services. Maiduguri, p. 88.
[51] Ibid. p.89.
[52] Ibid.

Nigerian government. The NNPC actively participates in petroleum activities through one of its subsidiaries, the Nigerian Petroleum Development Corporation (NPDC).[53] The NNPC is also a prominent regulator of PSCs in Nigeria. This is because, the NNPC vets and approves bidders for OPLs. It also ensures that successful bidders conduct petroleum operations in line with clearly set out guidelines.. Its affairs are managed by a Board of Directors consisting of a Chairman; the Permanent Secretary, Federal Ministry of Finance; the Group Managing Director of the NNPC; and three other persons to be appointed by the President. However, such must be persons who by reason of their ability, experience or specialized knowledge of the oil industry or of business or professional attainments are capable of making useful contributions to the work of the Corporation.[54] The Board of the NNPC is chaired by the Minister of Petroleum Resources.[55]

4.3.4.1 General Duties of the Nigerian National Petroleum Corporation

The Act provides that the NNPC shall be charged with the duty of –

(a) exploring and prospecting for, working, winning or otherwise acquiring, possessing and disposing of petroleum;

(b) refining, treating, processing and generally engaging in the handling of petroleum for the manufacture and production of petroleum products and its derivatives;

(c) purchasing and marketing petroleum, its products and by-products;

(d) providing and operating pipelines, tanker-ships or other facilities for the carriage or conveyance of crude oil, natural gas and their products and derivatives, water and any other liquids or other commodities related to the Corporation's operations;

(e) constructing, equipping and maintaining tank farms and other facilities for the handling and treatment of petroleum and its products and derivatives;

[53] The NPDC has its operational headquarters in Benin, Edo State.
[54] Section 1(2), the NNPC Act.
[55] Section 1(3). NNPC Act.

(f) carrying out research in connection with petroleum or anything derived from it and promoting activities for the purpose of turning to account the results of such research;

(g) doing anything required for the purpose of giving effect to agreements entered into by the Federal Government with a view to securing participation by the Government or the Corporation in activities connected with petroleum;

(h) generally engaging in activities that would enhance the petroleum industry in the overall interest of Nigeria; and

(i) undertaking such other activities as are necessary or expedient for giving full effect to the provisions of this Act.[56]

The NNPC is also under a duty to, from time to time, when the President so requires or the Corporation considers it appropriate to undertake a general review of the affairs of the Corporation and of any subsidiaries thereof for the purpose of determining how the management of the activities of the Corporation or any subsidiary thereof can most efficiently be organized and, where appropriate, to make a report to the President upon the Corporation's conclusions arising from the review.[57] The NNPC is also obligated to submit annual reports of its activities to the President. The Act stipulates that the Corporation shall prepare and submit to the President, through the Minister not later than 30th June in each financial year, a report on the activities of the Corporation during the immediately preceding financial year, and shall include in such report a copy of the audited accounts of the Corporation for that year and the auditors' report thereon.[58]

The reason for the requirement to submit annual reports to the president is not unconnected with the importance of revenue from petroleum operations to the Nigerian economy. It remains to be emphasized that looking at the general duties of the NNPC, it is

[56] Section 5(1), NNPC Act.
[57] Section 5(2).NNPC Act.
[58] Section 19, NNPC Act.

clear that it is generally under obligation to represent the government of Nigeria in all the spectrums of the petroleum industry namely, upstream, midstream and downstream industries.

4.3.4.2 Powers of the Nigerian National Petroleum Corporation

Section 6 (1) of the NNPC Act provides that the Corporation shall have powers to do anything which in its opinion is calculated to facilitate the carrying out of its duties under the Act including, without limiting the generality of the following, the power to –

(a) hold, manage and alienate movable and immovable property;

(b) purchase or otherwise acquire or take over all or any of the assets, businesses, properties, privileges, contracts, rights, obligations and liabilities of any other company, firm or person in furtherance of any business engaged in by the Corporation;

(c) to enter into contracts or partnerships with any company, firm or person which in the opinion of the Corporation will facilitate the discharge of the said duties under this Act;

(d) to establish and maintain subsidiaries for the discharge of such functions as the Corporation may determine; and

(e) to train managerial, technical and such other staff for the purpose of the running of its operations and for the petroleum industry in general.

The forgoing notwithstanding, any contract relating to any project of a value of more than ₦5,000,000 (or such higher limit as may be directed from time to time by the President) shall be referred by the Corporation to the President for approval before the award of any such contract is made by the Corporation. In our view, the threshold of ₦ 5,000,000 is too small and will certainly slow down the pace of PSC operations. A situation where every project of such value would have to go through the bureaucratic process of seeking and obtaining the President's approval will undoubtedly occasion undue delay in PSC operations.

It is however, submitted that the powers of the NNPC are enough to enable it perform its duties. However, one major drawback of the NNPC is the role duality as a player and regulator of the oil industry. In other words, the NNPC is a PSC partner as well as the regulator of the IOC operator. These diametrically opposed roles foisted on the NNPC is likely to generate conflict of roles. Another problem with the NNPC is its dependence on government for its funding and this frequently results in its inability to meet some of its important financial obligations timeously.[59] One example of this lapse is the huge cash call of about Six Billion US dollar[60] obligations remaining outstanding on the part of the NNPC. This thesis therefore, suggests that the NNPC should be reorganized to run as a full commercial entity to enable it cater for its obligations without any dependence on government for funding.

4.3.4.3 The Role of National Petroleum Investment Management Services as an arm of the Nigerian National Petroleum Corporation

The National Petroleum Investment Management Services (NAPIMS) is a Corporate Services Unit (CSU) in the Exploration and Production (E&P) Directorate of the NNPC charged with the responsibility of managing Nigerian Government's investment in the upstream sector of the Oil and Gas industry. NAPIMS is the upstream arm of the Nigerian National Petroleum Corporation that overseas Nigerian government's investments in the Joint ventures, production sharing contracts and service contract arrangements in the oil industry. It is the exploration and production arm of the NNPC. NAPIMS represents the equity holdings of the Federal Government of Nigeria in the PSC operations. It also supervises the mechanism of funding the PSC operations through cash call process. Consequently, NAPIMS

[59] Etikerentse, G.op.cit. p. 21.
[60] Umoru, H. & Erunke J. *Vanguard Newspapers*, Thursday, July 21, 2016, http://linkis.com/www.vanguardngr.com/agPGp retrieved on 3/8/2016 at 3:53pm.

enhances the benefit to the federation from its investments in the upstream petroleum industry through effective cost control and supervision of the PSC operations.[61]

In the strict sense, NAPIMS is neither an operator nor a regulatory body of the industry, contrary to the notion held by some sector of the public.[62] Rather, NAPIMS manages the Federal Government of Nigeria (FGN) interests in the oil and gas industry. This is its fundamental role. However, in doing so, NAPIMS exercises certain oversight functions in relation to the operation of a PSC. These oversight functions include:

a. funding of work programme and operations in which NAPIMS requires PSC contractors to submit a performance bond to cover the amount agreed as the minimum financial commitment for the phases of exploration period;
b. operational and financial controls in which NAPIMS verifies crude oil allocation for payment of royalty, cost oil, Petroleum Profits Tax & profit oil through cost recovery committee;
c. project monitoring and audit in which NAPIMS nominates a multidiscipline project monitoring team for all major development projects, to work with the Operator's project teams, in a "task force" in order to ensure cost effectiveness in project execution and enhance Nigerian content as well as compliance with due process; and
d. value for money in which it periodically commissions consultants/firms of chartered accountants to carry out value for money audit of the operating companies in order to advise on performance measurement, bench-marking and value analyses.[63]

[61] www.napims.com/pscs.html. Retrieved on 7/4/2016 at 5.00pm.
[62] Ibid.
[63] http://www.napims.com/oversight.html retrieved on 14/2/2017 at 3:08pm.

As evident, NAPIMS is a very essential arm of the NNPC especially as it overseas the investments of the government in the exploration and production industry. In practice, no oil field can be explored or developed without the active participation of NAPIMS. In other words, no upstream petroleum project can be carried out without the involvement of NAPIMS.

4.3.5 The Nigerian Content Development and Monitoring Board

The Nigerian Content Development and Monitoring Board (the NCDMD Board) was established under section 69 of the Nigerian Oil and Gas Industry Content Development Act, 2010 (the NOGICD Act).[64] The Board is a body corporate with perpetual succession and common seal and may sue and be sued in its corporate name. The NOGICD Act is intended to provide for the development of Nigerian content in the Nigerian oil and gas industry, Nigerian content plan, supervision, coordination, monitoring and implementation of Nigerian content and other related matters. Before this Act came into force, what represented local content in the industry was only stipulated in the Petroleum Act and the various production sharing contracts signed with the IOCs.[65] At the moment, the provisions of NOGICD Act applies notwithstanding anything to the contrary in the Petroleum Act.[66] Upon the commencement of the Act, all subsequent oil and gas arrangements, agreements, contracts or memorandum of understanding relating to any operation or transaction in the Nigerian oil and gas industry shall be in conformity with the provisions of the Act.[67] In effect, by the provisions of the NOGICD Act, all subsequent PSC arrangements in the upstream oil and gas industry must comply with the provisions of the Act. This is commendable in that the issues and extent of local content development in PSC arrangements have effectively been taking

[64] This Act came into effect on 22/4/2010 and is commonly referred to as the Local Content Act.
[65] Paragraph 38, 1st Schedule, Petroleum Act, Cap P10, L.F.N., 2004, Clauses 12.1 & 12.2, 1993 PSCs and Clause 13.3(b) (i) of the 2005 PSC; Chapter 2 infra.
[66] Section 1, NOGICD Act, 2010.
[67] Section 6, NOGICD Act, 2010.

out from the issues for negotiation with the IOCs having become a matter of extant legislation.

The Act applies to all regulatory authorities, operators, contractors, subcontractors, alliance partners and other entities involved in any project, operation, activity or transaction in the oil and gas industry in Nigeria.[68] The NOGICD Act also provides that Nigerian independent operators shall be given first consideration in the award of oil blocks, oil field licences, oil lifting licences and in all projects for which contract is to be awarded in the industry subject to the fulfilment of such conditions as may be specified by the Minister of Petroleum Resources.[69] It further provides that there shall be exclusive consideration to Nigerian indigenous service companies which demonstrate ownership of equipment, Nigerian personnel and capacity to execute such work to bid on land and swamp operating areas of the Nigerian oil and gas industry for contracts and services contained in the schedule to the Act.[70] Compliance with the provisions of the Act and promotion of Nigerian content development shall be a major criterion for award of licences, permits and any other interest in bidding for oil exploration, production, transportation and development or any other operations in Nigerian Oil and Gas industry.[71]

In the bidding for any licence, permit or interest and before carrying out any project in the Nigerian oil and gas industry, an operator shall submit a Nigerian Content Plan ("the Plan") to the Board demonstrating compliance with the Nigerian content requirements of the Act.[72] The Nigerian Content Plan submitted must contain provisions intended to ensure that first consideration shall be given to services provided from within Nigeria and to goods manufactured in Nigeria; and Nigerians shall be given first consideration for training and

[68] Section 2, NOGICD Act.
[69] Ibid., Section 3(1).
[70] Section 3(2).
[71] Section 3(3).
[72] Section 7.

employment in the work programme for which the plan was submitted. Furthermore, any collective agreement entered into by the operator, project promoter or other body submitting the plan with any association of employees respecting terms and conditions of employment in the project shall contain provisions consistent with this section.[73] The Nigerian Content Development and Monitoring Board shall review and assess the plan and, if satisfied that the plan complies with the provisions of the Act, issue a Certificate of Authorization ("the Certificate') to the operator for that project.[74]

The essence of the foregoing is that every IOC going into a PSC arrangement with the NNPC in the oil and gas industry must first submit its Nigerian Content Plan to the Board, obtain the requisite Certificate of Authorization before bidding for the oil prospecting licence (OPL) that would entitle it to prospect for oil in the allotted contract area. ***Usman***[75] has interrogated the apparent leaning of the Act in favour of Nigerian players in the oil and gas industry as against their foreign counterparts. In his view, the provisions of the law are anything but fair to foreign investment. Put mildly, they are discriminatory against foreign investment contrary to the requirements of international economic law.[76] He however, justified the law by arguing that, looked at dispassionately and without prejudice, such discrimination is excusable on consideration that foreign investment in the Nigerian oil and gas industry had a head start that has given it economic of scales over and above indigenous oil companies. Unless the competition scales are slanted in favour of indigenous oil companies in the manner sought to be done by the local content Act, such companies stand no chance in the competition. Finally, he submitted that laws such as the NOGICD Act are driven by national interest objectives which exists in every nation.[77]

[73] Section 10.
[74] Section 8.
[75] Usman, A. K. op.cit. p. 46.
[76] Ibid.
[77] Ibid.

This research agrees with the above justification. Over the years, the IOCs have dominated the industry to the disadvantage of indigenous companies. The balance can hardly be struck if all the players were to be allowed equal playing ground. The focus of Nigerian content policy is not about 'Nigerianization' of the oil and gas industry, but rather 'domiciliation' of value adding activities in Nigeria. In fact, it has been said that prior to the enactment of the Act in 2010, there was less than 5% of Nigerian content in the oil and gas industry. The bulk of the annual oil and gas industry spend went to foreigners and foreign countries as materials/equipment fabrication and engineering design were procured from and done by foreigners.[78] As at 2017, the NOGICD Act has assisted in achieving an aggregate 26% Nigerian content level in the oil and gas industry.[79] The 5 year strategic plan (2016-2020) of the Nigerian Content Monitoring Board is premised on the key objective of achieving an aggregate of 50% Nigerian content level in the industry.[80] This research believes that the NOGICD Act is a useful piece of legislation particularly having regard to the massive job opportunities that its implementation have added to the economy.

4.3.5.1 The functions of the Nigerian Content Development and Monitoring Board

Generally, the functions of the Board shall be to –

(a) implement the provisions of the Act;

(b) implement the regulations made by the Minister in relation to any aspect of the Act;

(c) supervise, coordinate, administer, monitor and manage the development of Nigerian content in the Nigerian oil and gas industry;

[78] Umar, M. B.; *Nigerian Content Law, Philosophy and Practice*. A Paper presented at DPR Training on Oil and Gas Contracts in Nigeria organized by Habacuc Solicitors, held at Nicon Luxury Hotel, Abuja, from December 2-4, 2016, p. 4.
[79] Umar, M. B.; *Nigerian Content Law, Philosophy and Practice*. A Paper presented at DPR Training on Oil and Gas Contracts in Nigeria organized by Habacuc Solicitors, held at Radisson Blu Anchorage, Victoria Island, Lagos, from December 7-10, 2017, p. 14.
[80] Umar, M. B.; *Nigerian Content Law, Philosophy and Practice*. A Paper presented at DPR Training on Oil and Gas Contracts in Nigeria organized by Habacuc Solicitors, held at Nicon Luxury Hotel, Abuja, from December 2-4, 2016, p. 12.

(d) supervise, coordinate, administer and monitor the implementation and development of Nigerian content as specified in the Schedule to this Act in the operations of operators, contractors and all other entities in the Nigerian oil and gas industry;

(e) appraise, evaluate and approve the Nigerian content plans and reports submitted to the Board in compliance with the provisions of this Act;

(f) award Certificate of Authorization and conduct reviews of the Nigerian content plans and reports submitted to the Board in compliance with the provisions of this Act;

(g) administer and operate e-market place and Joint Qualifications Systems set up in accordance with the provisions of this Act;

(h) assist local contractors and Nigerian companies to develop their capabilities and capacities to further the attainment of the goal of developing Nigerian content in the Nigerian oil and gas industry;

(i) make procedures to guide the implementation of this Act and ensure compliance with all the provisions of this Act;

(j) monitor and coordinate the Nigerian content performance of all operators in accordance with the provisions of this Act;

(k) make auditing procedures and conduct regular audits for the purposes of monitoring and implementing compliances with the provisions of this Act;

(l) provide guidelines, definitions and measurement of Nigerian content and Nigerian content indicator to be utilized throughout the industry;

(m) conduct studies, researches and investigations that may further the attainment of the goal of developing Nigerian content in the Nigerian oil and gas industry;

(n) organize conferences, workshops, seminars, symposia, trainings, road shows and other public education fora to further the attainment of the goal of developing Nigerian content in the Nigerian oil and gas industry;

(o) delegate any of its functions to any agent or operative appointed by the Council; and

(p) do legally anything necessary to be done to facilitate the carrying out of its functions.[81]

It is submitted that the functions of the Board as above clearly locates its role as a veritable regulator of not only PSC operations but the entire oil and gas value chain in Nigeria. It remains to be added that the Board has a Governing Council (the Council) which conducts the affairs of the Board. The Head office of the Council and the Board shall be located in any of the Oil or gas producing States of the Federation. However, the Council may establish branch offices of the Board in any other oil or gas producing States.[82] The provision for the location of the Head office was perhaps inserted to address the long-standing agitations by oil and gas producing States calling for IOCs to relocate their corporate headquarters to their respective operational locations.

The Governing Council consists of-

(a) a Chairman who shall be the Minister of Petroleum Resources;

(b) a representative of-

(i) Nigerian National Petroleum Corporation,

(ii) the agency in charge of technical regulation of the industry,

(iii) Ministry of Petroleum Resources,

(iv) Petroleum Technology Association of Nigeria,

(v) Nigerian Content Consultative Forum,

(vi) Council of Registered Engineers of Nigeria,

(vii) National Insurance Commission; and

(c) Executive Secretary who shall be the Secretary of the Council.[83]

[81] Section 70, NOGICD Act.
[82] Section 71.
[83] Section 72.

The Chairman and members of the Council are appointed by the President and shall be persons of proven integrity and ability. The membership of the Council is on part time basis except the Executive Secretary who will be on full time status.[84]

4.3.5.2 Offences and penalties under the Nigerian Oil and Gas Industry Content Development Act

The NOGICD Act provides that an operator, contractor or sub-contractor who carries out any project contrary to the provisions of the Act, commits an offence and is liable upon conviction to a fine of five per cent of the project sum for each project in which the offence is committed or cancellation of the project.[85] This research submits that cancellation of the project is a preferable penalty regime. This is because, superficially, the fine of five percent of the project cost is a very ingenious offence and penalty regime. Fixing 5% of the project sum as the penalty for a breach of the Act will assist the Board to generate more income to carry out its functions. However, viewed carefully, it is doubtful if this punishment regime is stringent enough to deter potential offenders. A determined IOC or any operator whatsoever who believes that it can sacrifice 5% of the project cost as fine, will gleefully contravene the Act if, in his opinion, he stands to benefit more from such noncompliance. The closest and very apt instance here is the preference of the IOCs to pay fines for continuous gas flaring rather than recycle the gas for productive use which is considered far more expensive.[86]

The point being made is that tying the contravention of the Act to payment of a certain percentage of the contract sum as in the instant case can lead to a deliberate breach of the Act. An operator will simply do the cost and benefit analyses and if it finds that it will be more rewarding to breach the Act, the operator will deliberately do so. This is why this research recommends that the penalty should be reviewed to make for a more stringent

[84] Sections 73 and 74.
[85] Section 68.
[86] Ibekwe, R.; "*A Critical Appraisal of the Legal Regime for the Control of Gas Flaring in Nigeria*." https://nairametrics.com/Nigeria-gas-flaring/. Retrieved on 25/7/2018 at 9:40am.

punishment that will sufficiently serve as a deterrent to offenders. In this regard, ***Ajogwu and Nliam***[87] have advocated that fines, cancellation of the contract and custodial punishment for those responsible for the violation of the NOGICD Act will be more appropriate. The reason being that the Act is the only statute that deals with the economic and social empowerment of Nigerians by the oil and gas industry. It is the codification of social and economic aspects of sustainable oil and gas exploration and production. Consequently, strict compliance with the provisions of the Act will put Nigeria in the part to sustainable oil and gas exploration and production.[88] It is submitted that given the strategic importance of the NOGICD Act to the socio-economic empowerment of Nigerians, the penalty or punishment regime for noncompliance ought to be stringently and efficaciously teethed to compel strict compliance by the IOCs.

4.3.6 The Nigeria Extractive Industries Transparency Initiative (NEITI)

The Nigeria Extractive Industries Transparency Initiative (NEITI) is another important regulatory institution for PSCs and indeed, the entire extractive industry in Nigeria.[89] The governing body of the NEITI is known as the National Stakeholders Working Group (the NSWG). The NSWG is responsible for the formulation of policies, programmes and strategies for the implementation objectives and functions of the NEITI.[90] The NSWG is constituted by the President and consists of a Chairman and not more than 14 other members one of whom shall be the Executive Secretary. The membership includes representatives from the extractive industry companies; civil society, labour unions in the extractive industry;

[87] Ajogwu, F. and Nliam, O. (2014). *Petroleum Law & Sustainable Development*. Centre for Commercial Law Development. Lagos. p. 259.
[88] Ibid.
[89] Section 1, *Nigeria Extractive Industries Transparency Initiative Act*, (No. 36), 2007. The NEITI as a body was established under the Nigeria Extractive Industries Transparency Initiative Act, 2007.[89] The NEITI is an autonomous self-accounting body which reports to the President and the National Assembly. It is a body corporate with perpetual succession, a common seal and may sue or be sued in its corporate name and may acquire, hold and dispose of movable and immovable properties in the discharge of its functions under the constitutive Act.
[90] Section 5, NEITI Act.

experts in the extractive industry; and one member each from the six Geopolitical zones.[91] All the members of the NSWG are appointed for a 4 year term only and hold office on part time basis except the Executive Secretary who has a single 5 year term and serves on full time basis.[92]

The NEITI is the Nigerian arm of the Extractive Industrial Transparency International (EITI) which is a global accountability tool to check incidents of corruption and malfeasance in the extractive industry worldwide. The EITI was launched by the then United Kingdom Prime Minister, Mr. Tony Blair in 2002 at the World Summit on sustainable Development in Johannesburg, South Africa.[93]The EITI was born out of extensive intellectual discussions and lobbying by civil society groups and oil multinationals such as Global Witness, Publish What You Pay and British Petroleum, over the quagmire several oil-rich, but unfortunately development-deprived nations have found themselves. The UK government using the vehicle of the Department for International Development (DFID), was nudged to found the EITI at a conference in London in 2003. At the conference, 140 delegates from governments, companies and civil society groups agreed on twelve principles to increase transparency over payments and revenues in the extractive sector. Nigeria voluntarily signed on to the EITI in 2003 and started implementation in 2004. However, on 28th May, 2007, it enacted the NEITI Act to give statutory backing to its commitment to the global EITI.

4.3.6.1 The objectives of the Nigeria Extractive Industries Transparency **Initiative**

The primary objectives of the NEITI are as follows:

[91] Section 6, NEITI Act.
[92] Ibid.
[93] Adio, W., *Preventing and Enhancing Transparency and Accountability in the Management of Revenues from the Extractive Sector – the NEITI Experience*. A Paper presented at the Second Annual Conference of the Academics Stand Against Corruption (ASAC) held at the University of Lagos, Lagos on Thursday, September 8, 2016, p.3. (Waziri Adio was the Executive Secretary of NEITI).

a. to ensure due process and transparency in the payments made by all extractive industry companies to the Federal Government and statutory recipients;
b. to monitor and ensure accountability in the revenue receipts of the Federal Government from extractive industry companies;
c. to eliminate all forms of corrupt practices in the determination, payments, receipts and posting of revenues accruing to the Federal Government from extractive industry companies;
d. to ensure transparency and accountability by government in the application of resources from payments received from extractive industry companies; and
e. to ensure conformity with the principles of the Extractive Industries International.[94]

The objectives of the NEITI as above clearly shows that it is essentially an institution designed to inject the necessary transparency in the oil and gas industry in particular and the extractive industry generally. There is no doubt that secrecy is the breeding ground for corruption. The Nigerian petroleum industry has for many years been enmeshed in secrecy. The secrecy tradition has provided the necessary cover for corruption and all manner of malfeasance to thrive in the petroleum industry. This explains the primary objectives of the NEITI as a tool for transparency and ultimate reduction of corruption in the industry.

4.3.6.2 The functions of the Nigeria Extractive Industries Transparency **Initiative**

For the purpose of realizing its objective, the NEITI is required to perform the following functions:

a. develop a framework for transparency and accountability in the reporting and disclosure by all extractive industry companies of revenue due or paid to the Federal Government;

[94] Section 2, NEITI Act.

b. evaluate without prejudice to any relevant contractual obligations and sovereign obligations the practices of all extractive industry companies and governments respectively regarding acquisition of acreages, budgeting, contracting, materials procurement and production cost profile in order to ensure due process, transparency and accountability;

c. ensure transparency and accountability in the management of the investment of the Federal Government in all extractive industry companies;

d. obtain as may be deemed necessary, from any extractive industry company an accurate record of the cost of production and volumes of sale of oil, gas or other minerals extracted by the company at any period, provided that such information shall not be used in a manner prejudicial to the contractual obligation or proprietary interest of the extractive industry company;

e. request from any company in the extractive industry, or from any relevant organ of the Federal, State or Local Government, an accurate account of money paid by and received from the company at any period, as revenue accruing to the Federal Government from such company for that period; provided that such information shall not be used in a manner prejudicial to the contractual obligation or proprietary interests of the extractive industry company or sovereign obligations of Government;

f. monitor and ensure that all payments due to the Federal Government from all extractive industry companies, including taxes, royalties, dividends, bonuses, penalties, levies and such like, are dully made;

g. identify lapses and undertake measures that shall enhance the capacity of any relevant organ of the Federal, State or Local Government having statutory

responsibility to monitor revenue payments by all extractive industry companies to the Federal Government;

h. disseminate by way of publication of records, reports or otherwise any information concerning the revenue received by the Federal Government from all extractive industry companies, as it may consider necessary;

i. promote or undertake any other activity related to its functions and when, in its opinion, is calculated to help achieve its overall objectives as enumerated in section 2 of the Act; and

j. ensure that all fiscal allocation and statutory disbursement due from the Federal Government to the statutory recipients are duly made.[95]

The functions of the NEITI evidently empowers it to regulate and enforce transparency in the extractive industry generally and the operation of PSCs in the upstream petroleum industry in particular. As players in the upstream sector, the NEITI is statutorily empowered to demand PSC operators to open their books for the purpose of determining how much the IOCs have paid to the Government by way of royalties, taxes, bonuses and the likes. In practice, NEITI prepares and publically presents independent comprehensive Audit Reports conducted on the nation's extractive industries particularly the oil and gas industry.[96] The publication is in keeping with the requirement of the global Extractive Industries Initiative (EITI) which Nigeria is a signatory since 2003. Under this requirement, member countries are expected to publish on a regular basis audit reports to acquaint the citizens with current information and data on what companies paid to government in terms of royalties, taxes, levies, signature bonuses, rents, and make public what government received from the companies for their business with our natural resources. The NEITI appoints audit firms for

[95] Section 3, NEITI Act.
[96] Nigeria Extractive Industries Transparency Initiative (NEITI) Oil and Gas Industry Audit Report, 2013, presented to the public in June, 2016.

the purpose of preparing the reports and disseminates same to the President, National Assembly and the Auditor-General of the Federation.[97]

4.3.6.3 Offences and penalties under the Nigeria Extractive Industries Transparency Initiative Act

The NEITI Act makes elaborate provisions for various offences and their penalties for any violation. For instance, an extractive industry company which gives false information or report to the Federal Government or its agency regarding its volume or production, sales and income or renders false statement of account required under the Act to the Federal Government or its agencies, resulting in the underpayment or non-payment of revenue accruable to the Federal Government or statutory recipient commits an offence and is liable on conviction to a fine not less than ₦30,000,000.[98] Where the extractive industry company has been convicted of an offence in this regard, the court shall in addition to the prescribed fine, order the company to pay the actual amount of the revenue due to the Federal Government.[99]

Furthermore, an extractive industry company which delays or refuses to give information or report under the Act or willfully or negligently fails to perform its obligations under the Act, commits an offence and liable on conviction to a fine not less than ₦30,000,000.[100] However, without prejudice to the foregoing penalties, the President may on the recommendation of the National Stakeholders Working Group suspend or revoke the operational licence of any extractive industry company which fails to perform its obligations under the Act.[101]

[97] Section 4, NEITI Act.
[98] Section 16(1) NEITI Act.
[99] Section 16(2).
[100] Section 16(3) NEITI Act.
[101] Section 16(4)

The Act also makes provision for personal liability of Directors of extractive industry companies who collude or connive with the commission of any of the offences stipulated in the Act. It states that if any extractive industry company commits an offence against the Act, every Director or other persons concerned in the management of the company commits the offence and is liable on conviction to not less than 2 years imprisonment or a fine not less than ₦5,000,000 unless that person proves that the offence was committed without his consent or connivance and that he exercised all such diligence to prevent the commission of the offence as ought to have been exercised by him, having regard to the nature of his function in that company and to all the circumstances.[102] In the same vein, a government official who renders false statement of account or fails to render a statement of account required under the Act to the Federal Government or its agencies, resulting in the underpayment or non-payment of revenue accruable to the Federal Government or statutory recipient, commits an offence and is liable on conviction to not less than 2 years imprisonment or a fine not less than ₦ 5,000,000 unless that person proves that the offence was committed without his consent or connivance and that he exercised all such diligence to prevent the commission of the offence as ought to have been exercised by him, having regard to the nature of his function in that company and to all the circumstances.[103]

It is submitted that the offences and penalties regimes under the NEITI Act are quite stringent to compel compliance unlike the NOGICD Act.[104] Exposing the directors and those controlling the management of the guilty company to liability is a very ingenious provision that will compel compliance. The provision of fines and custodial punishments regimes also give a greater teeth to the Act sufficient to deter potential offenders. It is submitted that the

[102] Section 16(5)
[103] Section 16(6)
[104] cf: section 68, NOGICD Act.

National Assembly should take a cue from the NEITI Act and amend the penalty section of the NOGICD Act.

4.3.7 The Federal Inland Revenue Service

The Federal Inland Revenue Service (FIRS) was established under the Federal Inland Revenue Service (Establishment) Act, 2007.[105] The preamble describes it as an Act to provide for the establishment of the FIRS charged with powers of assessment, collection of, and accounting for revenues accruable to the Government of the Federation and for related matters. The FIRS is a body corporate with perpetual succession and a common seal. It may sue or be sued in its corporate name and may acquire, hold or dispose of any property, movable or immovable, for the purpose of carrying out any of its functions.[106]The object of the FIRS is to control and administer the different taxes and laws specified in the First Schedule or other laws made thereto or to be made, from time to time, by the National Assembly or other regulations made thereunder by the Government of the Federation and to account for all taxes collected.[107]

One of the tax laws specified in the First Schedule to the FIRS (Establishment) Act is Petroleum Profits Tax Act.[108]As discussed in Chapter three, the Petroleum Profits Tax Act is the principal fiscal legislation in the taxation of the profits of companies engaged in petroleum operations in Nigeria. The point being made is that the FIRS is responsible for the taxation of international oil companies (IOCs) engaged in production sharing contracts in Nigeria in that the constitutive Act vest the FIRS with the powers to administer tax laws generally. Given the importance of petroleum profits tax and the huge revenues accruing therefrom to the Federal Government, the role of the FIRS in this regard cannot be over

[105] Section 1(1), FIRS (Establishment) Act, No. 13, 2007. The Act commenced on 16th Day of April, 2007.
[106] Section 1(2), FIRS (Establishment) Act.
[107] Section 2, FIRS (Establishment) Act.
[108] Cap. P13, L.F.N. 2004.

emphasized as the agency responsible for the assessment and collection of such taxes from the IOCs.

4.3.7.1 The Functions of the Federal Inland Revenue Service

The FIRS has extensive functions under the constitutive Act. These functions require that the FIRS shall –

a. assess persons including companies, enterprises chargeable with tax;
b. assess, collect, account and enforce payment of taxes as may be due to the Government or any of its agencies;
c. collect, recover and pay to the designated account any tax under any provision of the act or any other enactment;
d. in collaboration with the relevant ministries and agencies, review the tax regimes and promote the application of tax revenues to stimulate economic activities and development;
e. in collaboration with the relevant law enforcements agencies, carry out the examination and investigation with a view to enforcing compliance with the provisions of the Act;
f. make, from time to time, a determination of the extent of financial loss and such other losses by the government arising from tax fraud or evasion and such other losses (or revenue forgone) arising from tax waivers and other related matters;
g. adopt measures to identify, trace, freeze, confiscate or seize proceeds derived from tax fraud or evasion;
h. adopt measures which includes compliance and regulatory actions, introduction and maintenance of investigative and control techniques on the detection and prevention of non-compliance;

i. collaborate and facilitate rapid exchange of information with relevant national or international agencies or bodies on tax matters;

j. undertake exchange of personnel or other experts with complementary agencies for purposes of comparative experience and capacity building;

k. establish and maintain a system for monitoring international dynamics of taxation in order to identify suspicious transactions and the perpetrators and other persons involved;

l. provide and maintain access to up to date adequate data and information on all taxable persons, individuals, corporate bodies or all agencies of government involved in the collection of revenue for the purpose of efficient, effective and correct tax administration and to prevent tax evasion or fraud;

m. maintain database, statistics, records and reports on persons, organizations, proceeds, properties, documents or other items or assets relating to tax administration including matters relating to waivers, fraud or evasion;

n. undertake and support research on similar measures with a view to stimulating economic development and determine the manifestation, extent, magnitude and effects of tax fraud, evasion and other matters that affect effective tax administration and make recommendations to the government on appropriate intervention and preventive measures;

o. collate and continually review all policies of the Federal government relating to taxation and revenue generation and undertake a systematic and progressive implementation of such policies;

p. liaise with the office of the Attorney-General of the Federation, all governmental security and law enforcement agencies and such other financial supervisory institutions in the enforcement and eradication of tax related offences;

q. issue taxpayer identification number to every taxable person in Nigeria in collaboration with States Boards of Internal Revenue and Local Government Councils;

r. carry out and sustain rigorous awareness and enlightenment campaigns on the benefits of tax compliance within and outside Nigeria;

s. carry out oversight functions over all taxes and levies accruable to the Government of the federation and as it may be required, query subpoena, sanction and reward any activities pertaining to the assessment, collection of and counting for revenues accruable to the Federation; and

t. carry out such other activities as are necessary or expedient for the full discharge of all or any of the functions under the Act.[109]

The foregoing functions of the FIRS are elaborate enough to guarantee a robust tax administration system in Nigeria. It is also important to emphasize that the FIRS has been doing quite a lot to generally widen the tax drag net in order to boost the revenue of the nation particularly during the recession. The FIRS is very vigilant and jealously guides its functions from external intrusion. This much was observed recently when the FIRS successfully sued some of the 1993 PSC IOCs (SNEPCO, AGIP, Eso E&P, Total E&P and Statoil) challenging their arbitration with the NNPC over disputes relating to tax matters arising from the operation of production sharing contracts. The pit of FIRS claim in the suit was that same touch on their functions as the agency of government solely in charge of tax collection and administration in Nigeria.[110]

[109] Section 8, FIRS (Establishment) Act.
[110] FIRS vs NNPC & 4 Ors. (2012) 6 T.L.R.N. 1. These cases are extensively reviewed in chapter 5 infra.

4.3.7.2 Tax administration by the Federal Inland Revenue Service

The Minister of Finance is at the apex of tax administration in Nigeria at the federal level.[111] This is because section 51 of the FIRS (Establishment) Act subjects the powers of the FIRS Board to the general direction of the Minister of Finance and any written direction, order or instruction given by the Minister in consultation with the Executive Chairman of the FIRS must be carried out by the FIRS Board. Regardless of the overarching powers of the Minister of Finance over the FIRS Board,[112] it retains enormous powers and functions. Therefore, the FIRS Board shall:

a. provide the general policy guidelines relating to the functions of the FIRS;
b. manage and superintend the policies of the FIRS on matters relating to the administration of the revenue assessment, collection and accounting system under the Act or any enactment or law;
c. review and approve the strategic plans of the FIRS;
d. employ and determine the terms and conditions of service including disciplinary measures of the employees of the FIRS;
e. stipulate remuneration, allowances, benefits and pensions of staff and employees in consultation with the National Salaries, Income and Wages Commission; and
f. do such other things which in its opinion are necessary to ensure the efficient performance of the functions of the FIRS under the Act.[113]

The FIRS has the power to administer all the tax laws in Nigeria and any other enactment or law on taxation in respect of which the National Assembly may confer power on the FIRS.[114] However, the FIRS may, with the approval of the Minister of Finance by

[111] Ipaye, A. (2014) *Nigerian Tax Law & Administration: A Critical Review*. SCO Prime Publishers. London, p. 61.
[112] Section 3(2) enumerates to composition of the FIRS Board.
[113] Section 7, FIRS (Establishment) Act
[114] Section 25(1), FIRS (Establishment) Act.

Instrument published in the Federal Gazette appoint any government agency to collect revenue pursuant to the powers of the FIRS.[115]This provision is intended to facilitate the ease of tax assessment and collection as well as the reduction of the burden of the FIRS.

Arogundade[116] has expressed the view that the PSC Act (the Deep Offshore and Inland Basin Production Sharing Contracts Act[117]) has assigned a passive role to the FIRS. The reason, in his view, is that the IOC is to prepare the operation account and to deliver same to the NNPC. The allowable costs are those approved by the NNPC. The NNPC is to advise the FIRS on the receipts to issue, based on the profit-split. He concluded that the Deep Offshore and Inland Basin Production Sharing Contracts Act does not give the FIRS the powers to determine the status of each party to the PSC agreement based on the substance of the agreement and that the input of the FIRS is irrelevant under the arrangement since the NNPC would have determined the allowable expenses and would have determined the applicable tax and lifted the equivalent crude before approaching FIRS for receipts.[118]This research does not subscribe to this view. The FIRS is a very important institution for the taxation of the PSC operations in Nigeria. This is because, even though the NNPC approves the allowable costs (deductions) for the IOCs, the NNPC does so based on the guidelines provided to the NNPC by the FIRS. The FIRS also provides clarifications in instances where the NNPC runs into difficulty in determining applicable tax regimes in the PSC operations.

One notable example in this regard occurred during the build up to the various arbitrations[119]initiated by the PSC IOCs against the NNPC over disputes arising from the operation of the 1993 PSCs. The then Secretary/Legal Adviser of the NNPC, Prof. Yinka

[115] Section 25(2), FIRS (Establishment) Act.
[116] Arogundade, J.A. (2010) *Nigerian Income Tax and Its International Dimension.* Spectrum Books, Ibadan, 2nd ed. p. 210.
[117] Cap D3, L.F.N., 2004.
[118] Arogundade, J.A. op,cit. pp.210-211.
[119] The issues raised in these arbitrations are extensively discussed in chapter 5 infra.

Omorogbe wrote[120] to the FIRS requesting its decision on PSC tax issues and the FIRS responded providing its positions on each of the issues highlighted such as timing of amortization of capital costs; investment tax credit; signature bonuses; loan interest and non-operator costs; amongst others.[121]It is important to mention that the response from the FIRS formed the fulcrum of the NNPC's defence at the arbitration tribunals. It, therefore, follows that the FIRS remains a very potent agency in the regulation of PSCs in Nigeria particularly as it relates to the taxation of profits thereof. It is submitted with respect, that it is erroneous and misleading to suggest that the role of the FIRS in the operation of PSCs in Nigeria is passive or otherwise dominated by the NNPC. What is rather correct is that both agencies collaborate for effective taxation of profits arising from PSCs and petroleum operations generally.

In summary, it is now abundantly clear that there are a number of legal and regulatory institutions for production sharing contracts in Nigeria. Each of these institutions has been examined substantially to provide ample guide for everyone engaged in the operation of PSCs in the upstream petroleum industry.

[120] NNPC letter to the Chairman of FIRS dated 19th February, 2010 captioned: "FIRS DECISION ON PRODUCTION SHARING CONTRACT TAX ISSUES" ref: CSLD40.
[121] FIRS letter signed by the former Director, Tax Policy, Mr. M.A.C. Dike, for the Executive Chairman dated 24th May, 2010, ref: FIRS/TP/GEN/146/Vol.1/126.

CHAPTER FIVE

PROSPECTS AND CHALLENGES IN THE OPERATION OF PRODUCTION SHARING CONTRACTS IN NIGERIA

5.1 Introduction

Production sharing contracts remain the petroleum arrangement of choice in many developing countries including Nigeria. In the case of Nigeria, the attractiveness of production sharing contracts especially in the deep water acreages has resulted into enormous issues and challenges. As at today, many disputes arising from the operation of PSCs have been determined by Arbitration Tribunals as well as the courts while many others are still pending before the various hierarchies of Nigerian courts. This chapter therefore, focuses on those issues and challenges that had arisen and determined by the various Arbitration Tribunals as well as the courts. It bears mention that though there were about five different Arbitrations[1] between the various IOCs and the NNPC over PSCs, particularly the 1993 PSCs, this research considers only two of such arbitrations[2] which this researcher was involved in at some point. It is however, important to emphasize that the issues in each of the arbitration proceedings were substantially the same. Therefore, the discussion of any of them suffices to present a fair account of the issues and challenges in the operation of PSCs in Nigeria.

It is in view of the foregoing that this chapter discusses the challenging clauses in the 1993 PSCs in Nigeria and the background to the disputes leading to the arbitration proceedings between Statoil Nig. Ltd and NNPC; the jurisdiction of arbitration Tribunal over tax disputes under PSCs; the concept of arbitration and arbitrability generally and the

[1] Esso E&P (Exxon Mobil) & Ors. vs NNPC; NAE (Agip) & Ors. vs NNPC; Total E & P (Elf) & Ors vs NNPC; SNEPCO (Shell) & Ors. vs NNPC; and Statoil Nig. Ltd. & Anor. vs NNPC.
[2] SNEPCO (Shell) & Ors. vs NNPC, and Statoil Nig. Ltd. & Anor. vs NNPC. These were the arbitrations that arose from the 1993 PSCs discussed in chapter two supra.

watershed decision of Bello J, in the case of *FIRS vs NNPC & 4 Ors*[3] to the effect that tax disputes are not arbitrable is extensively reviewed. Other issues considered relates to the dispute over costs consolidation as opposed to costs ring-fencing for recovery and petroleum profits tax purpose; claim to investment tax credit/allowance as well as interest on loans as allowable deduction for petroleum profits tax computations. Another subject discussed relates to the decision of the Federal High Courts on the operation of PSCs and a review of the proposed reform in the petroleum industry with particular reference to the Petroleum Industry Governance Bill. These are the focal points of discussion in this chapter.

5.2.1 Challenging Clauses in Production Sharing Contracts

As discussed in chapter two, the 1993 PSCs has a total of twenty-three clauses and five Annexes. Some of these clauses were manifestly ambiguous and capable of conflicting interpretations. The reason being that these contracts were drafted at a time when there was no clear Nigerian legislation regulating PSCs. In other words, the 1993 PSCs pre-dated the Deep Offshore and Inland Basin Production Sharing Contracts Act[4] (the Deep Offshore Act). The Deep Offshore Act was only promulgated in 1999 (six years after the contracts were signed) as a safeguard (and given retrospective force to January 1993) to provide statutory impetus to the tax stipulations in the 1993 PSCs and to complement the Petroleum Profits Tax Act.[5] Prior to the promulgation of the Deep Offshore Act, what constituted the fiscal regime applicable to the 1993 PSCs was a Side Letter signed by the then Hon. Secretary of Petroleum and Mineral Resources, Mr. P.C. Asiodu for and on behalf of the Federal Government of Nigeria. At that time, the principal fiscal legislation in the petroleum industry was the Petroleum Profits Tax Act which was understandably tailored for the traditional joint venture petroleum arrangements that was prevalent in Nigeria before the advent of PSCs.

[3] (2012) 6 T.L.R.N. 1
[4] Cap D3, L.F.N., 2004.
[5] Cap. P13, L.F.N. 2004.

Given the limited understanding of the operation of PSCs at the time, the Deep Offshore Act which sought to translate the terms of the PSCs into a statute, ended up complicating both the legal and fiscal regimes for PSCs in Nigeria. This failure on the part of the draftsman of the Deep Offshore Act is traceable to the reconciliation, integration and conceptual difficulties that arose as a result of the change from the joint venture arrangement to that of the PSCs in the development of the upstream petroleum industry in Nigeria. Some of the challenging clauses in the PSCs that fell for determination before the Arbitration Tribunals are discussed below beginning with the background of the dispute leading to the arbitration between Statoil Nig. Ltd and the NNPC.

5.2.2 Background of the dispute leading to the arbitration between Statoil Nig. Ltd & Anor v. NNPC over production sharing contracts

By a PSC (the OPL 217 Agbami field PSC) entered into on 18th May, 1993, Statoil Nig. Ltd together with BP Exploration Nig. Ltd[6] (the claimants) and NNPC (the respondent), the claimants were engaged to conduct petroleum operations in the area of Oil Prospecting Licence (OPL 217), deep offshore. Following the finding of oil in commercial quantities, OPL 217 was subsequently converted to Oil Mining Lease (OML128). The claimants and the respondent had also entered into other PSCs dated same 18th May, 1993 for OPLs 213 and 218. OPLs 213 and 218 were subsequently converted to OMLs 132 and 129 respectively. However, as at the time of the arbitration, only OML 128 has commenced commercial production of crude oil. The claimants and the respondent also entered into a memorandum of understanding entitled "Production Sharing Contracts for OPLs 213, 217 and 218

[6] BP Exploration Nig. Ltd however assigned all its interests in the assets to Texaco Nig. Outer Shelf Ltd (TNOS) by two separate deed of Assignment dated 27/3/1996 and 20/4/1999. The Arbitration was therefore between Statoil and TNOS on the one hand and the NNPC on the other hand.

Memorandum" also dated 18th May, 1993 to clarify and supplement the PSCs signed between the parties.[7]

The claimants' case was that since November 2010, the respondent had breached the OPL 217 Agbami PSC by denying the claimants of their entitlements to lift quantities of available crude oil (ACO) determined in accordance with the provisions of the PSC by unilaterally lifting ACO to which the respondent was not entitled. The claimants alleged that the respondent had deprived the claimants of funds which they were entitled to receive in order to recover their operating costs and enjoy their contractual share of the profits.[8]

As expected, the respondent opposed the claims of the claimants, raising both jurisdictional and substantive defences as well as a counter-claim. The respondent urged the Tribunal to decline jurisdiction as the subject matter in dispute is not arbitrable as it is concerned with matters that could have direct or indirect impact on taxation, which matters properly lie within the jurisdiction of the Federal Inland Revenue Service and the Federal High Court. The respondent also denied any breach of the OPL 217 Agbami PSC and asserted that it had not over lifted ACO. The respondent also counter-claimed against the claimants alleging that the claimants had infect, over lifted ACO and were in breach of the PSC.[9]

The area within which the contracts relates to is in the deep offshore, approximately 70 miles off the coast of the central Niger Delta region and is known as the Agbami field which straddles OML 127 and OML 128. The dispute arose from OML 128 designated as Track 2 of the Agbami field which is the exclusive source of oil production out of which the claimants 'and respondent's respective entitlements to lifting available crude oil and the allocation of proceeds generated from the sale thereof arise. The dispute between the

[7] The Award in the matter of an Arbitration between Statoil & Anor. vs NNPC dated 17th March, 2015 hereinafter referred to as the Statoil Award. p. 6.
[8] Ibid. p. 7
[9] Ibid.

claimants and the respondent in the main, concerns the parties' different interpretation of the entitlement to lift ACO under the PSC and consequent allocation of oil for the purpose set out in the PSC. The ACO is stored in floating production storage and offloading vessel in the Agbami field (the Agbami FPSO) and the lifting occurs when either the claimants or the respondent load ACO from the FPSO onto a crude oil tanker ship. It was not in dispute that the ACO and the proceeds from the sale of the ACO are to be shared by the parties in accordance to clause 8 of the PSC on the basis of: Royalty oil, cost oil, tax oil and profit oil.[10] Following the disagreements, the claimants commenced the arbitration by a Notice of Arbitration dated 23rd May, 2011. This set of facts gave rise to a number of issues for determination which are briefly reviewed below beginning with the issue of the jurisdiction of the Tribunal to determine tax matters.

5.2.2 Jurisdiction of the Arbitratio#n Tribunal[11]and Arbitrability of Tax Disputes under Production Sharing Contracts

Shortly after the exchange of pleadings in line with the Tribunal's procedural orders, on 21st June, 2012, the respondent, relying on two decisions of the Federal High Court[12] sought a suspension of the arbitration proceedings. This was vehemently opposed by the claimants on 25th June, 2012. The Tribunal considered the respondent's application and took the view that there was no need to stay or bifurcate the arbitration proceedings vide a response dated 3rd July, 2012. The respondent was dissatisfied with the decision of the Tribunal and therefore approached the Federal High Court,[13] Lagos for a judicial review of the Tribunal's refusal to stay or bifurcate the arbitration. The Court obliged the respondent and granted an interim order on 4th day of October, 2012 restraining the Tribunal from

[10] Ibid, pp. 16-18.
[11] The Arbitration Tribunal was composed of Prof. Lawrence Boo (Chairman), Lord Mark Saville of Newdigate and Prof. Paul Obo Idornigie, SAN.
[12] Suit No. FHC/ABJ/CS/774/2011 between *Federal Inland Revenue Service vs NNPC & 4 Ors* and Suit No. FHC/ABJ/CS/764/2011 between *FIRS vs NNPC & 2 Ors* reported in (2012) 6 T.L.R.N. 1.
[13] Suit No. FHC/L/CS/1043/2012 between *NNPC vs Statoil Nig. Limited & 4 Ors.*

proceeding with the Arbitration. The order of the Federal High Court in this regard compelled the Tribunal to suspend proceedings for a while.

In the meantime, the claimants appealed to the Court of Appeal,[14] Lagos division seeking an order of the Appellate Court to vacate the interim injunction. The Court of Appeal granted the claimants' relief and set aside the interim order by a judgment delivered on the 12th day of July, 2013. The Court of Appeal, ***per Akinbami, J.C.A***. held that it was unable to see what possible irreparable harm the respondent (NNPC) could have suffered and therefore concluded that the "interim injunction having been granted with the 1st Respondent's failure to satisfy preconditions for interim injunction is hereby set aside."[15]

Aggrieved by the decision of the Court of Appeal, the respondent further appealed to the Supreme Court[16]challenging the judgment of the Court of Appeal. The appeal to the Supreme Court is still pending and has not been determined. Notwithstanding the respondent's pending appeal at the Supreme Court, the parties met with the Tribunal in London on 5th September, 2013 and agreed to proceed with the Arbitration proceedings including the oral evidentiary hearing set for 21st – 25th April, 2014 in Abuja, Nigeria.[17]

After the hearing, the first issue the respondent raised before the Tribunal was the issue of jurisdiction and arbitrability of the tax disputes arising from the OPL 217 Agbami PSC. The main plank of the argument of the respondent in this regard was that the substantive issues arising from the dispute relates to Government revenue and taxation of petroleum operations in the upstream industry. In other words, the issue bordered on the amount of tax payable to the Government by the claimants and therefore, by virtue of section 251(1) (a) & (b) of the Constitution of the Federal Republic of Nigeria,[18] all matters relating

[14] Appeal No. CA/L/758/2012 between *Statoil Nig. Ltd & Texaco Nig. Outer Shelf Nig. Ltd vs NNPC & 3 Ors.*
[15] Judgment of the Court of Appeal in Appeal No. CA/L/758/2012, p. 12.
[16] SC/432/2013 between *NNPC vs Statoil Nig. Ltd & 4 Ors.*
[17] The Statoil Award, pp. 14-15.
[18] Cap C20, L.F.N., 2004 as amended.

to the revenue of the Government of the Federation or connected with the taxation of companies and other bodies established or carrying on business in Nigeria fall within the exclusive jurisdiction of the Federal High Court of Nigeria. The respondent, again relied on the decision of the Federal High Court (per Bello J.) in FIRS vs NNPC & 4 Ors[19] which decision states that tax matters are not arbitrable under Nigeria statute and case laws.

The Tribunal, by a majority decision[20]disagreed with the respondent noting as follows:

> In the Tribunal's view, what is legally due from the Parties to the Government by way of tax is indeed a matter to be determined exclusively by the Nigerian tax authorities (i.e. FIRS) and, if their assessment is challenged, by recourse to the Nigerian courts or the TAT. What is legally due by way of tax cannot therefore be determined by either this Tribunal or indeed (it is important to note) by either of the parties to this arbitration.
>
> It is not disputed that many of the issues in dispute in this arbitration do not relate to Nigerian tax legislation, the Parties differing in their views as to the meaning and effect of this legislation. It is however clearly misleading and quite wrong to conclude that the mere fact that the matters in dispute between the parties relate to tax issues would make the matters non-arbitrable. In the Tribunal's view, issues between any contracting parties often arise out of law, including statutory rights or liabilities. The mere fact that they so arise or are so related to tax issues does not make them non-arbitrable. The parties in a contract could agree or disagree between themselves on who should bear

[19] (2012) 6 T.L.R.N. 1. This suit is further reviewed below.
[20] 2 to 1, with Prof. Paul O. Idornigie dissenting.

certain tax liability and/or the extent thereof but that of itself would not make the subject matter non-arbitrable.[21]

Further in their decision, the Tribunal expressly disagreed with the decision of Bello J. in FIRS vs NNPC & 4 Ors[22] and emphasized that:

> It bears emphasizing that this Tribunal is concerned only with the contractual rights and obligations existing between the Parties to the 217 PSC, and with non of the rights and obligations existing between the Parties and the Nigeria tax authorities. No claim is being made for FIRS to re-calculate the tax it had already assessed in this arbitration…. For this reason, we do not accept that any of the disputes are properly to be described as "*tax matters*," or "*tax disputes*" (sic) in the sense that their resolution by this Tribunal will to any degree impinge upon either the amount of tax legally due from the Parties to the Nigerian tax authorities under Nigerian tax legislation or indeed the rights and obligations existing between the Parties to the 217 PSC on the one hand and the Nigeria tax authorities on the other.[23]

In conclusion, the Tribunal stated that:

> The Majority have read Professor Idornigie's views as set out in his Dissenting Opinion and with utmost respect, do not share his view that the Tribunal is bound by the FHC's decision in *FHC Judgment 774* (sic) (which in his view represents the current law of Nigeria) to hold that the Tribunal lacks jurisdiction. The Majority could see little by way of support from the decisions cited in his learned Dissenting Opinion and do not share his view that the matters in dispute are not arbitrable. The Tribunal therefore by majority, answers this issue in the affirmative and holds that the subject-matter in this arbitration is arbitrable. The Tribunal therefore concludes that it has jurisdiction to resolve the contractual disputes arising between the Parties to the 217 PSC.[24]

The decision of the Tribunal as above is clearly inconsistent with Nigerian case law authorities on the subject. It fails to take into account the very nature and concept of arbitration as a private dispute resolution mechanism for actions '*in personam'* and not '*in*

[21] The Statoil Award, pp. 42-43.
[22] Supra.
[23] The Statoil Award, pp. 43-44.
[24] Ibid. p. 45.

rem'. To properly situate the error in the decision of the Tribunal and for ease of understanding, it is apposite to consider the concept of arbitration and arbitrability and the case of FIRS vs NNPC & 4 Ors[25] which the Tribunal disagreed with in some details.

5.2.2(a) The concept of arbitration and arbitrability

The Supreme Court of Nigeria offered a very useful definition of Arbitration in the case of *NNPC vs Lutin Investment Limited & Anor.*[26] in the following terms:

> An arbitration is the reference of a dispute or difference between not less than two parties for determination, after hearing both sides in a judicial manner by a person or persons other than a court of competent jurisdiction. The arbitrator, who is not an umpire, has the jurisdiction to decide only what has been submitted to him by the parties for determination. If he decides something else, he will be acting outside his authority and consequently the whole of the arbitration proceedings will be null and void and of no effect. This will include any award he may subsequently make.

It is simply the reference of a dispute or difference between not less than two parties for determination, after hearing both sides in a judicial manner, by a person or persons other than a court of competent jurisdiction.[27] Indeed, it has been observed that arbitration and other peaceful, informal methods of dispute resolution predate the establishment of British-type courts in Nigeria.[28] The extant law governing arbitration in Nigeria is the Arbitration and Conciliation Act.[29]

Arbitrability simply means the quality of being capable of resolution by arbitration. In arbitration, a distinction is usually drawn between what type of disputes that are referable to arbitration and the scope of a particular reference.[30] This can be garnered from a number of

[25] Supra.
[26] (2006) 2 N.W.L.R. [Part 965] 506, @ 542-543, para G-A. Per Onnoghen, J.S.C.
[27] Halsbury's Laws of England, 3rd ed. Vol 2, Para 2.
[28] Etomi, G., (2014) *An Introduction to Commercial Law in Nigeria: Texts, Cases & Materials*. MIJ Professional Publishers, Lagos. p.350.
[29] Cap A18, L.F.N., 2004.
[30] Idornigie, P. O., (2015) *Commercial Arbitration Law and Practice in Nigeria*. Panaf Press, Abuja. p.106.

the provisions of the Arbitration and Conciliation Act,[31] the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Award[32] and the UNCITRAL Model Law on International Commercial Arbitration.[33] In *Kano State Urban Development Board vs Fanz Construction Company Limited,*[34] the Supreme Court enunciated the test for arbitrability under Nigerian law as follows:

> The dispute or difference which the parties to an arbitration agreement agree to refer must consist of a justiciable issue triable civilly. A fair test of this is whether the difference can be compromised lawfully by way of accord and satisfaction. Thus an indictment for an offence of a public nature cannot be the subject of an arbitration agreement, nor can disputes arising out of an illegal contract nor disputes arising under agreements void as being by way of gaming or wagering. Equally disputes leading up to change of status, such as a divorce petition, cannot be referred, nor, it seems, can any agreement purporting to give an arbitrator the right to give a judgment in rem. Similarly, there is no dispute within the meaning of an agreement to refer disputes where there is no controversy in being, as when a party admits liability but simply fails to pay, or when a cause of action has disappeared owing to the application, where it now continues to apply, of the maxim action personalis moritur cum persona.

In effect, none of the subject matters listed above by the Supreme Court can be resolved by arbitration. Arbitrability can be addressed from several perspectives. It can be scrutinized from the viewpoint of the subject matter, that is, what kind of dispute may be referred to arbitration.[35] It can also be scrutinized by drawing a line between common law and civil law families of law.[36] The subject of arbitrability is typically divided into 'subjective arbitrability'

[31] S.48(b)(i) which provides that a court may set aside an award in the event of a finding that the subject matter of the dispute is not capable of resolution by arbitration under Nigerian Laws. See also S.52 (2) (b) (i).
[32] Article II (1) and Article V (2) (a).
[33] Article 34(2) (b) (i) and Article 36(a) (b) (i).
[34] (1990) 4 N.W.L.R. (Pt.142) 1, at 32-33.
[35] Asouzu, A.A., (2001) International Arbitration and African States: Practice, Participation and Institutional Development. Cambridge University Press. Cambridge. p.154.
[36] Idornigie, P. O., Op.cit. Pp. 106-107

and 'objective arbitrability'.[37] Therefore, many jurist have written about how to determine what types of disputes are referable to arbitration. National legislation as well as case law are divergent but there seems to be consensus that the subject matter of the dispute determines arbitrability.[38] Generally, each country determines which matters may or may not be resolved by arbitration in accordance with its own political, social and economic policy. Therefore, even though tax disputes are not expressly mentioned by the Supreme Court in *Fanz Construction Company Ltd* case above, the category of arbitrability is not closed in Nigeria for public policy considerations is likely to widen the scope.[39] In the instant research, arbitrability is considered from the standpoint of subject matter, *id est*, tax disputes.[40]

5.2.2(b) Judicial attitude to arbitrability of tax disputes in Nigeria.

The facts of the case of ***Federal Inland Revenue Service v. NNPC & 4 Ors***[41] is extensively reproduced hereunder to clearly demonstrate the contested issue of arbitrability of tax disputes regardless of whether the issue arose from a binding and subsisting contract (PSC) between the NNPC and the IOCs, namely: (1) Shell Nigeria Exploration and Production Company Limited; (2) Esso Exploration and Production (Deep Water) Limited; (3) Nigeria Agip Exploration Limited and (4) Total Exploration and Production Nigeria Limited. The plaintiff commenced this suit by originating summons seeking the determination of three questions and upon determination of such questions, the plaintiff seeks for 6 reliefs. The questions are:

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[37] Fortier, Y.L., *Arbitrability of Disputes*. In: Aksen, G.; Bockstiegel, K. *et al* (ed.) International Law, Commerce and Dispute Resolution. Liber Amicorum in honour of Robert Briner. (International Chamber of Commerce). p.269.

[38] Idornigie, P.O. *The Principle of Arbitrability in Nigeria Revisited*. Journal of International Arbitration, Kluwer Law International (2004), Vol. 21, Issue 3, Pp.279-287.

[39] Idornigie, P.O., Ibid. P. 113

[40] Bielu, K.J. (2020). "Rethinking the Non-Arbitrability of Tax Disputes in Nigeria: Implications for Production Sharing Contracts." *Nnamdi Azikiwe University Journal of Commercial & Property Law (NAU.JCPL)* Vol. 7. No. 2. p. 56.

[41] (2012) 6 T.L.R.N. 1; other suits that sought similar reliefs are: *FIRS vs ESSO E & P (Exxon Mobil)* (2012) 6 T.L.R.N. 87; Suit No. FHC/AB/CS/766/2011- *FIRS vs NAE (AGIP) & Ors*. and Suit No. FHC/AB/CS/765/2011 *FIRS vs TOTAL E & P (ELF) & Ors*.

i. Whether the Arbitral Tribunal in the matter of arbitration between: (1) Shell Nigeria Exploration and Production Limited (2) Esso Exploration and Production Limited (3) Nigeria Agip Exploration Limited (4) Total E & P Nigeria Limited, AND Nigerian National Petroleum Corporation, has jurisdiction to determine the subject matter of Arbitration which deals with taxation of the defendants by the Federal Inland Revenue Service, which jurisdiction is conferred on the Federal High Court by section 251 of the Constitution of the Federal Republic of Nigeria, 1999 as amended;

ii. Whether the Arbitral Tribunal has jurisdiction to enter a valid award on the taxation of the defendants which will have a binding effect on the plaintiff in the interpretation of, application and administration of the Petroleum Profits Tax Act, and Company Income Tax Act, and any other statute for the time being in force in Nigeria, as to entitle the plaintiff to seek reliefs being sought by this suit;

iii. Whether upon a proper reading of section 251(1) (u) of the Constitution of the Federal Republic of Nigeria 1999 (as amended) the questions in dispute raised regarding the operation of Production Sharing Contracts the subject matter of the dispute between the parties therein is not within the exclusive jurisdiction of the Federal High Court and there by rendering the entire purported arbitral proceedings unconstitutional, null and void '*ab-initio'*.

The 6 reliefs as set out in the originating summons were as follows:

1. A declaration that the claim of the 2nd to 5th defendants touching on taxation upon which the reference has been made to arbitration is not one which is allowed by law to be settled by Arbitration;

2. A declaration that the determination or claim by way of award before the said Arbitration will infringe on the right of the plaintiff/applicant to assess and collect tax and generate revenue for the Federal Government of Nigeria;

3. A declaration that the reference of the claim of the other defendants against the 1st defendant upon which terms reference has been made to Arbitration is contrary to public policy;

4. An order in addition to, or in alternative to (2) above revoking the Arbitration clause in so far as it relates to taxation or in the alternative an order excluding taxation and matters related thereto from the ambit of the arbitral agreement between the defendants;

5. An order restraining the defendants by themselves, servants, agents or Counsel from continuing with, or purporting to take any benefit from or abiding by any obligations or rights no matter howsoever described or arising from the arbitral proceedings or awards made pursuant thereto;

6. A declaration that the Arbitration provisions in the Production Sharing Contract and the defendants' submission to an Arbitration on matters exclusively reserved for the Federal High Court is unconstitutional, null, void and of no effect.

Upon being served with the originating summons, the 2nd – 5th defendants filed a Notice of Preliminary Objection challenging the jurisdiction of the Federal High Court to hear the suit as constituted as well as their counter affidavit and written address to the substantive suit. The 2nd – 5th defendants sought the following orders in their notice of preliminary objection:

a. An order that this honourable court lacks jurisdiction to entertain this suit;

b. an order that the plaintiff's suit as constituted is incompetent;

c. An order striking out this suit *in limine* for lack of jurisdiction and or lack of competence.

ALTERNATIVELY:

a. An order of this court refusing to exercise jurisdiction in this matter.

The grounds upon which the application was predicated were as follows:

1. The plaintiff has no locus standi to maintain this action because:
    a. the outcome of the arbitration proceedings which the plaintiff now challenges before this honourable court will in no way affect any interest, duty and obligation of the plaintiff herein at all;
    b. the plaintiff herein is not party to the arbitration proceedings and none of the reliefs sought in the arbitration proceedings relates to the plaintiff herein in any way whatsoever;
    c. the outcome of the arbitration proceedings (i.e. the eventual final Arbitral Award) will not and cannot bind the Plaintiff herein;
    d. the orders sought in the arbitration proceedings are purely contractual reliefs/remedies against the Nigeria National Petroleum Corporation (NNPC) pursuant to the Production Sharing Contract (PSC) executed between parties to the arbitration.

a. In consequence of Ground 1, the Federal High Court lacks jurisdiction to entertain the plaintiff's suit because the plaintiff lacks locus standi to maintain the suit. Issue of locus standi is sine qua non to court's assumption of jurisdiction;

b. The present suit by the plaintiff is an invitation to the Federal High Court to meddle into contractual matters between the 1st defendant (NNPC) and the 2nd to 5th defendants herein. The Federal High Court lacks the jurisdiction to entertain and or meddle into pure contractual matters.

c. The dispute submitted to arbitration are pure contractual matters/issues;

d. The issue before the arbitration has nothing to do with taxation of companies under Section 251(1) (b) of the 1999 Constitution. The life issues in the arbitration has nothing to do with mine and minerals as contemplated under Section 251(1) (n) of the 1999 Constitution. The payment, non-payment or the extent of what is accruable to the plaintiff (FIRS) do not arise in the arbitration;

e. The Federal High Court has no jurisdiction to meddle into matters of pure contract.

f. The plaintiff's suit is anticipatory, speculative pre-emptive and premature and thus incompetent:

g. The plaintiff originating summons failed to disclose any real or actual breach or threatened breach or interference with the powers, functions or obligations of the plaintiff under the law;

h. The plaintiff's originating summons failed to disclose how the outcome of the arbitration proceedings will affect it in the discharge of its statutory duties;

i. There is nothing in the plaintiff's originating summons to indicate that any of the parties in the arbitration has used or intended to use the result of the arbitration proceedings to evade any obligation owing to the plaintiff herein or at all.

The court heard arguments on the preliminary objection and the substantive suit together. The court dismissed the preliminary objection and found for the plaintiff. In holding that tax disputes are not arbitrable, his lordship made a very instructive decision which are largely reproduced below for evidential value:

> Looking at the above reliefs, I will say that shorn of all pretenses, the issues in dispute between, the claimants and the 1st defendant which were submitted to Arbitration arose out of the alleged breaches by NNPC of the Agreement in lifting tax oil based on its assessment of the taxes payable to the plaintiff and by extension to the Federal Government of Nigeria, instead of using tax returns sent to it for filing by the Contractor. So for

> all intents and purposes the claim of the Claimants before the Arbitration is in effect for a refund of all over paid taxes paid by NNPC on behalf of the 2nd -5th Defendants, through what they allege as over lifting of tax oil by which means all taxes accruable to the Federal Government are paid.[42]

On whether it is of any moment in the arbitrability of tax disputes if the dispute arose out of a valid and subsisting contract, the court emphasized that:

> While it is conceded that parties are bound by the sanctity of their contract and the issues in dispute arose out of the Contract Agreement (PSC) the question still remains whether parties can by all agreement purport to confer jurisdiction on an Arbitral Tribunal to determine issues relating to taxation of companies or connected with the Federal Government Revenue when such jurisdiction is exclusively conferred on this Court by the Constitution of the Federal Republic of Nigeria. The answer I must say is an emphatic No. In other words, the Constitution of the Federal Republic of Nigeria precludes any other court in Nigeria other than the Federal High Court, not to talk of an inferior Arbitration Tribunal, from exercising jurisdiction over tax matters relating to the Federal Government Revenue. I agree entirely with the plaintiff that any determination of the issues raised in the claimants' claim before the Arbitration Tribunal will impact negatively and will not only infringe on the functions and duties of the plaintiff but will adversely affect the revenue that would accrue and or/ had accrued to the Federal Government of Nigeria.[43]

His lordship called in aid a decided case in Uganda by the Hon. Lady Justice Hellen Obura and the writings of the famous Professor D.J. Bakibinga of Uganda in his Book titled "Revenue Law in Uganda when he concluded thus:

> It is against this backdrop that I am persuaded by the decision of the Uganda Commercial Court in the case of Heritage Oil and Gas Ltd v. Uganda Revenue Authority in Civil Appeal No. 14 of 2011 (2011) UG Comm C97 delivered on 13th September, 2011) cited and supplied by the learned Senior Counsel for the 1st Defendant….
>
> The above is the strong statement of the law in Uganda on the issues of Taxation and I believe that as it is in Uganda so it is in Nigeria, the issues of Tax are statutory and in the case at hand,

[42] FIRS vs NNPC & 4 Ors (2012) 6 T.L.R.N. 1, pp. 44-45.
[43] Ibid. p. 45

> they form part of the terms and conditions of the PSA (sic) and the PSA is anchored on the laws of Nigeria and the laws of Nigeria are explicit on the forum for resolution of Tax disputes and Arbitration is not one of them. To the contrary the Constitution which is the ground (sic) norm confers exclusive jurisdiction on tax matters and revenue of the Federal Government of Nigeria on the Federal High Court. It is not therefore intended by the Constitution of the Federal Republic of Nigeria that issues of taxation or tax matters should go to arbitration. I hold that such matters are not arbitrable.[44]

The *ratio decidendi* of this case is explicit. It is a judicial affirmation that tax disputes are not arbitrable under Nigerian law notwithstanding that such disputes arose from a valid and subsisting contract. It is instructive to emphasize that two of the appeals by some of the defendants against the judgment has since been dismissed by the Court of Appeal.[45]The Court of Appeal, per ***Yahaya, J.C.A.*** whilst re-echoing the exclusive jurisdiction of the Federal High Court (as opposed to an arbitration Tribunal) as it relates to revenue of the Federal Government and taxation of companies pursuant to section 251 (1) (a) & (b) of the Constitution held as follows:

> The above provision is a clear spelling, that when it comes to the revenue of the Government of Nigeria or its organ and on matters pertaining to taxation of companies and other bodies carrying on business in Nigeria, it is the Federal High court that has exclusive jurisdiction to adjudicate upon same. There is no dispute about it. Therefore, the claim filed before the Tribunal, being substantially tax disputes, the tribunal would not have jurisdiction to pronounce upon them, as they are not arbitrable.[46]

However, in another appeal filed by the 2nd defendant,[47] the same Court of Appeal, per ***Agim, J.C.A*** (as he then was) disagreed with the earlier decisions of his learned brothers when he held as follows:

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[44] Ibid. p. 45-47

[45] *Appeal No. CA/A/208/2012 – SNEPCO & 3 ORS. vs FIRS & NNPC***.,** per Abubakar Datti Yahaya, JCA, judgment of which was delivered on Wednesday, 31st August, 2016 just like *Appeal No. CA/A/235/2012- Statoil Nig. Ltd & Anor. vs FIRS & NNPC*. (2014) LPELR-23144 (CA), per Joseph Tine Tur, JCA, judgment of which was delivered on Friday, 13th June, 2014.

[46] *Appeal No. CA/A/208/2012 – SNEPCO & 3 ORS. vs FIRS & NNPC., p. 37.*

[47] Esso Exp. & Prod. (Nig.) Ltd vs F.I.R.S. (2021) 8 N.W.L.R. [Pt. 1777] 43.

> "This court in Esso Exploration and Production (Nig) Ltd & anor v. NNPC (sic) (Judgment in CA/A/507/2012 on 22-7-2016) and in Shell Nigeria Exploration and Production & Ors v. F.I.R.S. & anor judgment in CA/A/208/2012 ON 31-8-2016) (sic) held on the basis of the claims before the Arbitral Tribunal in each case that are in substance similar to the arbitration claims in our present case that the disputes were "centrally and effectively tax matters." With due respects to that very distinguished panel of erudite Justices of this court, I think that, this part of the judgments of this court in those cases were reached *per incuriam* for the reasons stated above. Therefore, I refuse to be bound by it. The dispute is basically contractual in nature."[48]

Even though the appellants have further appealed to the Supreme Court, the decision of the Federal High Court arguably remains the law until the Supreme Court determines one way or the other. This is particularly so having regard to the conflicting decisions of the Court of Appeal. Until that happens, it suffices to state that the arbitration Tribunal was evidently in error when it assumed jurisdiction regardless of the clear position of the extant Nigerian statute and case laws on non-arbitrability of tax disputes.

5.2.3 Costs Consolidation as Opposed to Costs Ring-Fencing for Costs Recovery and Petroleum Profits Tax Purposes

One significant problem with the recent amendment of the Deep Offshore and Inland Basin Production Sharing Contracts Act[49] is that the limited amendment of the principal Act, that is, the Deep Offshore and Inland Basin Production Sharing Contracts (Amendment) Act, 2019 did not address the problem of cost consolidation as opposed to cost ring-fencing for cost recovery purposes in the operation of PSCs in Nigeria. The issue of costs consolidation and costs ring-fencing as it relates to costs recovery and petroleum profits tax computations was one of the burning issues that fell for determination before the Arbitration Tribunal in the Statoil Nig. Ltd & Anor v. NNPC arbitration over OML 128. The issues specifically arose

[48] Ibid.pp.98-99, paras H-A.
[49] Cap D3 L.F.N. 2004. (the principal Act).

from the provisions of Clauses 8.1(b) and 8.1(e) of the OPL 217 Agbami 1993 PSC executed between the NNPC and Statoil Nig. Ltd. The prelude to this dispute was that as at the time of negotiating the 1993 PSCs, there was prevailing uncertainties of finding petroleum in commercial quantities at the Nigerian deep offshore acreages. In other words, prior to the execution of the 1993 PSCs, neither the IOCs nor the NNPC was sure that there would be a successful exploration of petroleum in the deep water frontiers of Nigeria. Therefore, to increase the prospects of the IOCs to find petroleum in the deep offshore acreages, the Government granted several Oil Prospecting Licences (OPLs) to each of the IOCs in the expectation that at least, one of the OPLs would yield a commercial petroleum discovery and thus metamorphose into Oil Mining Lease (OML). In the case of Statoil Nig. Ltd, the Government granted three OPLs namely, OPLs 213, 217, and 218. Out of the three OPLs, only OPL 217 was in commercial production of petroleum at the time of the arbitration and was, therefore, converted to and known as OML 128, (the sole producing field). The fulcrum of the dispute was whether all the OPLs 213, 217 and 218 can be consolidated for costs recovery and tax purposes or whether they would be treated as distinct and independent of each other for costs recovery and tax purposes. Each of these issues are discussed in some details below:

5.2.3a Consolidation as opposed to ring-fencing for cost recovery pursuant to clause 8.1(b) of the 1993 production sharing contracts

First, it bears repeating that one fundamental feature of a PSC is that the Contractor (the IOC) exclusively bears the entire costs and risk of prospecting for petroleum in the assigned Contract Area but the IOC is subsequently reimbursed upon a commercial discovery of petroleum. The reimbursement is done by allocation of Cost oil and not necessarily cash. The contention of the claimants (Statoil Nig. Ltd and Texaco Outer Shelfs Nig. Ltd), on the bases of clause 8.1(b) of the OPL 217 Agbami PSC was that they (the claimants) were entitled to

recover all operating costs (allocation of Cost oil) incurred in oil prospecting activities in OPLs 213, and 218 (where there was no commercial production of petroleum as at the time of the arbitration) from OML 128, the only producing field. The claimants argued that they are entitled to the allocation of cost oil "in such quantum as will generate an amount of proceeds sufficient for recovery of Operating Costs in OPL 213, 217, and 218" from the sole OML 128 derived therefrom. This claim is technically known as Costs Consolidation or Unitization[50] for costs recovery purposes. The text of Clause 8.1(b) of the PSC which the claimants relied on provides thus:

> The allocation of Available Crude Oil shall be in accordance with the Accounting Procedure (annex B), the Allocation Procedure (Annex C) and this Clause 8 as follows:
> (a) ….
> (b) Cost Oil shall be allocated to the CONTRACTOR (sic) in such quantum as will generate an amount of Proceeds sufficient for recovery of Operating Costs in OPL 213, 217, and 218 and any OMLs derived therefrom. All operating Costs expended in U.S Dollars or in U.S. Dollar equivalent will be recovered in U.S Dollars through Costs Oil allocations.

The NNPC (the respondent) on the other hand, opposed the position adopted by the claimants. The respondent took the view that each of the OPLs 213, 217, and 218 was distinct and independent contracts and, therefore, the operating costs incurred in any of the OPLs cannot be recovered from another OPL other than the same where the costs was incurred. In effect, the respondent contended that cost incurred in oil prospecting activities conducted in OPLs 213 and 218 cannot be recovered from OML 128, which flowed from OPL 217. This position of the respondent is known as Cost Ring-fencing.[51] The position of the respondent is that the claimants are to exclusively bear their losses on the costs expended in prospecting OPLs 213 and 218. The claimants are only entitled to recover costs incurred in prospecting OPL 217 from OML128 being the OML derived from OPL 217. The respondent took the

[50] Johnston, D. (1994) *International Petroleum Fiscal Systems and Production Sharing Contracts*. Ponwell Books. Tulsa, Oklahoma. p. 69.
[51] Ibid. p. 68.

view that permitting the claimants to consolidate costs for recovery purposes would in effect, be to grant a tax incentive to the claimants, a power which the parties could not have in the absence of an express provision of Nigerian law.

The respondent relied on Section 8 of the Deep Offshore and Inland Basin Production Sharing Contracts Act (the Deep Offshore Act) and Clause 1(v) of the PSC in support of their submissions. Section 8 of the Deep Offshore Act provides that "Cost Oil shall be allocated to the contractor in such quantum as shall generate an amount of proceeds sufficient for the recovery of operating costs in oil prospecting licenses as defined in the Production Sharing Contracts and any Oil Mining Leases derived therefrom." Clause 1(v), the definition clause of the PSC defines Oil Prospecting License (OPL) to "mean a license granted by the Minister under the Petroleum Act 1969 Cap 350, Laws of the Federation of Nigeria 1990 as amended, to a licensee to prospect for petroleum." The respondent argued that the word "a license" necessarily means that the area within which the licensee is permitted to explore oil is limited to that specific Contract Area and that costs recovery must necessarily also be limited to costs incurred within that Contract Area.

The Tribunal reviewed the arguments of the parties and noted that it is unable to see how Clause 8.1(b) of the PSC could be construed as a tax incentive for the claimants and that what the parties have done in this instance was to agree as between themselves that the claimants could recover their costs incurred in the other OPLs they were involved in (namely OPLs 213 and 218) or from any of the "OMLs derived therefrom."[52] Furthermore, the Tribunal agreed with the respondent that the licence to explore for oil under a prospecting licence must necessarily be limited to the Contract Area as defined within the PSC but it took the view that the limitation does not extend to the right to recover operating Costs as Section 8(2) of the

[52] The Statoil Award, pp. 51-52, para. 130.

Deep Offshore Act (which has precedence over the PPT Act[53]) specifically provides that: "All operating costs shall be recovered in U.S. Dollars through cost oil allocations in accordance with the terms of the production sharing contract."[54] Consequently, the Tribunal concluded as follows:

> Section 8.2 of the DOA (sic) read with Clause 8.1(b) of the 217 PSC, which extends the recovery of Operation Costs to operating Costs incurred in OPLs 213 and 218 and "any OMLs derived therefrom" in the Tribunal's view squarely justifies the basis for which the Claimants have made their claim for cost recovery…. The Tribunal therefore holds that the Claimants are entitled to claim for Operating Costs incurred in OPL 217 as well as OPL 213 and 218 and the OMLs derived therefrom, subject only that there shall not be double or multiple recovery of such costs.[55]

This research takes the view that the above decision of the Tribunal is correct in the light of the extant Nigerian legislation on which the decision was reached. However, it is submitted that the decision clearly negates the fundamental feature and principle of production sharing contracts to the effect that the IOC bears the entire risk in the event of drilling a dry hole under a PSC arrangement. The PSC contractor is only entitled to cost oil (reimbursement) upon discovering petroleum in commercial quantities. Where he fails to successfully prospect oil, the IOC walks away with all the losses with no reimbursement whatsoever.[56]

Ordinarily, each oil block (OPL) is ring-fenced and therefore, all costs associated with a given block or OPL must be recovered from revenues generated within that block (OPL). Each of the OPLs 213, 217 and 218 clearly relate to a select Contract Area specified in each of the respective PSCs. The natural and necessary implication, therefore, is that recovery of operating costs incurred in prospecting for oil in any of the OPLs must be ring-fenced

[53] Section 15(2), *Deep Offshore and Inland Basin Production Sharing Contracts Act.*
[54] The Statoil Award, p.52, para 132.
[55] Ibid. pp. 52-53, paras 133 &135.
[56] Johnston, D. (1994). *International Petroleum Fiscal Systems and Production Sharing Contracts*. Ponwell Books. Tulsa, Oklahoma, p.310; Jennings, A., (2002) *Oil and Gas Exploration Contracts*. Sweet & Maxwell Ltd. London, p. 5.

(limited) to the OML derived from the particular OPL in which the operating cost was incurred. Whilst this ought to be the position, unfortunately, the extant Nigerian law, particularly section 8(2) of the Deep Offshore Act expressly widens the scope of recovery of operating cost thus paving way for consolidation or allowing for costs to cross a ring-fence to the other OPLs. In fact, it has been said that this is not a popular direction for governments because of the risky nature of petroleum exploration.[57] The economic implication of this is that the Nigeria Government is subsidizing or fully bearing the cost of unsuccessful petroleum prospecting operations. It is submitted that it could not have been the honest expectation or intention of the Nigerian government to subsidize or bear the cost of unsuccessful petroleum activities on behalf of the IOCs.

The Tribunal confirmed this much when it agreed with the respondent (NNPC) that the licence to explore for oil under a prospecting licence (OPL) must necessarily be limited to the Contract Area as defined within the PSC. However, the Tribunal emphasized that the limitation does not extend to the right to recover operating Costs as section 8(2) of the Deep Offshore Act specifically provides that: "all operating costs shall be recovered in U.S. Dollars through cost oil allocations in accordance with the terms of the production sharing contract." The relevant terms of the Production Sharing Contract that allows for cost consolidation for cost recovery purposes is Clause 8.1(b) of the 1993 PSCs. In effect, the extant Statute (the Deep Offshore Act, Section 8(2) thereof) has given statutory backing to costs consolidation for recovery purposes and therefore, the Tribunal merely gave effect to our law as it were. This explains why this research puts the blame squarely on the uncertainty that affects the extant law on this issue and not the Tribunal. This is why this research considers the omission of the National Assembly to amend Section 8(1) & (2) of the principal Act as a missed opportunity. It is, therefore, submitted that the Deep Offshore Act should be further amended

[57] Johnston, D., Op.cit. p. 69.

to cure the manifest anomaly to properly enthrone cost ring-fencing and limit cost recoverability to the select Contract Area in line with global practice.

5.2.3b Consolidation as opposed to ring fencing for tax purposes pursuant to clause 8.1(e) of the OPL 217 Agbami production sharing contract

The issue under this subhead was whether petroleum profits tax (PPT) can be calculated and Tax Oil allocated on the basis that costs (capital and non-capital) of both producing and non-producing fields of the OPLs and OMLs could be aggregated for ascertaining PPT liability. In simple terms, the issue was whether the costs incurred in prospecting OPLs 213, and 218 could be consolidated in ascertaining the PPT liability of the claimants under the sole producing OML 128 derived from OPL 217. This issue specifically arose from Clause 8.1(e) of the PSC which provides that: "The CONTRACTOR shall for PPT (sic) purposes be entitled to consolidate OPLs 213, 217, and 218 and any OMLs derived therefrom."

The claimants relied on Clause 8.1(e) of the PSC and section 9 of the Petroleum Profits Tax Act[58] to claim that they have both contractual and legal right to consolidate OPLs 213, 217 and 218 and any OMLs derived therefrom for PPT purposes. The text of section 9 of the Petroleum Profits Tax Act is reproduced here for ease of reference:

> Ascertainment of profits, adjusted profit, assessable profits and chargeable profits
> (1)Subject to any express provision of this Act, in relation to any accounting period, the profits of that period of a company shall be taken to be the aggregate of -
> (d) the proceeds of sale of all chargeable oil sold by the company in that period;
> (e) the value of all chargeable oil disposed of by the company in that period;
> (f) all income of the company of that period incidental to and arising from any one or more of its petroleum operations.[59]

[58] Cap P13, L.F.N., 2004.
[59] Section 9(1), *Petroleum Profits Tax Act.*

(2) For the purpose of subsection (1) (b) of this section, the value of any chargeable oil so disposed of shall be taken to be the aggregate of:

(d) the value of that oil as determined, for the purpose of royalty, in accordance with the provisions of any enactment applicable thereto and any financial agreement or arrangement between the Federal Government of Nigeria and the company;

(e) any cost of extraction of that oil in determining its value, and

(f) any cost incurred by the company in transportation and storage of that oil between the field of production and the place of its disposal.[60]

A combined reading of section 9 of the PPT Act and Clause 8.1(e) of the PSC unmistakably justifies the position of the claimants. The respondent on its part could not dispute that Clause 8.1(e) of the PSC expressly grants a contractual right to the claimants to consolidate OPLs 213, 217 and 218 and any OMLs derived therefrom for PPT purposes but it however, took the position that the clause purports to grant tax incentive which must be provided for expressly by law and that parties could not, by contract, seek to grant tax incentives as the parties have no power to do so. The respondent concluded that clause 8.1(e) is therefore of no relevance in the absence of an enabling statute.[61] The respondent submitted that section 3 of the Deep Offshore Act, section 22(3) of the PPT Act read together with Clause 1 of the PSC (which defines a Contract Area) makes it impossible to arrive at the interpretation, as given by the claimants, that clause 8.1(e) of the PSC permits such consolidation for tax purposes.[62]

The relevant statutes relied on by the respondent are sections 22(3) of the PPT Act and section 3 of the Deep Offshore Act. Section 22(3), PPT Act provides that "In computing the tax payable, the investment tax credit shall be applicable in full to petroleum operations in the contract area such that the chargeable tax is the amount of the assessable tax less the investment tax credit."

On the other hand, Section 3 of the Deep Offshore Act provides:

[60] Ibid. Section 9(2).
[61] The Statoil Award, p. 62, para 168.
[62] Ibid. p. 63.

> 3(1) The petroleum profits tax payable under a production sharing contract shall be determined in accordance with the Petroleum Profits Tax Act: Provided that the petroleum profits tax applicable to the contract area as defined in the production sharing contracts shall be 50 per cent flat rate of chargeable profits for the duration of the production sharing contracts.
> (2) Nothing contained in this Act shall be construed as having exempted the contractors from the payment of any other taxes, duties or levies imposed by any Federal, State or local government, or Area Council Authority.

Considering the foregoing statutory authorities relied upon by the respondent, the point being made is that the use of the term "Contract Area" necessarily limits the claims for any tax incentives to the "Contract Area" which as defined in the select PSC would only be OPL 217 and any OML derived that OPL which is OML 128 and not beyond. Regarding the express provision for consolidation for PPT purposes in section 9 of the PPT Act, the respondent admitted same but contended that this was intended for joint venture petroleum arrangements and was not applicable to PSCs operations. The respondent argued that the availability for consolidation is to allow the participating company that seeks to file its independent tax return to aggregate all its operations under one corporate filing. The respondent stated that this situation cannot apply to a PSC arrangement where tax returns are filed based on the Contract Area as defined in the PSC and that the consolidation in section 9 of the PPT Act seeks to aggregate the interest of a company and not in a specific participating field. The respondent emphasized that the Deep offshore Act and the PPT Act expressly outlawed consolidation with respect to PSCs.[63]

Ruling on the submissions of the parties, the Tribunal noted that there does not appear to be any provision of the Deep Offshore Act and the PPT Act which suggests, much less prohibits or outlaws, or even refers to any of the provisions in the PSC as being considered unlawful. The Tribunal referred to the long title to the Deep Offshore Act and concluded as follows:

[63] Ibid. p. 64, paras 173 & 174.

> Again, it is worth reminding ourselves that the DOA (sic) is intended to give effect to terms granted in the PSCs and not to unravel them. If it was the legislature's intention to prevent such terms or incentives from being stipulated, specific prohibitory provisions should and would have been enacted. The absence of prohibitory provisions in the DOA and the PPT Act 2004 (sic) speaks loudly against the Respondent's submissions that such an agreement is against Nigerian law. … On this issue, the Tribunal reaches the conclusion that Clause 8.1(e) remains binding between the parties and, between themselves, the Claimants are entitled to consolidate for PPT purposes, OPLs 213, 217 and 218 and any OMLs derived therefrom.[64]

The above decision of the Tribunal once again, brings to the fore the weaknesses in our extant laws to effectively and effectually regulate the operation of PSCs in Nigeria. Whilst the arguments of the respondent represents the ideal operation of a PSC as it relates to taxation of petroleum profits, the extant statutes does not make ample provisions to support the ideal position with the requisite certainty for enforcement. The unfortunate lacuna in our extant statutes has unwittingly provided justification for the reckless consolidation of OPLs 213, 217 and 218 for tax purposes instead of ring-fencing. It is therefore submitted that the Deep Offshore Act and the Petroleum Profits Tax Act should be amended to make for the much need certainty to boosts Nigeria's earnings from her prolific deep offshore assets.

5.2.4 Investment tax credit: Whether the Claimants are entitled thereto

Another issue that fell for determination before the Tribunal relates to whether or not, upon a proper interpretation of the relevant Clauses of the OPL 217 Agbami PSC and the extant Nigerian statutes, the claimants were entitled to investment tax credit (ITC). Investment tax credit or allowance is a fiscal incentive whereby the government allows a company to be reimbursed an additional percentage of tangible capital expenditure. For example, if an IOC (contractor) spent US$10 million on expenditures eligible for a 20%

[64] Ibid. pp. 66-67, para 181 & 184.

investment tax credit, then the contractor will actually be reimbursed US$12 million through cost recovery.[65] In other words, the contractor will recoup its principal expenditure of $10 million together with another $2 million which is 20% of its principal expenditure of $10 million. Investment tax credit/allowance is also referred to as uplift allowance[66]

This dispute arose pursuant to Clause 15.3 of the 1993 PSCs which provides as follows:

> 15.3
>
> > (a) The ITC shall be in accordance with the PPT Act (sic) as amended
> > (b) The ITC rate applicable to the Contract Area shall be fifty percent (50%) flat rate for the duration of this Contract. In computing the PPT payable, the ITC shall be applicable in full to the Petroleum Operations in the Contract Area such that the chargeable tax is the amount of the assessable tax less tax offsets of which ITC is an item. The chargeable tax so derived shall be split between the CORPORATION and the CONTRACTOR (sic) in accordance with the proportion of the percentage of Profit Oil split.[67]

The claimants claimed that they were entitled to ITC being the financiers of all the equipment purchased for petroleum operations in the Contract Area. The respondent on the other hand, challenged the claimants' claim to ITC. Relying on Section 4(1) of the Deep Offshore Act, the respondent contended that the claimants are not parties who had incurred any qualifying capital expenditure "wholly, exclusively and necessarily" for the purposes of petroleum operations and therefore, ineligible to benefit from any ITC. The text of section 4 of the Deep Offshore Act is reproduced below for ease of reference:

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[65] Johnston, D. (1994) *International Petroleum Fiscal Systems and Production Sharing Contracts*. Ponwell Books. Tulsa, Oklahoma, p. 305.

[66] Radon, J. The ABCs of Petroleum Contracts: License-Concessions Agreements, Joint Ventures, and Production-Sharing Agreements. OpenOil Online Curriculum: Governance: Contracts. P. 77 http://openoil.net/wp/wp-content/uploads/2012/02/Contracts-reading -material.pdf. retrieved on 17/11/2016 at 5:40pm.; Johnston, D. op.cit. p. 316.

[67] Clause 15.3 of the Production Sharing Contract signed between the NNPC and Statoil (Nigeria) Ltd and BP Exploration (Nigeria) Ltd dated 18th May, 1993.

> (1) Where the Nigerian National Petroleum Corporation (in this Act referred to as "the Corporation") or the holder and the contractor have incurred any qualifying capital expenditure wholly, exclusively and necessarily for the purposes of petroleum operations carried out under the terms of a production sharing contract in the Deep Offshore or Inland Basin, there shall be due to the parties in respect of the production sharing contracts executed prior to 1 July 1998, a credit (in this Act referred to as "investment tax credit") at a flat rate of 50 per cent of the qualifying expenditure in accordance with the production sharing contract terms for the accounting period in which that asset was first used for the purposes of such operations.[68]

The respondent argued that in order to be entitled to ITC, the claimants must have incurred a "qualifying capital expenditure" and that the claimants had not incurred any such expenditure. This is because the arrangement under the PSC is that the claimant would merely finance the cost of purchasing the assets for the petroleum operations and could then recoup it through the allocation of Cost oil. The respondent referred to Clause 11.1 of the PSC which provides that the "CONTRACTOR (sic) shall finance the cost of purchasing all equipment to be used in Petroleum Operations in the Contract Area pursuant to the Work Programme and such equipment shall become the property of the CORPORATION on arrival in Nigeria." The respondent, in the main, submitted that since the equipment giving rise to ITC became the property of the respondent upon arrival in Nigeria by virtue of Clause 11.1 of the PSC and that the claimant would ultimately be reimbursed of the total cost of purchasing the equipment, there was no basis for the claimant to be entitled to ITC.

In response to the respondent's arguments, the claimants referred to paragraph 6 of the Memorandum of 18th May 1993 signed by the parties, the text of which are as follows:

> 6. It is understood and agreed that notwithstanding Clause 11.1 of the PSCs which provides that all equipment purchased under the PSCs shall become the property of the CORPORATION on arrival in Nigeria, such equipment shall become the property of the CORPORATION (sic) on the earlier of either the

[68] Section 4, *Deep Offshore and Inland Basin Production Sharing Contracts Act.*

> termination of the relevant PSC or when the cost thereof is fully recovered under the Accounting Procedure to the PSC.[69]

The claimants contended that the text of paragraph 6 of the Memorandum, as above negates the effect of Clause 11.1 of the PSC and therefore, entitled them (claimants) to ITC. The respondents took the view that the Memorandum of 18th may 1993 could not change the position that the claimants remain merely financiers for the purchase of the equipment giving rise to the ITC.

After reviewing the submissions of the parties, the Tribunal considered that the arguments of the respondent distorted the clear intention of the parties. The Tribunal noted that there could be no clearer intention expressed in the memorandum of 18th May, 1993 than that the parties have covenanted to re-state the position in relation to Clause 11.1 of the PSC and to ensure that the ownership and title to the assets acquired remain with the claimants until the same is fully paid or when the PSC is terminated. The Tribunal concluded that the claimants ought, under the PSC, to be considered the owner of the assets and be entitled to claim ITC. To do otherwise was to sanction a blatant violation of the covenant set out in the memorandum of 18th May, 1993.[70] Alluding to the financing arrangement under Clause 11.1 of the PSC, the Tribunal intriguingly held that:

> The "financing" arrangement under Clause 11.1, 217 PSC, (sic) and the retention of ownership under the Memorandum of 18 May, 1993, (sic) allows the Respondent to assert a certain degree of ownership rights to the asset to enable it claim ITC under the DOA[71] (sic). But for Clause 11, 217 PSC, the Respondent would not be able to seek any ITC for itself as it is the Claimants who had incurred the expenditure and not the Respondent. The co-existence of such rights under the Memorandum of 18 May 1993 with Clause 11 of the 217 PSC is fully consistent with Section 4(1) of the DOA (sic) which expressly provides for the Respondent as well as the "*contractor … under … a production sharing contract*" (sic) who has incurred qualifying capital expenditure to be entitled

[69] Memorandum to the PSC signed between the NNPC and Statoil Nig. Ltd in 1993.
[70] The Statoil Award, p. 70, para 191.
[71] *The Deep Offshore and Inland Basin Production Sharing Contracts Act.*

> to ITC. The Nigerian revenue authority is not in any manner deprived of any revenue it otherwise would be entitled to as this impacts only the Parties inter se.[72]

The Tribunal concluded that even assuming that it could be argued that the Memorandum of 18th May, 1993 could or should be ignored as canvassed by the respondent, it does not follow that as between the parties, the respondent alone is entitled to the benefit of tax allowances or ITC. This is because the claimants were entities specifically addressed at Section 22 (1) and (4) of the Petroleum Profits Tax Act which provides that: "(1) A crude oil producing company which executed a Production Sharing Contract with the Nigerian national Petroleum Corporation in 1993 shall, through the duration of the Production Sharing Contract, be entitled to claim an investment tax credit allowance as an offset against tax…", (4) the chargeable tax computed under subsection (3) of this section shall be split between the Nigerian Petroleum Corporation and the crude oil production company in accordance with the proportion of the percentage of profit of oil split." The Tribunal emphasized that the PSC in dispute having been signed in 1993, the claimants without any question are the parties which were contemplated under the PPT Act to be fully entitled to the ITC benefits.

The foregoing decision of the Tribunal once again, brings to fore the painful challenges in the implementation of PSCs arising from the uncertainties in our extant statutes regulating PSCs especially the fiscal regimes. This research takes the firm view that as between the NNPC (respondent) and the Contractors (claimants), the respondent owns the assets that triggers ITC. In other words, it is the NNPC that incurred the qualifying capital expenditure (QCE) that triggered entitlement to investment tax credit and therefore solely entitled to ITC as a tax rebate for the expenditure incurred. The reason is simply because the claimants would be fully reimbursed over time. The text of paragraph 6 of the Memorandum of 18th May, 1993 could, at best be interpreted to mean a lien which does not translate to title

[72] The Statoil Award, p. 70, para 192.

in law contrary to the position adopted by the Tribunal. Unfortunately, section 4 of the Deep Offshore Act is nebulous and unhelpful in resolving this important question particularly when read side by side with the text of clause 11.1 of the 1993 PSCs. The same goes with section 22 of the Petroleum Profits Tax Act. The manifest uncertainty and weaknesses of these two key statutory provisions (S. 4 of the Deep Offshore Act and S. 22 of the PPT Act) have provided a leeway for the Tribunal to reach a conclusion that is economically detrimental to the Nigerian government. The effect of this was that the claimants would be doubly compensated for each qualifying Capital Expenditure incurred in the development of the oil field. In other words, first, the claimants would take benefit of ITC commensurate with their oil split ratio and secondly, the claimants would be fully reimbursed for the expenditure incurred through allocation of Cost oil.

Regrettably, section 4 of the Deep Offshore Contracts Act and section 22 of the Petroleum Profits Tax Act which ought to have been final statutory arbiter are not clear in this regard. The two statutes rather take an uncertain middle course position that both the respondent and the claimants are entitled to investment tax credit once any of the parties have incurred any qualifying capital expenditure wholly, exclusively and necessarily for the purposes of petroleum operations. The Tribunal has interpreted this uncertainty in the Act to mean that the claimants are entitled to claim ITC in proportion to their share of profit oil to the disadvantaged of the NNPC. Clearly, the framers of section 4 of the Deep Offshore Act and section 22 of the Petroleum Profits Tax Act are under a misconception of the operation of a PSC. In practice, the parties in a PSC (NNPC and IOC) work together as a single team. The IOCs are usually appointed as the operators of the oilfields, (largely because of their expertise and resources) who undertake petroleum operations on the understanding that upon attaining commercial quantity in production, the IOC's cost will be fully reimbursed through the allocation of cost oil and an agreed portion of the profit oil will also be allocated to the IOC

as a reward for its efforts. In effect, the equipment giving rise to investment tax credit would either be jointly owned or owned by either of the parties, in this case, the NNPC by virtue of the agreement of the parties under the OPL 217 Agbami PSC. If the equipment belongs to the NNPC by virtue of the agreement of the parties, it is, therefore, awkward for the Act to state that both parties are entitled to investment tax credit.[73]

In view of the foregoing, it is submitted that section 4 of the Deep Offshore Act and section 22 of the Petroleum Profits Tax Act reflect legislative ineptness which could have been drafted differently if the framers had adverted their minds to the actual nature and operation of a PSC and the economic interest of Nigeria. It is, therefore, submitted that section 4 of the Deep Offshore Act as well as section 22 of the Petroleum Profits Tax Act should be amended to reflect the true intentions of the parties as reflected in clause 11.1 of the PSC to improve Government's revenue take from the operation of the PSCs in Nigeria.

5.2.5 Dispute over interests on inter-company loan as allowable tax deductions pursuant to Section 10 of the Petroleum Profits Tax Act

Part of the claimants' claims that was considered by the Tribunal was the issue of tax allowance arising from interest on inter-company loans. The claimants claimed to have incurred interest expenses on inter-company loans secured for the financing of petroleum operations. As at 29th June, 2012, the 1st claimant, Statoil Nig. Ltd claimed that its interest on such loans (loan from its oversea parent company, Statoil Coordination Centre NV) stood at US$210, 690, 140.93 (Two hundred and ten million, six hundred and ninety thousand, one hundred and forty dollars and ninety-three cents) while the 2nd claimant, Texaco Nig. Outer Shelf Ltd claimed that its interest on inter-company loans (Chevron Nigeria LLC, a Delaware Limited liability company) stood at US$212,571.092.86 (Two hundred and twelve million, five hundred and seventy-one thousand, ninety-two dollars and eighty-six cents) as at 31st

[73] Chapter Three infra.

May, 2012.[74] The PSC signed by the parties recognizes interest on loans to finance petroleum operations as part of non-capital costs that are recoupable "provided the terms of such loans were with the prior approval of the CORPORATION, (sic) and not higher than the prevailing commercial rates."[75]

The claimants admitted that they neither obtained the "prior approval" of the respondent nor disclosed the details of the terms of such loans to the respondent as at the time of obtaining the loans. The claimants however, said that details of the loans were subsequently disclosed to the respondent. In particular, the claimants were not necessarily asking for the recovery of the costs but they sought to be allowed to claim interest expense as deduction against their petroleum profits tax liability. In this respect, the claimants sought a 100% tax-deduction in their favour as it was their case that these expenses were incurred wholly by them and not by the respondent and as such, the percentage oil split sharing formula of tax deduction benefit should not inure to the benefit of the respondent.[76] The claimants' position here is that the tax allowance benefit in accordance with the parties' oil split ratio as is the case with Investment Tax Credit (ITC) should not apply because they (the claimants) solely incurred the interest on loan that entitles them to the tax deductions. The claimants founded their claim in this regard on Section 10(1) (g) of the Petroleum Profits Tax Act which provides as follows:

> 10(1) In computing the adjusted profit of any company of any accounting period from its petroleum operations, there shall be deducted all outgoings and expenses wholly, exclusively and necessarily incurred, whether within or without Nigeria, during that period by such company for the purpose of those operations, including but without otherwise expanding or limiting the generality of the foregoing –
>
> (…)
>
> (g) all sums incurred by way of interest on any inter-company loans obtained under terms

[74] The Statoil Award, p. 76, para 212-213.
[75] Annex B, Article II, para 1(h), 1993 PSC.
[76] The Statoil Award, pp. 76-77, para 215.

> prevailing in the open market, that is the London Inter-Bank Offer Rate, by companies that engage in crude oil production operations in the Nigerian oil industry;…

On the face of it, the fact that section 10(1) (g) supports the claimants claim is self-evident. However, the respondent argued that the claimants were disentitled to the claim because the claimants failed to obtain the "prior approval" of the respondent before obtaining the inter-company loans as required under the PSC. Nevertheless, the Tribunal took the view that the mere failure to obtain prior approval for the loans was not enough to bar the claimants from seeking tax deductions against petroleum profits tax liability in line with the extant law. The Tribunal then had recourse to section 13(2) of the Petroleum Profits Tax Act which makes it uncertain whether or not the claimants were entitled to their claim. Section 13(2) of the PPT Act provides:

> 13 (2) notwithstanding the provisions of subsection (1) (d)[77] of section 10 of this Act, in computing the adjusted profit of any company of any accounting period no deductions shall be allowed in respect of sums incurred by way of interest during that period upon any borrowed money where such money was borrowed from a second company if during that period-
> (d) either company has an interest in the other company; or
> (e) both have interests in another company either directly or through other companies; or
> (f) both are subsidiaries of another company.[78]

The Act went further to state that "a company shall be deemed to be a subsidiary of another company if and so long as an interest in it is held by that other company either directly or through any other company or companies. An interest in this regard means a beneficial interest in issued share capital by whatever name called. However, the Board shall disregard any such last-mentioned interest which in their opinion is insignificant or remote, or

[77] It is submitted that S.10 (1) (g) ought to be the one intended.
[78]Section 13 (2), Petroleum Profits Tax Act.

where in their opinion that interest arises from a normal market investment and the companies concerned have no other dealings or connection between each other.[79]

The forgoing provisions of section 13(2) of the PPT Act clearly prohibits deductions on interest arising from inter–company loans as in the instant case. However, it is uncertain to reach this conclusion because the opening provisions of section 13(2) of the Act makes reference to subsection 10(1) (d). This enacts a violent conflict between section 10 (1) (g) and section 13 (2) of the Petroleum Profits Tax Act regarding the issue of deductibility of interest on inter-company loans obtained under terms prevailing in the open market, that is the London Inter-Bank Offer Rate (LIBOR) by companies engaged in crude oil production and operation in Nigeria. Whilst section 10(1) (g) allows deductions of such expenses, section 13(2) in attempting to limit the application of section 10(1) (g) grievously refers to section 10(1) (d) which has nothing to do with inter-company loans but deals with the issue of royalties. This manifest conflict between sections 10(1) (g) and section 13(2) which refers to section 10(1) (d) confronted the Tribunal markedly in their determination of this issue. The parties as well as the Tribunal conceded that both sections were conflicting and the conflict has not been resolved by the Nigerian legislature.[80] The Tribunal acknowledged that section 13(2) is intended to neutralize section 10(1) (g) but emphasized that:

> One element in Section 10(i)(g) (sic) that appears not have been neutralized by section 13(2) is the proviso that interest on inter-company loans be *"obtained under terms prevailing in the open market, that is the London Inter-Bank Offer Rate*" (sic) or LIBOR. This appears to limit the recoverability of interest on inter-company loans only if the interest is capped at LIBOR terms. Such a limitation is understandably intended to prevent the claimants from using inter-company loans with high interest rates to benefit their related lenders and at the same time obtain the benefit of tax deduction from the assessable income from Petroleum Operations in Nigeria. Read in this manner, Section 10(1) (g) would therefore operate as an exception to Section

[79] Ibid. Section 13 (3).
[80] The Statoil Award, p. 78, para 219.

> 13(2) viz. that interest on inter-company loans would not be available for tax deductions unless the loans are *"obtained under terms prevailing in the open market, that is the London Inter-Bank Offer Rate*".[81] (sic)

The Tribunal thereafter reviewed the claimants' loan agreements in support of the transactions and made a finding that the claimants' related companies were charging interest at 3.5% above LIBOR. The claimants argued that the 3.5% interest rate above LIBOR is in line with commercial rates of interest and therefore falls within section 10(1) (g) and therefore deductible in computing PPT liability. The Tribunal reckoned that in commercial banking loans, it is not unusual for bank lenders to charge a margin over and above the interbank offered rates. The Tribunal, however, noted that the literal meaning of the text of section 10(1) (g) did not allow such construction. In conclusion, the Tribunal held as follows:

> Section 10(1) (g), (sic) however, makes no such provision. Instead the text of the provision states clearly that the interest must be under *"terms prevailing in the open market, that is the London Inter-Bank Offer Rate"*. (sic) Any argument that the phrase "prevailing in the open market" (sic) allows for any margin above LIBOR is negative by the words *"that is the London Inter-Bank Offer Rate",* the words *"prevailing open market"* are merely descriptive of LIBOR and nothing more. In the Tribunal's view, Section 10(1) (g) allows deductions of tax for interest payable to related companies only if the interest charged under such transactions is at LIBOR and no more. If the intention is otherwise, some liberty would have been expressly provided so in the text of Section 10(1) (g).
>
> It follows that as all the loans were made with interest rates higher than the prevailing LIBOR, the Claimants' claim for interest payable for their inter-company loans do not fall within the exception of Section 10(1) (g) (sic) and accordingly the Claimants are not entitled to the tax deduction claimed and a consequent reduction of allocation of Tax Oil to the Respondent.[82]

This research commends the interpretative prowess of the Tribunal to address the manifest conflicting provisions of the Petroleum Profits Tax Act. This is another telling

[81] Ibid. p.79, para 220.
[82] Ibid. pp. 80-81, paras 226-227.

example of the issues and challenges in the operation of production sharing contracts in Nigeria arising from the inadequacies in our extant laws. It is submitted that the conflict between section 10(1) (g) and section 13(2) is one too many in our fiscal regimes for production sharing contract, hence the urgent need for the amendment of the Act to address this obvious inconsistency.

In the final analyses, the Tribunal entered an award in favour of the claimants and dismissed the counter-claim of the respondents in its entirety for lacking in merits. In its final Award dated 6th August, 2015, the Tribunal held as follows:

> On the bases above,
>
> The Tribunal hereby **ADJUDGES** and **AWARDS** (sic) as follows:
>
> I. The Respondent shall pay to the Claimant (jointly):
> a. Damages in the sum of **US$ 941, 557, 083** and interest accrued thereon up to 28 February 2015 amounting to **US$ 50, 821, 615.58**;
> b. Continuing interest on the damages adjudged at the rate of LIBOR (1 month) (average) +2% on simple basis as from 1 March 2015 until payment is fully and finally made;
> c. Costs incurred by the Claimants in the application for this Final Award which we hereby fix at **USD$ 25,000.00**.
>
> II. The Respondent shall bear and pay additional costs of this arbitration which we hereby fix at **£13, 773.71**. The Claimants having paid advances towards the costs of arbitration shall be entitled to immediate reimbursement by the Respondent for such sum paid.[83]

The amount of the judgment debt against the Nigerian state arising from the above Award calls for deep sober reflection. One inescapable lesson to be learnt is that our PSC fiscal regimes (statutes) like the Deep Offshore Act and the Petroleum Profits Tax Act should be clear and certain and should not, as much as possible, be left at the mercy of the interpretative vagaries of Arbitral Tribunals or the Courts. The legal instruments regulating fiscal regimes of PSCs in Nigeria should be drafted comprehensively in such a manner that they will mean

[83] The Final Award dated 6th August, 2015, p. 5.

what they intend and intend what they mean. In effect, the text of such statutes should lend themselves to easy and literal interpretation only. This is more so because, as a general rule, taxing Statutes must be clear and positive and there is no implication or intendment in tax.

5.3. Select decision of the Federal High Court on the operation of Production Sharing Contracts in Nigeria

The Federal High Court, Lagos division has handed down another decision that reflects the inherent challenges affecting the smooth operation of PSCs in Nigeria. This is different from the decision of Bello, J in FIRS v. SNEPCO & 4ors discussed above. While the decision of Bello, J was before the Statoil arbitration, the later decision was after the arbitration.

5.3.1 Nigerian National Petroleum Corporation vs Statoil Nig. Ltd & Texaco Nig. Outer Shelf Ltd[84]

Shortly after the arbitration Tribunal published the majority Award[85] in the arbitration between Statoil Nig. Ltd, Texaco Nig. Outer Shelf Ltd (TNOS) and NNPC, the later being dissatisfied with the Award filed an origination motion before the Federal High Court seeking an order setting aside the Arbitral Award. The respondents on their part filed two separate suits seeking for the enforcement of the Award.[86] The three suits were subsequently consolidated and determined together in the suit under consideration.

The kernel of the applicant's case[87] was that the Tribunal erred in assuming jurisdiction to determine a dispute which under Nigerian law is not arbitrable; a tax dispute; that the Tribunal erred in law on the face of the record and exceeded its jurisdiction when it failed to follow established Nigerian law and precedent (that is, the Federal High Court decision in

[84] Suit No. FHC/L/CS/638/2015 delivered on 7th March, 2017 by the Federal High Court, Lagos, per Buba, J.
[85] The Statoil Award.
[86] Suit No. FHC/L/CS/832/2015 Statoil & Anor vs NNPC (filed upon the publication of the Award) & FHC/L/CS/1469/2015 – Statoil Nig. Ltd & Anor vs NNPC (filed upon the publication of the final Award).
[87] NNPC is the applicant whilst Statoil and TNOS are respondents.

Suit No. FHC/ABJ/CS/774/11[88]) and undermined the hierarchy of the courts in holding that the Federal High Court judgment "is plainly wrong" amongst other grounds. The applicant argued, in the main, that the simple issue before the court was whether the matter before the arbitration Tribunal was a tax dispute or related to tax dispute. It submitted that based on the decision of the Federal High Court, (per Bello J.) in FIRS vs NNPC & 4 Ors to the effect that Tax matters are not arbitrable under Nigerian law, that the arbitration tribunal was wrong to have assumed jurisdiction over the dispute between the parties.[89]

The respondents on their part argued that the arbitration was a domestic one and therefore, the only ground to set it aside are as provided under sections 29 and 30 of the Arbitration and Conciliation Act which requires the applicant to demonstrate that, first, the Arbitrators went outside the scope of what the parties submitted and secondly, the Arbitrators misconducted themselves or alternatively, that the Award was improperly procured. The court was urged to dismiss the suit because none of the grounds set out in the originating motion come within any of the provisions of the Act to allow the court to set aside the Award.[90] On the issue of alleged refusal of the Tribunal to follow the decision of Bello, J in FIRS vs NNPC & 4 Ors, the respondents submitted that the Tribunal did not arrogantly refuse to follow the decision of Bello, J. The respondents submitted that the threefold issue for the court's determination are: first, whether tax disputes are arbitrable? Secondly, even if they are not arbitrable, is the instant one a tax dispute? Thirdly, even if the court finds that the disputes are tax disputes, are there not those that are purely contractual? The respondents argued that the dispute are not tax disputes and urged the court not to set aside the Award or at the very least to preserve those that are not tax matters.[91]

[88] FIRS vs NNPC & 4 Ors (supra), per Bello, J.
[89] NNPC vs Statoil & Anor (supra) p. 5, per Buba J.
[90] Ibid. pp. 8-9.
[91] Ibid. p. 11.

After reviewing the submissions of the parties, the court noted that the issue of jurisdiction was a matter of law and indeed hard law for that matter, no more, no less. The court emphasized that the submissions of the respondent that the ruling of the Tribunal was final and binding and can only be reviewed on grounds set out in the Arbitration and Conciliation Act must and shall take into account that where the matter in the first place ought not to go to the arbitration at all or ab initio, the fact that the Tribunal rules that it has jurisdiction cannot elevate the provisions of the Act, and the grounds stated therein as the only vehicle to challenge such ruling.[92] The court admitted that it was a settled principle of law that where parties by consent submits their dispute to be heard and determined by arbitration and a decision is reached thereby, a court of law has a duty to enforce the decision reached in such arbitration. However, the court held thus:

> I have read the Arbitration Act (sic) especially Sections 48(b) and 52(2) (b) of the Act dealing with arbitrability. These sections provide that a Nigerian court may set aside or refuse to recognize and enforce an award where it finds that the subject matter of the dispute is not capable of settlement by arbitration under the laws of Nigeria or that the recognition or enforcement of the award is against public policy in Nigeria. "Court" is defined in section 57(1) of the Arbitration Act as a "High court of a state, the High court of the Federal capital Territory, Abuja of the Federal High court." A Federal High Court in the FHC Judgment (sic) 774 has found that tax dispute are not capable of settlement by arbitration.[93]

Arising from the foregoing, the court concluded that tax matters are not arbitrable in the Nigerian jurisdiction. The court also declined the invitation of the respondents to severe the issues that are purely contractual from those that are tax related citing the fact that it will be difficult to begin to remove the chaff from the grains. Finally, the court stated:

> To this Court there is nothing left. This court upon a calm reflection has no difficulty in upholding the submission of the Applicant on all grounds and hold that this case has merits, the

[92] Ibid. p. 12.
[93] Ibid. p.28.

> award is defective and hereby grant the order sought and hereby set aside the Arbitral award made by a majority of the members of the Arbitral panel of Prof. Lawrence Boo, Lord Mark Saville of Newgate and Prof. Paul Idornigie (dissenting) made on 17/3/15 in the arbitration proceedings between **STATOIL (NIG) LTD. & TEXACO NIG. OUTER SHELF LTD V. NNPC.** (sic)[94]

The decision of the court as above once again highlights the nagging challenges in the operation of PSCs in Nigeria. This research agrees with the judgment to the extent that tax disputes are not arbitrable in keeping with the prevailing judicial precedent in Nigeria as enunciated by Bello J, in FIRS vs NNPC & 4 Ors. Therefore, being a court of coordinate jurisdiction, the Judge (Buba, J.) could not have sat on appeal over the judgment of his brother Judge, Bello J. even though he could dissent. The court's insistence to follow the established precedence is commendable as same would assist in achieving certainty regarding the non-arbitrability of tax disputes in our jurisprudence. Another commendable aspect of the judgement relates to the court's refusal to allow a clear breach of Nigerian legal regime on non-arbitrability of tax disputes on the part of the Tribunal. The respondents had argued that the court should have regard to the fact that the parties had voluntarily submitted to the jurisdiction of the Tribunal and that public policy demanded that the court should enforce the Award rather than set same aside.

However, it is submitted, with respect, that the judgment has a number of drawbacks, chief of which is the fact that both the applicant and the respondent conceded that certain aspects of the disputes are purely contractual and not tax related. The respondents invited the court to severe those which are purely contractual and preserve same.[95] Unfortunately, the court stated that doing so was difficult and set aside the entire Award on the sole ground that tax disputes are not arbitrable. This approach does little in improving the judicial

[94] Ibid. p. 32.
[95] This was what the Court of Appeal did in the case of Esso Exp. & Prod. (Nig.) Ltd vs F.I.R.S (2021) 8 N.W.L.R. [Pt. 1777] 43.

jurisprudence of PSCs in Nigeria. If the court had attempted to review the Award with the requisite judicial toothcomb, our case law authorities on the subject would have been richer and the respondents would have, at least, reaped some fruits from their victory at the arbitration Tribunal. This is crucial because, regardless of how one feels about it, the development of the Nigerian petroleum industry still owes a lot to the support of the IOCs.

It cannot be gainsaid that it took the bravery, expertise, financial wherewithal, technical know-how and adventurous proclivities of the IOCs to be able to explore the Nigerian Deep Offshore despite the volatility of the area. The courts must not be used nor perceived to be used as an instrument for the oppression or suppression of the IOCs. It is, therefore, important and necessary for consistency and credibility for the NNPC to comply with the decisions of Arbitral Tribunals to which it had voluntarily submitted where the Award does not manifestly offend extant Nigerian laws. There is no dispute that the relevant authorities signed the OPL 217 Agbami PSC and as such, the NNPC cannot be seen to be reneging from its obligations arising therefrom no matter what the outcomes are today. This explains why no effort must be spared to comprehensively amend the relevant laws to ensure certainty and clarity in the fiscal regimes regulating production sharing contracts in the upstream sector.

5.4 Proposed Reforms in the Petroleum Industry in Nigeria

Having regard to the identified challenges militating against the petroleum industry in Nigeria, the members of the 8th National Assembly took it upon themselves to review the applicable laws in the industry. The National Assembly sought to revisit the failed Petroleum Industry Bill with a view to enacting the various components in piece meal for ease of legislative scrutiny. The first piece of such bills is the Petroleum Industry Governance Bill which the Senate eventually passed into law on the 25th of May, 2017. The key provisions of the Bill are reviewed below for clarity.

5.4.1 The Petroleum Industry Governance Bill

The Petroleum Industry Governance Bill (PIGB) was conceived in 2015 but passed into law on 25th May, 2017 by the Senate of the National Assembly. The Bill is, however, awaiting the assent of the President to become operational as an Act of the Federal Republic of Nigeria. Unfortunately, on 28/8/2018, the President declined assent to the Bill citing the fact that it whittles down his powers as the Minister of Petroleum Resources, amongst other reasons.[96] Regardless, it is important to consider certain key provisions of the Bill in the hope that the National Assembly and the presidency will reach a compromise in the near future. The Bill contains a total of 8 parts, 93 sections and 5 schedules. The preamble describes it as an Bill to provide for the governance and institutional framework for the Petroleum Industry and for other related matters. Section 1 thereof provides that the objectives of the Bill shall be to: -

(a) create efficient and effective governing institution with clear and separate roles for the petroleum industry;

(b) establish a framework for the creation of commercially oriented and profit driven petroleum entities to ensure value addition and internationalization of the petroleum industry;

(c) promote transparency and accountability in the administration of petroleum resources of Nigeria;

(d) foster a conducive business environment for petroleum industry operations.

The objectives of the Bill, particularly, the objective in section 1(c) reflects an understanding of one of the problems of the upstream petroleum industry identified in this

[96] The Cable online Newspaper, http://petrobarometer.thecable.ng/2018/08/28/exclusive-buhari-rejects-pigb-says-it-whittles-down-his-power/ accessed on 28/8/2018 at 5:56pm.

research, which is the problem of excessive secrecy. It is for this reason that this research considers the objectives as apt for the purpose.

5.4.2 The Functions and Powers of the Minister of Petroleum Resources under the Petroleum Industry Governance Bill

The Bill also enumerates the functions and powers of the Minister of Petroleum Resources. The Minister shall –

(a) be responsible for the determination, formulation and monitoring of Government policy for the petroleum industry;

(b) exercise general supervision over the affairs and operations of the petroleum industry subject to the provisions of the Act;

(c) advise the Government on all matters pertaining to the petroleum industry;

(d) promote the development of local content in the Nigerian petroleum industry;

(e) represent Nigeria at international organisations that are primarily concerned with the petroleum industry;

(f) negotiate and execute international petroleum treaties and agreements with other sovereign countries, international organisations and other similar bodies on behalf of the Government;

(g) upon the recommendation of the Commission, grant, amend. Renew or revoke any licence or lease required for petroleum exploration or production pursuant to the provisions of the Act or any other enactment; and

(h) do all such other things as are incidental to and necessary for the performance of the functions of the Minister under the Act.[97]

It is, however, provided that the Minister may in writing delegate to any senior officer of the Ministry or institution any power or function conferred on him by or under the Bill.[98]

[97] Section 2(1), Petroleum Industry Governance Bill, 2017.

This is a cheering improvement on the provisions of the Petroleum Act which merely provides that the Minister may by writing under his hand delegate to another person any power conferred on him by or under the Petroleum Act except the power to make orders and regulations.[99] The PIGB identifies the officer to which the powers may be delegated to mean "any senior officer of the Ministry or institution." Furthermore, just as the Petroleum Act,[100] the Petroleum Industry Governance Bill (PIGB) also retains the right of pre-emption of the Minister over all petroleum products in the event of a state of national emergency as specified in the Constitution of the Federal Republic of Nigeria 1999, as amended.[101]

5.4.3 The Establishment of the Nigeria Petroleum Regulatory Commission

One phenomenal provision in the Bill is the establishment of the Nigeria Petroleum Regulatory Commission (NPRC). The Commission is a body corporate with perpetual succession and a common seal and which may sue or be sued in its corporate name.[102] The Bill vests the NPRC with the powers to regulate the entire value chain in the petroleum industry. The regulatory powers conferred on the NPRC cuts across the upstream, midstream and downstream operations.[103] Section 4(3) and (4) of the Bill expressly transfers all assets and liabilities of the Petroleum Inspectorate, the Department of Petroleum Resources (DPR) and the Petroleum Products Prices Regulatory Authority to the NPRC from the effective date of the Bill. This provision automatically removes the layers of bureaucratic bottlenecks that hitherto existed in the industry. In effect, the NPRC is set up to serve as a 'one stop shop' for all petroleum related matters in Nigeria. Thus, section 6(2) of the Bill spells out the functions of the NPRC with reference to the regulation of the upstream petroleum operations, section

[98] Ibid. section 2(2)
[99] Section 12(1) Petroleum Bill
[100] Section 7, Petroleum Bill
[101] Section 3, PIG Bill
[102] Section 4(1), PIG Bill
[103] Sections 4, 5, 6, and 7, PIG Bill.

6(3) embodies the functions of the NPRC with reference to downstream petroleum operations while section 6(4) specifies the functions of the NPRC with reference to regulation of midstream petroleum operations.

The Bill also establishes a governing Board of the NPRC which shall be responsible for the policy and general administration of the Commission.[104] The Board consist of the following members:

(a) a non-executive Chairman;

(b) two non-executive Commissioners;

(c) the Chief Executive Commissioner;

(d) four other Executive Commissioners;

(e) a representative of the Ministry of Petroleum Resources who shall not be below the rank of director;

(f) A representative of the Ministry of Finance who shall not be below the rank of director; and

(g) A representative of the Ministry of Environment who shall not be below the rank of director.[105]

The appointment of the Chairman and the executive Commissioners shall be by the President subject to the confirmation of the Senate.[106] The Board is responsible for the general direction and supervision of the Commission; overseeing the operations and providing general guidelines for the carrying out of the functions of the NPRC.[107] The Minister of Petroleum Resources may, however, issue general directions to the NPRC on

[104] Section 13(1), PIG Bill.
[105] Section 13(2) PIG Bill
[106] Section 13(3) PIG Bill
[107] Section 14

matters concerning the petroleum industry and the NPRC shall implement such directions provided that the directions are not in conflict with the provisions of the Bill.[108]

5.4.4 The Establishment of the Ministry of Petroleum Incorporated

The Bill establishes the Ministry of Petroleum Incorporated (MOPI) as a corporation sole which may sue and be sued in its said name and shall have perpetual succession and a corporate seal which may from time to time be broken, changed, altered and made anew as the Ministry of Petroleum Incorporated seems fit. Until a seal is provided, a stamp bearing the inscription "Federal Ministry of Petroleum" may be used as the corporate seal.[109] The intention of this provision is to ensure that the transition process is not stalled simply because the MOPI has not been incorporated or that the MOPI has not procured a seal for its usage. Therefore, within the interval of the MOPI procuring its own official seal, any seal from the Federal Ministry of Petroleum will suffice to authenticate any document that is intended to give effect to any official transaction involving the MOPI. The Ministry of Petroleum Incorporated shall hold on behalf of the Government shares in the successor commercial entities incorporated[110] pursuant to the provisions of the Bill and all deeds and other instruments requiring the seal of the corporation shall be sealed, with the seal of the Ministry of Petroleum Incorporated in the presence of the Permanent Secretary and signed by the Permanent Secretary, and such signing shall be sufficient evidence that the said seal was duly and properly affixed and that the same is the lawful seal of the Ministry of Petroleum Incorporated.[111]

The Bill makes provision for the Minister to transfer property hitherto vested in the MOPI to any other entity with conveyance or any further assurance. In this wise, the Bill provides that the Minister may, by order, vest in any other authority or company any

[108] Section 15, PIG Bill
[109] Section 36(1) & (2)
[110] The commercial corporate Entities are discussed below
[111] 36(5) & (6)

property, movable or immovable, for the time being vested in the Ministry of Petroleum Incorporated and, upon the coming into operation of any such order, the property to which such order relates shall, without any conveyance, assignment or transfer whatever, vest in such company or authority for the like title, estate or interest and on the like tenure and for the like purposes as the same was vested or held immediately before the coming into operation of the order.[112] This provision is commendable as it makes for easy assignment of interests in properties formerly owned by the MOPI to any commercial entity or authority as the Minister deems fit.

5.4.5 The Nigeria Petroleum Assets Management Company and the National Petroleum Company

Section 37(1) of the Bill provides that the Minister shall, within six months after the effective date, take such steps as are necessary under the Companies and Allied Matters Act to incorporate two entities – the first may be called the Nigeria Petroleum Assets Management Company, or such other name as may be available and the other may be called the National Petroleum Company, or such other name as may be available, as companies limited by shares, which shall be vested with certain assets and liabilities of the Nigerian National Petroleum Corporation ("NNPC"). Each of the commercial entities is discussed below beginning with the NPAMC.

5.4.5a The Nigeria Petroleum Assets Management Company

Upon incorporation and transfer of assets to each of the NPAMC and NPC, the NPAMC shall be responsible for the management of assets currently held by the NNPC under the Production Sharing Contracts and Back-in Right Provisions under the Petroleum Act 1969 as amended while the NPC shall "be responsible for the management of all other assets held by NNPC except the Production Sharing Contract and Back-in Right assets currently

[112] Section 36(8)

held by the NNPC."[113] The NPAMC upon being incorporated will take over the management of the PSCs where government has no upfront funding obligations. The company, though incorporated at the Corporate Affairs Commission will be entirely owned by the Government. Thus, section 38(1) provides that at the time of its incorporation, the initial shares of the NPAMC shall be held in the ratio of 20% by the Bureau for Public Enterprises, 40% by the Ministry of Finance Incorporated and 40% by the Ministry of Petroleum Incorporated on behalf of the Government. The Bill also specifies the objects to be included in the company's memorandum of association. Thus, the Minister shall ensure that the Memorandum of Association of the NPAMC includes the following objects:

(a) to hold and manage certain petroleum assets on behalf of the government of the Federation;

(b) to ensure maximum value (in terms of return on investments) for the government of the Federation through prudent management of the assets;

(c) to negotiate and enter into new exploration and production agreements with other petroleum companies as may be required by the government of the Federation; and

(d) to monitor the revenue and cost elements of the operation and the production output of its petroleum contracts and undertake the sale of crude oil or other petroleum derivatives produced from the assets.[114]

A careful consideration of the foregoing objects reveals that the NPAMC is intended to exclusively regulate the operation of PSCs in Nigeria. In effect, the NPAMC, will become the successor company to the NNPC with regard to the latter's powers to regulate PSCs in Nigeria. The remarkable difference between the NNPC and the NPAMC is that the latter is

[113] Section 37(2)
[114] Section 39, PIG Bill

incorporated at the Corporate Affairs Commission as a company limited by shares unlike the NNPC that is a statutory corporation. To make for a seamless transfer of PSC assets of the NNPC to the NPAMC, the Bill provides that the Minister shall, within twelve months of incorporation of the NPAMC, by an order, require the NNPC to transfer some employees, assets, liabilities, rights and obligations of the NNPC to the Management Company, as specified in the order.[115] It is submitted that such employees to be transferred are likely to be those in the relevant department of the NNPC that hitherto regulated PSC operations in Nigeria such as the National Petroleum Investment Management Services (NAPIMS) which is the directorate arm of the NNPC that overseas and represents the equity holdings of the Federal Government of Nigeria in the PSC operations. Furthermore, the NPAMC has a Board of directors composed of a non-Executive Chairman who may be the Minister of Petroleum; the Managing Director who must possess relevant experience with at least 10 years' experience at a senior management position in petroleum exploration and production company; four other Executive Directors who shall possess relevant experience with at least 10 years' experience at a senior management position in petroleum exploration and production company; four non-Executive Directors who shall be persons with at least twenty years cognate professional or management experience and a representative of the Ministry of Petroleum who shall not be less than the level of Director.[116] The structure of the NPAMC is commendable and consistent with the Malaysian model of the PETRONAS. The overt objective is to entrust Nigeria's PSC assets to a full-fledged commercial entity to obviate the bureaucracy that had been a clog in the progress of the NNPC. This structure introduces a level of independence from Government interferences and this will ensure that the NPAMC is run profitably unlike the NNPC.

[115] Section 41(1)
[116] Section 55

5.4.5b The National Petroleum Company

Upon incorporation, the NPC will take over assets other than the PSCs such as the Joint Venture and Service Contract arrangements. At the time of its incorporation, the initial shares of the National Petroleum Company shall be held in the ratio of 20% by the Bureau for Public Enterprises, 40% by the Ministry of Finance Incorporated and 40% by the Ministry of Petroleum Incorporated on behalf of the Government.[117] To allow for its smooth operations as a company limited by shares, the Act provides that the National Petroleum Company shall not be subject to the provisions of the Fiscal Responsibility Act 2007 and the Public Procurement Act 2007.[118] The insulation of the NPC from the provisions of the Fiscal Responsibility Act and the Public Procurement Act removes the bureaucratic bottlenecks in procurement processes introduced by those Acts. However, it is submitted that this provision of the Act is unnecessary. This is because, the NPC is a limited liability company incorporated at the Corporate Affairs Commission (CAC) and therefore has become a body corporate with independent corporate identity by virtue of section 37 of the Companies and Allied Matters Act.[119] The corporate existence of the company is distinct and independent from that of the shareholders and members. It, thus, follows that the mere fact that 100% of the initial share capital are held by government institutions does not *ipso facto* make it a government Agency or Corporation to be bound by the Fiscal Responsibility Act or the Public Procurement Act.

For the initial funding of the NPC, it is provided that not later than 6 months from the date of incorporation of the National Petroleum Company, the Minister, after consultation with the Ministers responsible for finance and budget, shall present a request for the

[117] Section 61, PIG Bill
[118] Section 62
[119] Section 37, Companies and Allied Matters Act, Cap C20, L.F.N., 2004.

appropriation of funds for the initial capitalisation of the National Petroleum Company.[120] In other to meet its financial obligations under the JV arrangements, the NPC is entitled to retain its revenues and formulate its dividends policy. In this regard, section 65 of the Petroleum Industry Governance Bill states that "notwithstanding the provision of any other law to the contrary, the National Petroleum Company shall be entitled to retain its revenue from its operations and shall be entitled to defray from such revenue all its expenses including its cash call obligations in respect of its joint venture assets and its petroleum operations and its obligations to lenders and financiers."[121] However, the Government shall within five years from the date of incorporation of the National Petroleum Company, divest, in a transparent manner not less than 10% of the shares of the National Petroleum Company and within ten years from the date of incorporation divest not less than an additional 30% of the shares of the National Petroleum Company to the public in a transparent manner.[122] The object of the NPC is to ensure that the present JV arrangements are converted to incorporated JV arrangements such that it will be able to raise funds independently from its shareholders and other financiers both locally and offshore. This structure will relieve the government of the age long burden of cash call obligations and pass same to the shareholders of the NPC.

Section 67(1) requires the Minister to, within twelve months of incorporation of the National Petroleum Company, by an order, require the NNPC to transfer employees, assets, liabilities, rights and obligations of the NNPC (including assets and liabilities held by the NNPC on behalf of the Government) to the National Petroleum Company, as specified in the order. It is submitted that the employees, assets, liabilities and obligations are those that are hitherto used for the JV operations and regulations under the NNPC. The composition of the Board of the NPC is similar to that of the NPAMC except that the Chairman need not be the

[120] Section 63, PIG Bill
[121] Section 65 (1) & (2)
[122] Section 66

Minister.[123] Furthermore, the NPC shall be organized and managed on the basis of the provisions of the Bill, the Companies and Allied Matters Act and its Memorandum and Articles of Association, code of corporate governance of the Nigerian stock exchange and applicable rules of any other stock exchange where its shares are listed.[124] This provision is conclusively indicative that the NPC is to be managed as a purely private sector driven entity.

5.4.6 The Nigeria Petroleum Liability Management Company

The Petroleum Industry Governance Bill provides that the Minister shall, within six months after the effective date, take such steps as are necessary under the Companies and Allied Matters Act to incorporate a company which may be called the Nigeria Petroleum Liability Management Company, or such other name as may be available, as a company limited by shares, which shall be vested with certain liabilities of the Nigerian National Petroleum Corporation and the pensions liabilities of the Department of Petroleum Resources.[125] Upon incorporation and the transfer of liabilities the NPLMC shall assume and be responsible for the management of the liabilities of the Nigerian National Petroleum Corporation ("NNPC") and the pensions liabilities of the Department of Petroleum Resources (DPR) transferred to it pursuant to the provisions of the Act. The initial shares or other ownership interest of the NPLMC shall be held by the NPC, the NPAMC and the Nigeria Petroleum Regulatory Commission in the ratio of their respective liabilities.[126] Evidently, this is intended to provide for a corporate entity to assume and manage the liabilities of the NNPC and the DPR in the petroleum industry in order not to financially encumber the NPAMC and the NPC. It is also commendable to note that each of the successor entities are to take the initial shares and ownership interests according to their respective liabilities. The NPLMC is thus required to ascertain outstanding liabilities of the NNPC within twelve months of the

[123] Section 79
[124] Section 80.
[125] Section 86
[126] Section 86(2), (3) & (4)

effective date and layout a clear plan and timeline for the settlement of such liabilities. The Minister shall in consultation with the shareholders of the NPLMC take all necessary actions to provide the resources required by the liability management Company for settlement of the liabilities of the NNPC and the pension liabilities of the DPR in their respective ratios. Once the entire outstanding liabilities have been settled, the Minister is required to undertake the winding up of the NPLMC.[127] The management company is more or less a special purpose vehicle created to cater for legacy liabilities of the NNPC such as cash call obligations and the pension liabilities of the DPR. Once these legacy bad assets are settled, the liability management company become otiose and therefore liquidated accordingly.

5.4.7 Adaptation and repeal of existing laws in the Petroleum Industry under the Bill

The Petroleum Industry Governance Bill makes provision for adaptation of existing statutes in the Petroleum industry. The Bill provides that the relevant provisions of all existing enactments or laws, including but not limited to the Petroleum Act, Oil Pipelines Act, Hydrocarbon Oil Refineries Act and the Companies and Allied Matters Act, to the extent that they deal with matters provided for in the Bill, shall be read with such modifications as to bring them into conformity with the provisions of the Bill. However, if the provisions of any other enactment or law, including but not limited to the enactments specified in the Bill are inconsistent with the provisions of the Bill, the provisions of the Bill shall prevail and the provisions of that other enactment or law shall, to the extent of that inconsistency, be void in relation to matters provided for in the Bill.[128] The effect of this provision is that the Petroleum Act, Oil Pipelines Act, Hydrocarbons Oil Refineries Act and the Companies and Allied Matters Act will all be subservient to the Petroleum Industry Governance Bill.

[127] Section 86(8), (9) & (10).
[128] Section 86, PIG Bill

The Bill also makes provision for the transfer of powers to the Nigeria Petroleum Regulatory Commission (NPRC) to the effect that any regulatory functions conferred on the Minister pursuant to the Petroleum Act and the Oil Pipelines Act or on the chief executive of the Inspectorate pursuant to the Nigerian National Petroleum Corporation Act, shall be deemed to have been transferred to the Commission.[129] In other words, all the powers and functions of the Minister of Petroleum under the Petroleum Act, the Oil Pipelines Act and the Petroleum Inspectorate department of the NNPC are ceded to the NPRC. Therefore, award of OPLs, OMLs and approval for assignment of interest in OPLs or OMLS are now to be exercised by the NPRC.

The Bill repeals the Petroleum Products Pricing Regulatory Agency (Establishment) Act,[130] and Petroleum Equalisation Fund (Management Board, ETC.) Act[131] from the effective date unlike the NNPC Act.[132] It states that the Nigerian National Petroleum Corporation Act, Nigerian National Petroleum Corporation (Projects) Act[133] and Nigerian National Petroleum Corporation Amendment Act shall be deemed to be repealed on the date that the Minister signifies by legal notice in the Gazette that the assets and liabilities of the NNPC are fully vested in successor entities.[134] Pending the effective date of the repeal of the various Act, any licence, lease, certificate, authority or permit which was issued by the DPR and which had effect immediately before the effective date shall continue to have effect, mutatis mutandis, for the remainder of its period of validity as if it had been issued by the NPRC.[135] The essence of this provision is to ensure continuity of approval processes and

[129] Section 86
[130] Cap P43, Laws of the Federation of Nigeria, 2004
[131] Cap P11 Laws of the Federation of Nigeria, 2004.
[132] Cap N123, Laws of the Federation of Nigeria, 2004
[133] Cap N124 Laws of the Federation of Nigeria, 2004
[134] Section 87 (1) & (2)
[135] Section 88

operations in the industry pending when the Minister signifies that the assets and liabilities have been fully transferred to the successor entities.

In summary, the issues and challenges affecting the operation of PSCs in Nigeria are critical and requires urgent attention. These issues largely stem from the lacuna in our extant laws especially the fiscal statutes like the Petroleum Profits Tax Act and the Deep Offshore and Inland Basin Production Sharing Contracts Act and the 2019 amendment to it. Another rich source of the challenges are the terms of the 1993 PSCs which were negotiated and drafted at a time when there were no clear and specific Nigerian statutes to regulate the PSC regime. These factors have turned the operation of PSCs to a nightmare with huge revenue losses to the Nigerian government and seemingly endless disputes and bitter acrimony between the IOCs and the government. The attempt of the National Assembly to address the legal lacuna has been highlighted in the proposed Petroleum Industry Governance Bill. The reforms introduced by the PIGB is limited to the institutional framework in the industry and not the fiscal regimes. It is, therefore, hoped that the National Assembly would extend their legal reforms by amending other relevant statutes to effectually correct the anomalies in the fiscal regimes for PSCs to engender a much better economically beneficial PSCs operations to the government devoid of or with minimal disagreements with the IOCs.

CHAPTER SIX

SUMMARY AND CONCLUSION

6.1 Summary

The Nigerian government resorted to production sharing contracts to extricate itself from the burden of cash call obligations associated with the traditional joint venture arrangements that hitherto prevailed in the upstream industry. The production sharing contract, by its nature, requires the International oil company (IOC) contractor to solely provide the funding and technological expertise of the entire exploration and development cost. However, where the IOC finds petroleum deposits in commercial quantities, the IOC is reimbursed by means of cost oil and a certain pre-agreed percentage of profit oil after tax deductions. Thus, the PSC arrangement frees government from the huge costs associated with oil and gas explorations activities particularly in the deep offshore areas that are renowned for its cost sensitivity. Lucrative as the PSC arrangement appears, the key drawback to it as this research has shown is the relevant statutes for regulating the legal regime of PSCs are either uncertain, obsolete or too weak to effectually regulate the operation of PSCs in Nigeria. The limited knowledge of the operation of PSCs on the part of the Nigerian Petroleum industry officials as well as the absence of a clear cut legal or fiscal regime for the regulation of PSCs as at the time the PSCs were negotiated are all contributory factors to the challenges associated with the PSCs in Nigeria.

Tax revenues from the upstream petroleum sector is very critical to the Nigerian economy. In fact, tax revenues from the upstream petroleum industry is the largest source of funding for the national budget. This explains why disputes are inevitable in the industry having regard to the nature of tax itself, the strict manner in which the courts interpret tax statutes and government's sustained desire to garner as much tax incomes as it could from profits made in the petroleum industry. The different layers of regulatory institutions, some of

them with conflicting roles in the industry has not help matters either. This has introduced an avoidable packs of bureaucratic bottlenecks that further delay approval process in the industry. As important as revenues from the operation of PSCs is to the Nigerian economy, the fiscal laws ought to be firmly crafted to effectively regulate the operations of PSC with minimal disagreements. Unfortunately, the statutes are a far cry from what is expected hence the present bitter hostilities between the NNPC and IOCs as this research has demonstrated. Sadly, none of the dispute resolution mechanisms either by the courts or the arbitration Tribunals has been able to resolve the dispute conclusively to this day. The cloud of uncertainty that hovers over our PSC operations is evidently linked to numerous gaps and contradictions in the extant fiscal regimes.

6.2 Findings

The following findings are made:

a. the extant fiscal regime for production sharing contracts in Nigeria are inadequate to regulate the operation of the acreage or oil mining leases to which they apply and this has created a lot of disagreements between the NNPC and the IOCs. There is an inclination on the part of the Nigerian National Petroleum Corporation (NNPC) and the International Oil Companies to insist on and defend their respective interests and positions as it relates to the extent cost recovery and investment tax credit under the production sharing contracts. This parochial attitude on both sides is the main sources of constant acrimony in the Nigerian upstream sector. This attitude shapes their respective disposition and interpretation of the production sharing contracts (PSCs). The legion of cases pending before the various hierarchies of Nigerian Courts are traceable to the disagreements between the NNPC and the IOCs on account of the parties' parochial interpretation of the PSCs;

b. one of the factors that is responsible for the disputes between the NNPC and the IOCs as it relates to the applicable legal regime for production sharing contracts in the upstream petroleum industry in Nigeria is the uncertainty of the Deep Offshore and Inland Basin Production Sharing Contracts Act vis-à-vis the Production Sharing Contracts signed between the NNPC and the IOCs regarding the consolidation and recovery of cost incurred in exploring oil prospecting licenses (OPLs) from any oil mining lease (OML) derived therefrom in a given contract area. This uncertainty has created room for divergent interpretations on both sides. While the IOCs take the view that costs incurred in exploring various OPLs are consolidated and recoverable from any OML(s) derived therefrom, the NNPC believes that costs are 'ring-fenced' and limited to a specific contract area. In other words, neither the relevant statutes nor the document embodying the terms of the production sharing contract itself provides with certainty what the position is regarding the issue of cost consolidation of OPLs and recovery of same from any OML derived therefrom. This is a thematic issue that is compounding the challenges in the operation of PSCs;

c. the divergent judicial interpretations of the provisions of the production sharing contracts as it relates to the applicable fiscal regimes or statutes in the disputes between the NNPC and the international oil companies has not helped matters. Even the recent amendment of the Deep Offshore and Inland Basin Production Sharing Contracts (Amendment) Act, 2019 was limited. It did not address the major problem of cost consolidation as opposed to cost ring-fencing for cost recovery purposes in the operation of PSCs in Nigeria. The implication of this is that the IOCs are still feeding fat on government take from the PSCs;

d. the general secrecy in the entire fiscal systems in the upstream petroleum industry in Nigeria is a major factor limiting public debate of applicable fiscal regimes for

production sharing contracts in Nigeria. Section 5 of the Petroleum Profits Tax Act provides for official secrecy in the petroleum fiscal system. The official secrecy rule that operates in the sector makes it difficult, if not impossible, for Nigerians to publicly debate the terms of the fiscal systems. It also effectively shuts out the Nigerian academic community (which is the largest pool of knowledge and expertise) from contributing their ideas to the development of our petroleum fiscal systems. The result is a repeated shortchange of Nigeria by the IOCs;

e. the conflict between section 10 (1) (g) and section 13 (2) of the Petroleum Profits Tax Act regarding the issue of recoverability and tax deductibility of interest on inter-company loans obtained under terms prevailing in the open market, that is the London Inter-Bank offer Rate (LIBOR) by companies engaged in crude oil production and operation in Nigeria. While Section 10(1) (g) allows deductions of such expenses, section 13(2) in attempting to limit the operation of section 10(1) (g) makes reference to section 10(1) (d) which has nothing to do with inter-company loans but Royalties. This error has exposed such a key fiscal statute to the vagaries of judicial interpretation;

f. the ambiguity of the Petroleum Profits Tax Act, the Deep Offshore and Inland Basin Production Sharing Contracts Act and the text of the Production Sharing Contracts signed between the NNPC and the IOCs as it relates to Investment Tax Credit (ITC). The PPTA and the Deep Offshore Act make direct references to the contractor (the IOC) as being entitled to Investment Tax Credit. Meanwhile, the text of the 1993 PSC, clause 11.1 in particular, vests the ownership/title of all equipment used for petroleum operations on the NNPC. Therefore, it ordinarily follows that the NNPC alone is entitled to Investment Tax Credit (ITC) being the owner of the asset that triggers the claim to ITC. This ambiguity on the part of the PPT Act and the Deep

Offshore Act has created serious contest over who is entitled to Investment Tax Credit between the NNPC and the IOC in practice. Sadly, the arbitration Tribunal has ruled that the IOC is entitled to ITC because of the uncertainty of the relevant statutes.

6.3 Recommendations

Following the findings and observations identified in the extant legal regimes for PSCs in Nigeria, the following recommendations are proffered:

a. notwithstanding the inherent weaknesses in the extant regime for production sharing contracts, the NNPC and the IOCs should collaborate as partners in progress and do away with the unhealthy inclination of insisting on and defending their respective interests and positions under the production sharing contracts. The parties should work together as equal business partners, with mutual respect and shun all parochial attitude and animosity towards each other. The prevailing bitter rancor and acrimony has not helped either of the parties. Therefore, good economic sense commends that the parties should quit the 'war trenches' and work together in their collective interests. Furthermore, the NNPC and the IOC should set up a joint negotiation team to resolve all the pending disputes arising from the PSCs with a view to withdrawing the various cases pending in courts. This will save the parties the time, energy, resources and anxiety associated with litigation. This is more so having regard to the continuous working relationship that exists between the parties;

b. further to the above, one of the factors responsible for the disputes between the NNPC and the IOCs as it relates to the applicable fiscal regime for production sharing contracts in the upstream petroleum industry in Nigeria is the uncertainty of the Deep the uncertainty of the Deep Offshore and Inland Basin Production Sharing Contracts Act and the Petroleum Profits Tax Act vis-à-vis the Production Sharing Contracts signed between the NNPC and the IOCs regarding the consolidation and recovery of

cost incurred in exploring oil prospecting licenses (OPLs) from any oil mining lease (OML) derived therefrom in a given contract area. This should be clarified with a bespoke amendment to the affected statutes. Generally in a PSC, cost are not consolidated but ring-fenced. The uncertainty of the extant statutes in this regard has opened a regrettable floodgate for the IOCs to seek to consolidate costs for recovery and tax purposes. This directly has a negative impact on the chargeable tax. As a universal rule, tax statute are interpreted strictly with no room for inference nor intendment. Therefore, fiscal regimes regulating a key sector like our upstream petroleum industry cannot afford the luxury of uncertainty as to expose it to divergent interpretations on both sides as this research has observed. The need to cure this anomaly cannot be more urgent than now and we, therefore, recommend that the relevant provisions of the Deep Offshore Act and the Petroleum Profits Tax Act should be amended forthwith in the interest of the Nigerian petroleum economy;

c. the Supreme Court of Nigeria should rise to the occasion and determine the appeals arising from the operation of PSCs pending before it with finality to permanently address the present contradictory decisions of the Court of Appeal as it relates to the applicable fiscal regime for PSCs. Furthermore, the Deep Offshore and Inland Basin Production Sharing Contracts (Amendment) Act, 2019 should be further amended, to ensure that every aspect of the principal Act that has been a subject of arbitration or litigation is addressed, especially section 8(1) & (2) of the principal Act which deals with the issue of cost consolidation as opposed to cost ring-fencing for cost recovery purposes in the operation of PSCs in Nigeria. This will guarantee a huge revenue boost for the government just as the amendment to section 5 of the principal Act.
d. discussions involving Nigerian upstream petroleum fiscal regimes should be liberalized in keeping with the Freedom of Information Act. The prevailing general

secrecy in the entire fiscal systems in the upstream petroleum industry in Nigeria should be dispensed with and section 5 of the Petroleum Profits Tax Act that provides statutory impetus to this unpalatable official secrecy should be expunged from the Petroleum Profits Tax Act. Nigerians generally and the Nigerian academic community in particular should be gainfully engaged in the public debate over the terms of the petroleum fiscal arrangements. This approach would enrich the debate, instill transparency in the negotiation processes and ultimately boost Nigeria's take from her petroleum resources.

e. furthermore, the conflict between section 10 (1) (g) and section 13 (2) of the Petroleum Profits Tax Act regarding the issue of recoverability and tax deductibility of interest on inter-company loans obtained under terms prevailing in the open market, that is the London Inter-Bank offer Rate (LIBOR) by companies engaged in crude oil production and operation in Nigeria should be addressed by an urgent amendment to the Petroleum Profits Tax Act. As said earlier, tax statutes are always construed strictly and all such statutes must be certain, clear and comprehensible. It must establish a direct link between the itself and the taxpayer. Therefore, a situation where section 10(1) (g) allows deductions of such expenses and section 13(2) in attempting to limit the operation of section 10(1) (g) then makes reference to section 10(1) (d) which has nothing to do with inter-company loans but Royalties is appalling to say the least, hence the urgent need to amend the Act in order to cure the manifest anomaly; and

f. the ambiguity of the Petroleum Profits Tax Act and the Deep Offshore and Inland Basin Production Sharing Contracts Act as it relates to Investment Tax Credit (ITC) should be clarified by a strategic amendment. The PPTA and the Deep Offshore Act make direct references to the contractor (the IOC) as being entitled to Investment Tax

Credit. Meanwhile, the text of the 1993 PSC, clause 11.1 in particular, vests the ownership/title of all equipment used for petroleum operations on the NNPC. Therefore, it ordinarily follows that the NNPC alone is entitled to Investment Tax Credit (ITC) being the owner of the asset that triggers the claim to ITC. Unfortunately, relevant sections of the PPT Act and the Deep Offshore Act are not clear on this particular issue thus leading to a serious contest over who is entitled to Investment Tax Credit between the NNPC and the IOC in practice. Only a well thought out amendment to the statutes would address this incongruity with finality.

In conclusion, while this research totally concedes that production sharing contracts is noble, commendable and a preferable petroleum arrangement in the upstream industry, it has however, endeavoured to highlight a number of problems affecting the legal regimes for regulating the PSC arrangement as presently constituted. These problems have seriously limited the efficacy of the arrangement leading to huge revenue losses to Nigeria and several liabilities of nagging cases before the various hierarchies of the courts. It is for this reason that the research has also preferred some suggestions on how some of these problems can be tackled. It is hoped that the National Assembly and other relevant authorities will do well to make the requisite adjustments to the legal regimes regulating PSCs as advocated here to deepen the confidence in our petroleum industry and to ensure that the production sharing contracts will be more economically beneficial to the government of the federation.

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