A CRITICAL ANALYSIS OF THE REGULATORY REGIMES OF THE PETROLEUM INDUSTRY IN NIGERIA

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A DISSERTATION SUBMITTED TO THE FACULTY OF LAW, AHMADU BELLO UNIVERSITY, ZARIA IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE AWARD OF THE DEGREE OF MASTER OF LAWS-LLM

DEPARTMENT OF COMMERCIAL LAW,
FACULTY OF LAW,
AHMADU BELLO UNIVERSITY, ZARIA

NOVEMBER, 2016

DECLARATION

I declare that the work in this Dissertation entitled "Critical Analysis of the Regulatory Regimes of the Petroleum Industry in Nigeria" has been carried out by me in the Department of Commercial Law. The information derived from the literature has been duly acknowledged in the text and a list of references provided. No part of this dissertation was previously presented for another degree or diploma at this or any other institution.

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Benjamin David SHEKARAU **Date**
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CERTIFICATION

This dissertation entitled "A CRITICAL ANALYSIS OF THE REGULATORY REGIMES OF THE PETROLEUM INDUSTRY IN NIGERIA" by Benjamin David SHEKARAU meets the regulation governing the award of Master of Laws-LL.M of the Ahmadu Bello University, Zaria and is approved for its contribution to knowledge and literary presentation.

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DEDICATION

I dedicate this entire dissertation to Almighty God, my late Father, Sir Amos David Shekarau, my late Mother, Christiana David Shekarau and my new precious jewel, Baby Christiana Benjamin Shekarau.

ACKNOWLEDGEMENTS

My profound gratitude goes to Almighty God, who made everything possible to this point. I greatly appreciate Prof B.Y. Ibrahim for being more than just a supervisor throughout the entire research period. He consented to seeing me at anytime including Sundays and Public Holidays. This was a gesture I never took for granted Sir, I am very grateful. My profound gratitude goes to Prof. A.R. Agom who amidst his tight and busy schedule agreed to give my work a speedy and careful consideration to enable me meet up with the deadline. Thank you very much Sir. My sincere appreciation also goes to the immediate past Dean, faculty of law A.BU. Zaria, Prof. Y.Y. Bambale for being there for all of us anytime we need his assistance. I also appreciate the current Dean, Faculty of Law A.B.U. Zaria, Dr A.M. Madaki for his frantic efforts to coordinate my external defence in good time. This work will not be complete if I fail to acknowledge and appreciate the efforts Dr Akande in ensuring that we complete this work in good time and also Dr D.C John who was my internal examiner. Thank you Sir. All distinguished lecturers of the faculty of law A.B.U. are hereby acknowledged and appreciated for their contributions in one way or the other. My Wife (Kingy) for her patience and understanding throughout the exercise. Thank you so much, I couldn't have

asked for a better life partner. My Family, Dr and Dr (Mrs.) Emmanuel Shekarau, Mr. Jacob Shekarau, Mr. Victor Shekarau and Samuel Shekarau. I thank you all for your support in one way or the other. A special appreciation to Rev. Barnabas Arastus and Rev Joseph Dada for their spiritual guidance and prayers. My Friends, Brown Solomon, Iliya (Versace), Danladi Iliya Masara, Daniel Peter and Ishaya Tanko (I thank you guys specially) Gospel, Emmanuel Olateju, Suleiman Kuku, Suleiman Guru, Williams Yisa, and Clementina. Time will fail me to begin to mention your names, but I appreciate everyone by name for your contributions in one way or the other for the success of this work. Thank you all.

Finally, I want to, with all humility, thank my external examiner, most distinguish Professor, Yinka Omorogbe (Mrs) leading authority as far as Oil and Gas Law in Nigeria is concerned. I consider my oral examination and the subsequent award of the Degree of LL.M by her as a great honour and a privilege of a life time. The Company Secretary and Legal Adviser, Warri Refining and Petrochemical Company Limited, Barr. C.A.Ogar and Mr. Hippolite Amadi Executive Director, Services, Warri Refining and Petrochemical Company Limited. I sincerely appreciate you (Sirs) for your kind support and encouragement may God reward all your endeavors.

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ABSTRACT

*This research work titled "**critical analysis of the regulatory regimes of the petroleum industry in Nigeria"** is centred on the legal and institutional frameworks of the regulatory regimes of the petroleum industry in Nigeria. The work attempted to trace the development, growth and evolution of the regulatory regimes in the petroleum industry pre and post oil discovery in Nigeria and in the same vein traced the evolution of regulatory institution in the petroleum industry. The work also examined the legal frameworks of the petroleum industry and also analysed the roles of regulatory institutions of the petroleum industry in Nigeria. Doctrinal research methodology was adopted throughout the research period. In conclusion, the work identified the following problems as factors affecting the regulatory regime in the industry; obsolete legal framework in the industry, inadequate penalties for defaulting companies operating in the industry, excess executive powers granted to the minister by the petroleum Act, fusion of corporate governance in the industry, conflict of oversight functions among the regulators and non-juristic personality of the DPR. At the end, we recommended that a speedy passage of the Petroleum Industry Bill is necessary if the obsolete nature of the existing petroleum laws must be addressed. Reduction of excesses administrative powers of the Minister of Petroleum should also be addressed by way of legislative amendment of the existing Acts, Decentralization of corporate governance in the industry should be a priority to our law makers, provision and enforcement of stiffer sanction regime should be enthroned in the industry, clear definition of functions and upgrading of DPR's corporate personality should also be addressed by the relevant authority.*

CHAPTER ONE

GENERAL INTRODUCTION

1.1 Background to the Study

The Petroleum Industry is currently the largest industry in Nigeria and the major generator of Gross Domestic Product (GDP) in the country which accounts for 80% contribution to the Nigerian economy. Nigeria's budget in a fiscal year is largely sourced from the Petroleum Industry.[1]

Oil was discovered in Nigeria in 1956 at Oloibiri[2] after half a century of exploration. The discovery was made by Shell-BP, who was at that time the sole concessionaire of oil exploration licence in Nigeria. Upon the said discovery, Nigeria joined the ranks of oil producers in 1958 when its first oil field came on stream producing approximately 5,100 barrel per day (bpd)[3]. After 1960, exploration rights in onshore and offshore areas adjoining the Niger Delta were extended to other foreign companies. In 1965 the exploration field was discovered by Shell in shallow waters of Warri.[4] In 1970, which saw the end of the civil war coincided with the rise in the world oil price, and Nigeria was able to reap instant riches from its oil production.

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[1] http://www.nnpcgroup.com/history of petroleum industry, accessed in December, 2015
[2] Current Bayelsa State
[3] *Opcit* at note 1
[4] *ibid*

Consequent upon discovery of crude oil in Nigeria, and the increasing growth in the petroleum activities in the industry, there was the need by Federal Government to enthrone a legal and institutional framework by way of a regulatory regime that will regulate the petroleum industry. The effect of this led to the enactments regulatory laws in the industry[5] and regulatory institutions respectively in order to ensure transparency, accountability and effective service delivery in the industry for the benefits of all Nigerians.

However, Nigeria operates a command and control regulatory framework in the petroleum industry[6]. This type of regulation was prevalent in the United States and Britain during the 1970s and 1980s[7]. Under this type of regulatory framework, regulators are deemed to be acting in the public interest. This work focuses on the extant public regulatory regime petroleum industry in Nigeria. Generally, factors, such as red-tape, over-regulation and regulatory capture, amongst others, are some reasons militating against a command and control regulatory regime[8]. This work will therefore attempt to

[5] For instance; Petroleum Act, CAP P10, LFN, 2010,Petroleum Profit Tax Act, CAP P13, LFN 2010,Nigerian National Petroleum Corporation Act, CAP N123, LFN, 2004,Oil Pipelines Act CAP O7, LFN, 2004,Nigeria Extractive Industries Transparency Initiative Act (NEITI) ,Nigerian Oil and Gas Industry Local Content Development Act, CAP N124A, LFN 2004

[6] EVARISTUS.O, Transnational Corporation, Civil Society and Social Responsibility in Nigeria's Oil and Gas Industry, 15 AFR. J. INT'L & COMP. L. 107-129 (2007).

[7] ROBERT R.D. Is Regulation Right, Centre of Risk and Regulation at the London School of Economics and Political Science 1-5 (2000), http://eprints.lse.ac.uk/35976/1/IsRegula- tionRight.pdf.

[8] *ibid*

examine the state-oriented or public regulatory framework in petroleum industry in Nigeria, and the fundamental ills afflicting the industry.

1.2 Statement of the Research Problem

1. With the exceptions of the Nigerian Oil and Gas Local Content Development Act[9] and Nigerian Extractive Industry Transparency Initiative Act[10] which were enacted in 2007 and 2010 respectively (although they are not the principal legislations on petroleum industry), the first comprehensive principal legislation on petroleum industry that repealed the 1914 Mineral Oils Act dates as far back as 1968[11]. Other legislation includes NNPC Act which came into being in 1978, while the Profit Tax Act had been in existence since 1958 even before the commencement of Petroleum Act in 1968. In view of this, the principal laws regulating the petroleum industry are for all intent and purpose obsolete in nature and the current legal framework in the industry can no longer sustain the industry due to technological advancement in the industry and this has led to ineffective implementations of the said laws due to the lacunas they provide in comparison with the current realities obtainable in the industry.

[9] CAP N124 LFN, 2004
[10] CAP N130 LFN, 2004
[11] Petroleum Act, CAP P10, LFN, 2004

2. The petroleum industry is bedeviled by a poor sanction regime by virtue of the type and the nature of sanctions provided in the laws regulating the industry. This has led to environmental degradation, pollution of air, water and endangering of life and properties due to petroleum industry activities by the oil companies in the areas they operate. The company's operational actions or inactions due to a poor sanction regime has led to a lot restiveness in host communities which has hampered operations and at the end has affected the Nigerian economy as a whole.
3. The regulatory regime in the petroleum industry is also challenged by the fact that there seem to be excessive administrative powers granted to the Minister under the Petroleum Act which has in recent past led to misuse and abuse of office and has encouraged nepotism and corruption in the industry thereby leading to lack of accountability and transparency in the use of public funds for the good of all Nigerians.[12]
4. Fusion of Corporate Governance in the regulatory regime of the petroleum industry is yet another problem that has been identified in the industry. Most of the corporate powers in the petroleum industry

[12] The case of the missing $20 billion dollars as alleged by the former CBN as being unremitted by NNPC from the proceeds of crude sale from 2012-2014 offers a classical example to the above mentioned problem.

are centered around the Minister of Petroleum or his office. This fusion of corporate powers has led to a number of beauracratic bottle neck in the industry thereby by slowing down decision making.

5. Overlap of oversight functions among the regulatory institutions of the petroleum industry and weak enforcement of the extant laws by these institutions.

After reviewing the background study and the statement of problems which this work intends to solve, it is pertinent to specify in a specific manner the research questions which this work seeks to answer. They are follows;

1. What are the problems associated with the effective implementation of the laws regulating the petroleum industry in Nigeria?
2. Why are the regulatory institutions weak in carrying out their statutory functions?
3. What will be the status of Petroleum Industry Governance Bill and how does it intend to usher in a new legal regime if eventually passed into law?
4. How can all the problems indentified in the work be solved?

1.3 Aim and Objectives

The aim of this work is to make recommendations that will provide practical solutions which can usher in and enthrone an entirely new legal regime in the petroleum industry in Nigeria if implemented. In order to achieve the said aim, the following objectives become necessary:

1. To critically examine the legal frameworks of the petroleum industry particularly the Petroleum Act, other related laws the and problems associated with the effective implementation of the said laws.
2. To analyse from the legal point of view, the roles of the regulatory institutions in the industry and the factors militating against the functional discharge of their regulatory mandates.
3. To consider the Petroleum Industry Governance Bill and how it intends to enthrone a new legal regime in the petroleum industry.
4. Make recommendations on how some of the problems identified can be solved.

1.4 Scope and Limitation of the Research

This work shall focus mainly on the Petroleum Industry, its legal framework and the regulatory institutions in Nigeria. The work is further narrowed down by restricting most of its discussions to the principal

legislations on the industry by paying special attention to the Petroleum Act. The work will also attempt to discuss the local content aspect of the industry and the fiscal regime in the industry using the Petroleum Profit Tax Act as a case study. This work will not attempt to discuss other legislations in the industry including environmental and natural gas laws.

1.5 Literature Review

Notwithstanding the inadequacy of literatures authored by local writers in the field of Petroleum law in Nigeria, there are however few Nigerian authors who have written extensively and have made meaningful contributions as far as Petroleum Law in Nigeria is concerned. For instance Etikerentse[13] published a book on Petroleum Law in Nigeria titled Nigerian Petroleum Law[14] the book is comprehensive in nature as far as petroleum law in Nigeria is concerned. In the said book under review the author particularly in chapter one, attempted to discuss the issue of regulatory regimes in the petroleum industry while trying to discuss the historical background and the growth Petroleum Law in Nigeria but that little highlight cannot completely shed light to the nature and scope of the regulatory regimes in the Petroleum Industry and the problems associated with this regulatory regime. In the same

[13] Etikerentse.G. (2005) Petroleum Law Nigeria, (2nd edition) Dredew Publishers, Lagos
[14] *Opcit at note 19*

book the author also attempted in details to discuss one of the regulatory institutions which is the Nigerian National Petroleum Corporation (NNPC) out of the number of regulatory Institutions regulating the Petroleum Industry in Nigeria. In the appendix to the said book the author also discussed in details some laws regulating the Petroleum Industry. Although the laws analyzed by the author are few out of the many laws regulating the Petroleum Industry in Nigeria[15] .

Omorogbe, in her recent publication titled Oil And Gas Law In Nigeria[16] the author highlighted some of the laws regulating the Oil and Gas Industry[17] These laws are in one way or the other important in the regulation of Petroleum Industry in Nigeria but however, out of the laws mentioned, only few of them were briefly discussed by the author of which the brief discussion cannot fully explain to the readers the challenges associated with provisions of the said laws. The author of this book under review also attempted to discuss the regulatory institutions but only one which is the NNPC out of the few other regulators was discussed. The Ministry of

[15] For Instance the NNPC Act was not analysed by the author. NESREA Act, 2007 too was not analysed; Oil Spill Act is also a regulatory law; NIPC Act;PPPRA Act. Nigerian Oil and Gas Industry Content Development Act also oversees the activities going on in the Petroleum Sector.
[16] Omoregbe,Y (2001) Oil and gas Law in Nigeria, Malthouse Publishers, Lagos
[17] For instance the author mentioned the following laws as part of the several laws regulating the oil industry they are: Petroleum Act, The Oil in Navigable Waters Act, Oil Terminal Dues Act, Associated Gas Re-Injection Act, Federal Environmental Protection Agency Act

Petroleum Resources and the Department of Petroleum Resources which are the apex regulators were left out. On the whole, the book provides a comprehensive insight to anyone seeking information on oil and gas industry in Nigeria.

Omorogbe authored another book entitled The Oil and Gas Industry Exploration and Production Contracts[18]. In this book under review, few topics in the book have been found useful to this subject matter of research.

Atsegbua a book titled Oil and Gas Law in Nigeria Theory and Practice[19]. While reviewing the said book, this writer observed that nothing was mentioned by the author of the book under review about any regulatory regimes in the petroleum Industry, neither was anything mentioned about the regulatory laws or their institutions. The book mainly focused on the technical and International aspect of the petroleum industry.

Another text worthy of review is a book written by Olisa entitled Nigerian Petroleum Law and Practice[20] which focuses more on the activities and services that are centered on the petroleum industry. For instance most of the chapters dealt with topics like the Exploration and Production rights and

[18] Omoregbe, Y, (1997) *Oil and Gas Industry in Nigeria, Exploration and Production Contracts.* Florence and Lambard, Lagos.
[19] Atsegua A, (2012) *Oil and Gas Law in Nigeria, (Third Edition),* Fiefers Lane Publishers, Benin,
[20] OLISA, M.M Nigerian Petroleum Law and Practice (2nd edition) Jonia Ventures Limited Lagos, 1997

types of oil licenses[21], He also discussed Petroleum Arrangements which are the Joint Ventures Agreements, Pooling and Utilization Agreements, Service Contracts and Production Sharing Contracts Agreements. Net Interest, Farm Out and Carried Interest Agreements, Marginal Fields. Added to this are issues of pipelines and Refineries. Petroleum profit tax and Fiscal Incentives were also discussed. The author further issues involving Crude Oil and petroleum Products, Operators Contracts for Service and Natural Gas.

1.6 Research Methodology

The research methodology adopted in this work is basically a Doctrinal Research methodology.

1.6.1 Doctrinal

The doctrinal research methodology adopted in this work includes, reference to several enactments i.e. the laws regulating the Petroleum Industry, books written by authors on Petroleum/Oil and Gas Laws in Nigeria, Articles, Articles in books and Journals, Conference proceedings, internet and other relevant materials.

[21] For Instance, Oil Exploration License, Oil Prospecting License, Oil Mining Lease, Obligation of the Licensee and the Lessee

1.7 Justification of the Research

The justification for embarking on a research work in this area is inspired by the fact that petroleum industry is currently one of the most important industries in the economic life of Nigeria and yet no adequate and well researched literatures that covers the law and practice of the petroleum industry activities and operations together is readily available for those seeking information in this area or those that want to acquire knowledge in this area. This work will therefore contribute to knowledge by providing an insight to the laws, practice and regulations available in the petroleum industry in Nigeria. Students and lecturers in the faculties of laws in the Nigerian universities, (particularly the students and lecturers of oil and gas law), legal practitioners, other professionals in the petroleum industry and the general public will find this work very useful.

1.8 Organizational Layout

This research work is made up five chapters with sub-headings discussed there under

Chapter One deals with the general introduction, statement of problem, scope of research, methodology, literature review, justification, organizational layout.

Chapter Two intends to take care of the Historical Evolution, Growth and Development of Petroleum Laws in Nigeria, Regulatory Regimes of the Petroleum Industry in Nigeria, Regulatory regimes pre and post oil discovery Nigeria. Conceptual clarification of the terms commonly used in the petroleum industry.

Chapter Three, will essentially seek to examine the various laws regulating the Petroleum Industry i.e. The Petroleum Act, Oil Pipeline Act, Petroleum Profit Tax Act, and Nigerian Oil and Gas Industry Local Content Development Act.

Chapter Four, will discuss the regulatory Institutions of Petroleum Industry i.e. Ministry of Petroleum Resources, Department of Petroleum Resources, Nigerian National Petroleum Corporation, Nigerian Extractive Industry Transparency Initiative.

Chapter Five, draws the curtain of this research work with, findings, recommendations and conclusion.

CHAPTER TWO

HISTORICAL EVOLUTION, GROWTH AND DEVELOPMENT OF THE REGULATORY REGIMES OF THE PETROLEUM INDUSTRY IN NIGERIA

2.1 Introduction

Although the regulatory regime of the petroleum industry in Nigeria dates back to the very early part of last century, yet no real discernible government regulatory policy in the petroleum industry existed. The absence of such a policy could be blamed on the fact that until the early 1970s there had been no substantial oil production. Nigeria's economy had been based mainly on Agriculture and the Government's interest in petroleum was limited to enforcing the few petroleum regulations that existed[22]. Ascertaining exactly when the regulatory regime of the petroleum industry began can be quite confusing. Principally because what is contained in the main legislative enactment represents only a partial picture of what the current situation is. For better understanding, it is expedient to first consider the history of the petroleum laws before and after oil discovery and its attendant regulations over the years[23].

[22] ETIKERENTSE G (2005) *Petroleum Law in Nigeria (*2nd edition), Dredew Publishers, Lagos.
[23] OMOROGBE Y (2001) *Oil and gas Law in Nigeria*, Malthouse Publishers, Lagos.

2.2 Regulatory regimes pre-oil discovery in Nigeria

An examination of historical background of the petroleum industry would reveal that the major constituents of the laws which touch upon the exploration and production of petroleum dates back to the Minerals Oils Act of 1914[24] which was enacted *"to regulate the right to search for, win and work mineral oils".* This aspect of the laws did not develop in any great measure until the later part of the 1950-60 decade, when the active search for oil in the country was stepped up. One other reason for its stunted growth before this period was the cessation of the pioneering work begun in 1908 in the industry by the German firm known as the Nigerian Bitumen Company on the outbreak of hostilities between Britain and Germany in the First World War. With Nigeria then being under the territorial control of the United Kingdom, and Germany losing the war, the Nigerian Bitumen Company's activities which had not recorded any commercial discovery were not resumed at the end of the war instead, a consortium of Royal Dutch and Shell (Dutch and English interests) known as Shell D' Arcy's Company emerged and began oil exploration operations in 1937 from its base in Owerri, the present state capital of Imo State. Shell D' Arcy's operations similarly

[24] CAP 135, LFN 1948

experienced an interruption of six years because of the Second World War and it was not until 1946 that the company resumed active operations. By that date it had been joined by British Petroleum (BP), the British State-owned oil company, thus establishing Shell-BP, as it was commonly known before the nationalization of BP's shares therein in 1979. Shell-BP did not only fully assume as the pioneer position of the Nigerian Bitumen Company in the search for petroleum in Nigeria, until its successor, Shell Petroleum Development Company of Nigeria Limited has held and led the field since that time, when compared to the other oil majors in Nigeria. This privileged position of Shell-BP was not surprisingly maintained, because under Section 6 (1) (a)[25] the right to search for and win oil could only be made to British subjects and to those companies which had their principal places of business in Britain or in its dominions and whose chairmen or majority shareholders and directors were British subjects. These significant qualifications for the grant remained the operative law until the repeal was introduced by Section 2[26]. In early 1946, the law specifically providing for the ownership of petroleum and the right to search for and win mineral oils in Nigeria, Section

[25] Mineral Oil Act, CAP 135 of the 1948 Edition of Laws of Nigeria
[26] Ibid

3(1)[27], stipulated that: "The entire property in and control of all mineral oils, on under or upon any lands in Nigeria, and of all rivers, streams and watercourses throughout Nigeria, is and shall be vested in the Crown. Save in so far as such rights may in any case have been limited by any express grant made before the commencement of this Act". A new sections was added to the 1914 Act by the Mineral Oils (Amendment) Act in 1950 whereby the submarine areas of Nigeria's territorial waters were brought under the ambit of the 1914 Act[28] and by yet another amending legislation in 1959, the legislative competence of Nigeria's Federal legislation was pronounced to cover the submarine areas of other waters which the legislature may decide to legislate upon in the future, in matters relating to mines and minerals. It should be remembered that all that time, since 1946, Shell-BP had resumed exploration activities and was proceeding with the same. It drilled its first well in 1951 at a location near Ihuo village, some sixteen kilometres north-east of Owerri[29]. From there its operations were moved to drill its Akata-1 well[30]. So, with the company's increased activities, as was to be expected,

[27] Ibid
[28] Ibid
[29] ETIKERENTSE G (2005) *Petroleum Law in Nigeria (*2nd edition), Dredew Publishers, Lagos.
[30] Reference is made to Shell-BP's operations here and will continue to be mentioned as the discussions under this topic progresses because, as has been stated, Shell-BP did enjoy a great measure or governmental protection at this stage of the oil industry in Nigeria and therefore the early development and growth of Nigerian petroleum law were understandably linked with Shell-BP's operations and advancement

there came some form of governmental control and regulation to ensure compliance by Shell-BP in its operations of safe and good oil-field practice measured by the international standards then known in the industry. Accordingly, a set of Regulations known and described as "The Mineral Oils (Safety) Regulations[31]" were issued with an effective date of 31 January 1952[32]. The Regulations were made under the powers granted by Section 9[33]. These Regulations have since been updated and replaced by the Mineral Oil (Safety) Regulations 1963[34], which became effective from 11th April 1962. These Regulations as amended are currently known as Mineral Oils (Safety) Regulations as a subsidiary legislation of the Petroleum Act[35].

2.3 Regulatory regimes post-oil discovery in Nigeria

The first commercial discovery of crude oil[36] was made early in 1956 in a location near Oloibiri village in the current Bayelsa State, with production starting at 5,100 barrels per day in 1958[37]. Since pipelines were and still are one of the cheapest means of transporting such crude oil through long distances between the well-head and the point of exportation or refining,

[31] Mineral and Safety Regulations of 1952
[32] ibid
[33] Minerals Act CAP 135 LFN 1948
[34] ETIKERENTSE.G (2005) *Petroleum Law in Nigeria* (2nd edition), Dredew Publishers, Lagos.
[35] CAP P10 LFN, 2004
[36] When the oil that is discovered in a particular well head is enough to be explored for exportation or local refining
[37] Ibid at foot note 13

hence the Oil Pipelines Act[38] was passed with provisions designed to meet the requirements of this development in Shell-BP's operations. In order to specially tax the realised profits of oil companies, separately and distinctly from the companies which engage in other enterprises, the Petroleum Profits Tax Act[39] with retroactive effect from 1st January 1958 was enacted. Towards the end of the 1950-60 decade, shortly before Nigeria's independence from Britain and after the repeal of the provisions of the laws which disqualified non-British companies from grants of exploration licenses, some international companies that were mainly of American nationality became involved in continuing search for more oil in commercial quantities[40]. Available for grant in addition to other areas was the 50% of Shell's entire concessions at the time, which it had relinquished in 1958[41]. The Nigerian Gulf Oil Company which was a subsidiary of Gulf Oil Corporation with its headquarters in Pittsburgh, U.S.A., but which said subsidiary was a Delaware Corporation, was licensed about 1961 to explore for petroleum in Nigeria[42]. Other multinationals that were represented on the scene and which secured exploration licences at about the same time, included Mobil Oil, Texaco,

[38] CAP O7 LFN, 2004
[39] CAP P13, LFN, 2004
[40] ETIKERENTSE G (2004) *Petroleum Law in Nigeria* (2nd edition), Dredew Publishers, Lagos.
[41] *ibid*
[42] *ibid*

Sunrayy Tenneco, Occidental, Agip, the Italian State-owned oil company as well as its French counterpart Safrap, which later became known as Elf Petroleum. The principal legislation under which these companies' grants were made was the Mineral Oils Act[43] Their realised profits were taxed in accordance with the terms of the Petroleum Profits Tax Act[44]. A few non-legislative regulations also applied to their operations at the time. Administrative directives from the appropriate Government Ministry, to the oil companies virtually had tile force of law. For example, Agreements were entered into between the Nigerian Government and some of the oil companies in which the conditions relates to the following:

(i) The percentage of the companies' profits that would be subject to taxation under the Petroleum Profits Tax Act,

(ii) Variation in the royalty amounts due and payable at a given period,

(iii) Revision (usually upward) in the posted price to be applied to crude produced for taxation purposes and

(iv) The levy on ships evacuating crude oil from designated oil terminals in the country were addressed. Further, the creation of fiscal incentives to oil companies were announced by way of letters

[43] CAP 135 LFN, 1948
[44] CAP P13 LFN, 2004

addressed to them even though such announcements had the effect of amending existing provisions of items of legislation.

It must be stressed however that steps were usually taken by the Government to formally translate the terms of such agreements or letters into law. In order to give further legal backing to any action taken under such agreements prior to legislation, retroactive commencement dates were frequently provided[45]. For examples of this include the following laws and regulations:

a. Oil Terminal Dues Act[46], which brought into law, the terms of a long-standing Agreement, hence the stipulation of a 1st January 1965 commencement dates in the Act.
b. Petroleum Profits Tax Act[47], which increased the items of expenditure that may be expensed or deducted in the calculation of taxable profits, thus making for better investment incentives.
c. Petroleum (Drilling and Production) (Amendment) Regulations 1979 by which new royalty rates (effective 1st April 1977) were prescribed.

In the foregoing instances of (b) and (c), the dispensation or provisions contained in the 1979 amendments had been conveyed to the oil companies

[45] ETIKERENTSE G (2005) Petroleum Law in Nigeria (2nd edition), Dredew Publishers, Lagos,
[46] CAP O8, LFN, 2004
[47] Ibid

by a letter from the Nigerian National Petroleum Corporation issued in May 1977[48] even though their contents had been implemented in the operations of the oil companies since 1st April 1977[49]. This explains the 1st April 1977 commencement date in these two latter respective amendments. Resulting from the increase in the number of active oil companies in Nigeria, a change in Nigeria's existing petroleum legislation was indicated. It was clear to all concerned that the frail structures of the Mineral Oils Act (and its amendments) could no longer sustain the modern pressure and trends in the industry. So, in 1969, the first major attempt at producing a detailed and comprehensive law for the grant of rights to search for and win and continue to explore oil in Nigeria was made through the promulgation of the Petroleum Act[50] by the then Federal Military Government. The Petroleum (Drilling and Production) Regulations were prescribed at the same time as a subsidiary legislation of the Petroleum Act. The Act[51] introduced many major changes to the 1914 Act[52] as a result of which the former was wholly repealed ex facie.

2.4 Evolution of regulatory Institutions in the Petroleum Industry in Nigeria

[48] *Opcit at not 52*
[49] ibid
[50] CAP P10 LFN, 2004
[51] Ibid
[52] Mineral Oil Act, CAP 135, LFN, 1948

In the beginning, Petroleum matters were handled by the Hydrocarbon Section of the Ministry of Lagos Affairs, which reported directly to the Governor-General[53]. The Unit kept records on matters relating to exploration, and importation of petroleum products. It also enforced safety and other regulations on matters which were then mostly products importation and distribution. As the activities of the petroleum industry expanded, the Unit was upgraded to a Petroleum Division within the Ministry of Mines and Power[54].

The Petroleum Division grew to become the Department of Petroleum Resources in 1970. In 1971, a new body called Nigerian National Oil Corporation (NNOC) was established to handle direct commercial operational activities in the oil industry on behalf of the Federal Government, while the Department of Petroleum Resources under the Federal Ministry of Mines and Power continued to exercise statutory supervision and control of the industry[55]. In 1975, the Department was upgraded to a Ministry and named the Ministry of Petroleum and Energy which was later renamed the Ministry of Petroleum Resources[56]. In 1977, the Ministry of Petroleum Resources and

[53] History of DPR: http//www.dpr.gov.ng. Accessed on 15th December, 2015
[54] *Ibid*
[55] *Ibid*
[56] *Ibid*

the Nigerian National Oil Corporation (NNOC) were merged to form the Nigerian National Petroleum Corporation (NNPC) by virtue of the enactment of NNPC Act[57], in order to conserve the then scarce manpower in the oil industry. The law also created the Petroleum Inspectorate as an integral part of the NNPC Act[58], and entrusted it with the regulation of the petroleum industry[59].

In 1985, the Ministry of Petroleum and Energy was re-established and 1986 the said Ministry was renamed the Ministry of Petroleum Resources[60]. The Petroleum Inspectorate Division which is an integral part of the Corporation performing statutory, regulatory, supervisory, enforcement and ensuring compliance with established laws regulating the industry transferred to the Ministry of Petroleum Resources in 1988[61]. Upon the said re-establishment of the Ministry of Petroleum Resources, the following responsibilities were assigned to the ministry[62]:

[57] *Op cit* at note 2
[58] Section 10, *ibid*
[59] Olisa, M.M. (1997) Nigerian Petroleum Law and Practice, 2nd Edition, Jonia Ventures Limited, Lagos, pp.227-230
[60] *Ibid*
[61] *Ibid*
[62] Federal Government of official Nigeria Gazatte No.15, Volume 70, 3rd March, 1984

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 survey to drilling, production, construction and operation of process plants like refineries, petrochemical and liquefied natural gas plants 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 operations and the administration and enforcement of environmental protection statutes and statutory provisions affecting such operations.
e. Fixing of production allowable and prices for crude oil, natural gas, petroleum products and their derivatives;
f. Enforcement of oil and gas conservation laws and practices and monitoring petroleum activities to ensure proper conservation of oil and gas.

g. Giving such assistance to the petroleum industry as would enhance the industry in the overall interest of Nigeria; and

h. Duties relating to the following bodies -

   i. Nigerian National Petroleum Corporation,

   ii. Organization of Petroleum Exporting Countries,

   iii. Petroleum Equalization Fund

By virtue of its separation in 1988 from NNPC, DPR became the technical, supervisory and enforcement arm of the Ministry. Subject to the privileges, exemptions and restrictions provided for the benefit of the Corporation. The NNPC is by the implication of this separation under the technical supervision of the DPR to ensure compliance with safety and other extant laws in so far as the activities of the Corporation are concerned with regards to the issuing of licenses, leases, and other operational requirements as stated under the Petroleum Act[63] and the Oil Pipelines Act[64]. While the Ministry of Petroleum Resources is now the supervisory ministry of the Corporation[65].

[63] *Op cit* at note 1
[64] *Op cit* at note 2
[65] Olisa, M.M. *op cit* at note 9

2.5 Conceptual Clarifications of terms commonly used in Petroleum Industry

i. Upstream

The upstream sector of the petroleum industry in Nigeria basically deals with Exploration and Production of Crude Oil. This activity is capital intensive and requires highly skilled professionals, manpower and equipments to carry out the said activity[66]. Due to the nature of the activity, owing to the fact that most countries including Nigeria do not possess the expertise and manpower to explore the oil, the Exploration and Production activity is usually done through some contractual practices that will be discussed below[67].

Generally, these contracts operate within a legal regime that vests all mineral resources, including petroleum, in the state as sovereign. There are diverse types of contracts called by various names, and with many variations. Nonetheless, it is possible to classify all contracts under one of the following:

1. The Concession

The concession may be subdivided into two groups the traditional concession and the modem concession.

[66] OMOROGBE Y (2001) *Oil and gas Law in Nigeria*, Malthouse Publishers, Lagos.
[67] Opcit at note 73

a. The Traditional Concession

The earliest type of petroleum arrangement between governments and companies was the traditional concession. This was an agreement whereby the oil company received the exclusive right to explore for petroleum and, if petroleum was discovered to produce market and transport the oil and gas, return, the company paid some specified costs and taxes. These concessions had certain characteristics. First of all the contract area was often very large. In several instances, it extended over the whole of the national territory. Secondly the duration was very long, typically between 40 years to 150 years[68].

b. The Modern Concession

The definition the modern concession remains the same. It is still an arrangement whereby the oil company receives the exclusive right in exchange for its payments of all costs and specified taxes, to explore for petroleum and, if found, they produce, market and transport it. In other words, under this agreement the company has rights over the produced petroleum it

[68] OMOROGBE Y (2001) *Oil and gas Law in Nigeria*, Malthouse Publishers, Lagos.

'owns' it at the point of extraction. It is now called by various names e.g. license or lease, but it is still the most widely used type of agreement[69]. In Nigeria what is known as an oil-mining lease, is by definition a concession. The terms which characterized the oil concession are now changed. The duration is normally for an initial period of twenty years[70]. The area is greatly reduced, e.g. in Nigeria the maximum area for oil-mining leases under the Petroleum Regulations 1969 is 50e square' miles! The company is usually given rights only in respect of one mineral resource, crude oil, and sometimes, natural gas. Financial obligations are greatly increased companies are liable to rents, royalties, and a higher tax rate which captures between 55 and 90 percent of the economic rent on the average for the state. Petroleum in situ remains at all time the property of the state, in almost all agreements of this nature. However the contractor still has extensive rights over the petroleum, being granted the exclusive rights to explore search and drill for, produce, store, transport and sell petroleum found within the concession area[71]. As stated above Nigerian oil-mining leases are by definition, concessions. The oil-mining lease is specified in Petroleum Act 1969, and is to be widely found

[69] ibid
[70] ibid
[71] OMOROGBE, Y (2001) Oil and gas Law in Nigeria, Malthouse Publishers, Lagos

in exercise as one of the constituent agreement underline the joint nature. It is much more rarely found existing by itself, been apparently reserved only for indigenous oil companies.

2. The Production Sharing Contract

Production Sharing Contracts are legal arrangements in when crude oil produced is shared by the parties in predetermined proportions,' it originated in Indonesia where it is initially used for agricultural contracts. It was first used for crude oil contract in Iran. Since its inception it has provided extremely popular, and is extensively used in several countries all over the world.

In a standard PSC, the company bears all the risks of exploration, and is often in charge of the operation and management of the contract area. When oil is discovered in commercial quantities, the company is entitled to recoup its investments from the crude oil produced from the contract area. This portion of the oil is often referred to as cost recovery oil. Percentages of production set aside for cost recovery vary but are normally 40-50 per cent. The remaining production is shared between the parties. This sharing process is referred to as the production spilt. There is a wide variation in the ratios of production splits. They range from 81 to 90 per cent going to the NOC with a

corresponding 19 to 10 per cent accruing to the private oil company in Egypt and Libya, to a 15 - 85 National Oil Company split in Chile. Invariably the party that is allocated a greater percentage of production is also the one that pays the rates and taxes. Therefore, in real terms the variations are not as striking as they seem. In a normal PSC company income tax is paid, as the company is regarded as a contractor rather than an operator. The income tax rate assigned to the contractor might be borne by itself or on its behalf by the National Oil Company, as is the case in Egypt. However, in Nigeria petroleum profits tax is payable. Unlike the concession, ownership of petroleum discovered remains vested in the state or it's National Oil Company, and the contractor does no, acquire title to its share of the petroleum until the oil reaches a mutually agreed point[72].

3. The Risk Service Contract

Risk Service Contracts are arrangements whereby the contractor provides the entire risk capital for exploration are production. If no discovery is made the contract ceases to exist with no obligation on either party. In the event of a commercial discovery expenses are recouped and the contractor is entitled to payment, which is in cash, although often an option for payment to

[72] ibid

be made in crude Oil is included within the contract. This method of payment constitutes the major difference between the risk service contract and the production sharing contract. As with the typical PSC, the service contractor is normally subject to company income tax[73].

Risk Service Contracts have been extensively used in Brazil, Argentina, and Colombia, where a part of their appeal appears to lie in the fact that sovereignty over the resource is assured at all times. As is common with these countries, this sovereignty is often declared in no uncertain terms. However, their popularity has waned as a result of low oil prices and debt burdens of developing countries. Thus, even these nationalistic Latin American countries have de-emphasized service contracts and have even entered into concessions[74].

4. The Pure Service Contract

The Pure Service Contract is a simple contract of work. All risks are borne by the state, and the contractor performs its stipulated services and is paid a flat fee for these services[75]. Arrangements of this sort exist mainly in the oil-rich middle-east countries, e.g. Saudi Arabia, Kuwait, Qatar, Bahrain, Abu Dhabi. Often the service contract is accompanied by a legally

[73] ibid
[74] ibid
[75] ibid

unconnected but parallel purchase contract for part of the oil being produced from the contract area, as is the case in Saudi Arabia[76]. It should be noted that the fact that the state is bearing "risks and costs does not imply it transfer of knowledge and/or technology, just as employing a contractor to build a house does not imply that the owner of a building will acquire any knowledge of the construction process as a result of relationship[77].

5. Technical Assistance Agreements

Technical assistance agreements are of great significance for a Country that is interested in developing a viable indigenous petroleum industry. On the face of it they are remarkably similar to pure service contracts, the main difference being that the company in question is engaged to provide technical services, without any interest in the oil at any time. However technology and knowledge transfers are more likely to occur under this type of contract[78]. Under Technical Assistance Agreements (TAA) the host country is exclusively responsible for the financing of the project. In addition, it owns the crude oil, equipment and facilities relating to the project, and manages it through the national oil company. The company provides technical services relating to all aspects of the project and seconds its own staff to run the

[76] ibid
[77] ibid
[78] ibid

project under the management of the national oil company. The company is purely a contract without even purchase rights to any part of the production[79]. The technical assistance agreement has rightly been described as the most radical departed from the traditional corporation from owner to contract. Currently only a few technical assistance agreements are to be found world-wide, countries such as Iran and Venezuela[80].

ii. Downstream

The downstream sector basically is concerned with the post-production stages of oil and gas through the refining and processing stages, until it passes to the consumer. It is a fairly vast subject and will be briefly treated here under the subheadings of transportation, refining, marketing and petrochemicals.

a) Transportation

Once the oil is produced, it is transported to refineries by pipelines and oil tankers. This is irrespective of whether the Oil is being exported or being used domestically since the usefulness of oil only becomes apparent after it

[79] ibid
[80] ibid

has been refined. The different products from the refinery are generally transported by pipelines and oil tankers, and, within the country, by road tankers. In Nigeria, rail transportation plays negligible role because of the poor state of the railways.

Petroleum products are distributed within the country through a pipeline network of 4,000 - 5,000 kilometers into interconnected between the nation's four refineries and 21 depots. This network is operated by the Petroleum Products Marketing Company Limited. In addition, marine tankers ferry product from the refineries to depots. Generally, movement of the products from the depots is by road.

The movement of petroleum products is the responsibility of the marketers through tankers, the products are conveyed to the service stations where they are retailed to the customer. The Oil Pipelines Act[81], and the Oil and Pipelines Regulations, 1995 both apply to products, S.(2) of the Oil Pipelines Act defines a pipeline as being:

[81] Cap 338

> "…for the convenience of mineral oils, natural gas and any of their derivatives or components and also any substance (including steam or water) used or intended to the used in the production or relining or conveying of mineral oils, natural gas, and any of their derivatives or components".

The law and Regulations give detailed requirement guidelines and standards for the grant of a permit to survey a pipeline route and for a license to construct and operate a pipeline. The application for a permit to survey should be addressed to the Minister and delivered to the Director of the Department of Petroleum Resources. The applicant must undertake an Environment Impact Assessment (EIA) study of the project, according to the Regulations. The Environmental Impact Assessment Act also requires full EIA for kilometers in excess of 50 kilometers and a partial EIA for lesser lengths and both DPR and the National Environmental Standards and Regulatory Enforcement Agency NESREA requirements that must be satisfied by the applicant. The pipeline grid is currently stated to be at less than optimal levels, because of leakages and damaged pipeline some feel that the condition and efficiency of pipeline service will be enhanced if the private sector is more involved. The private companies would provide pipelines which could be utilized by other persons. However the Nigerian law as it exists would have to be amended to allow for this. According to S.18 (1) of

the Oil Pipelines Act a person may use a pipeline not owned by him. The application is made to the Minister and he has the final say concerning the approval of this application. Such government power is unlikely to be readily accepted by a private company. In several developed countries third party access is accepted and accommodated under the respective municipal legal systems. In these countries, the distribution networks function efficiently and the pipeline users have a choice as to which· organization they should utilize.

b) Refining

The Petroleum Refining Regulations, the 1993 Guidelines issued by the Minister and the Hydrocarbon Oil Refineries Act all regulate refining in Nigeria. A prospective refinery owner has to apply for a licence to construct or operate a refinery. This application must be accompanied by a detailed study of the project and a non-refundable fee. The Regulations and Guidelines are quite detailed. The plant must conform to the approved inspections which will be undertaken. After permission to commission and operate the refinery has been given several conditions must be satisfied. These include the appointment of a qualified refinery manager, and a complete equipment report with evidence of availability of adequate spare parts. Any amendment or modification of the existing refinery also requires the minister's prior

approval. Presently there are four refineries in Nigeria, one in Warri, two in Port Harcourt and one in Kaduna. Cumulatively these "refineries have a combined installed capacity of 445,000 Barrels. This is stated to be above the estimated domestic consumption rate in Nigeria.

c) Marketing

Section 4 of the Petroleum Act provides that no person shall store sell or distribute any petroleum products in Nigeria without a licence granted by the Minister. There are however two exceptions to this law:

1. Small quantities of 500 liters or less of kerosene and selected other products.
2. Products that are not being stored in connection with importation, sale or distribution of petroleum products.

This provision appears to exclude exported products in Nigeria. NNPC sells products for domestic consumption through one of its subsidiaries Product and Pipelines Marketing Company PPMC which sells to petroleum product marketing companies. There are however laid down guidelines for steady distribution and sale at uniform prices throughout the country.

d) Petrochemicals

Petrochemicals are chemicals derived from hydrocarbons. There are numerous types. The basic components are produced by cracking naphtha and ethane. These components are the olefins, ethylene, propylene, butylenes, butadiene and the aromatics BTX. So many things can be made from petrochemicals e.g. drugs, tyres, synthetic fabrics, disposable nappies, sweeteners, etc. It is true to say that petrochemicals are an indispensable part of modem life.

CHAPTER THREE
LEGAL REGULATORY FRAMEWORKS OF THE PETROLEUM INDUSTRY IN NIGERIA

3.1 Introduction

The laws regulating the Petroleum Industry clearly provides a striking example of the use of statutory intervention as an instrument of regulation, administration, management and enforcement of laws relating to the Petroleum Industry. It is however instructive to note that Petroleum Industry did not gain momentum until late 1970's following the aftermath of oil boom in Nigeria. This chapter will therefore attempt to analyse these laws with the view of unveiling the challenges behind the successful implementation of the said laws.

3.2 Petroleum Act

The statutory intent of this Act[82] 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 there from, in the Federal Government and for all other matters incidental thereto. Section 2 (1) (a)-(c) of the Act[83] provides that the Oil exploration licence, Oil prospecting licence, and Oil

[82] Petroleum Act, CAP P10 LFN, 2004
[83] Ibid at Section 2

mining lease may be granted by the Minister subject to this Act. Sub-section (2)[84] of the same section gave a condition upon which such licences can only be granted, which is to the effect that a licence can only be given to a company registered under Companies and Allied Matters Act. The problem however with this section is the faith in and the assumption that the minister or any of the agencies under the ministry of petroleum is capable of fulfilling these responsibilities without their decisions being influenced by external factors, hence, no provisions for checks and balances before, during or after the issuance of such licenses. From the wordings of the section particularly the sub-section (2)[85] the only requirement for the qualification for such licence is that the company must be registered under Company and Allied Matters Act. So by implication, giving the section a literary meaning any company whether or not it has the manpower, financial viability, technical skills, equipment and expertise can simply apply and probably be granted such a licence so long as it is registered under the Companies and Allied Matters Act. Section 4 (1)[86] of the Act[87] provides that;"Subject to this section, no person shall import, store, sell or distribute any petroleum product in

[84] Ibid
[85] Ibid
[86] Petroleum Act, CAP P10 LFN, 2004
[87] Ibid

Nigeria without a licence granted by the Minister. Section 4 (2) went further to say that subsection (1) of this Act shall not apply in respect of –

a) Storage, sale, or distribution of not more than **500 litres** of and such other categories of petroleum products as may be exempted from the application of subsection (1) of this section by the Minister by order published in the Federal Gazette.
b) Storage of petroleum products undertaken otherwise than in connection with the importation, sale or distribution of petroleum products.

Apart from the impracticability of enforcing this particular provision of this Act, the Act did not even provide for the mode or ways of enforcing this provision. For instance which agency, Parastatals, or institution is responsible for uncovering the offenders and bringing them to book?

The Office of the Minster of Petroleum Resources in Nigeria is an important entity in the regulation of petroleum industry by virtue of the Petroleum Act. The major feature of the Act is the mode of control exercised over the sector by the Minister of Petroleum Resources. Some of the powers of the Minister include the power to grant and revoke licenses and make regulations, amongst others. Arguably, these powers of the Minister have

been subject to abuse and have been subject of litigation in a plethora of cases[88].

The Petroleum Act contains procedures for the revocation of oil prospecting licenses (or oil mining licenses) by the Minister. Paragraph 23(1)(a)[89] states that "The Minister may revoke any oil prospecting or mining licence where the licensee or lessee (oil companies) becomes controlled ultimately or indirectly by a non- Nigerian or foreigner". Also, by virtue of Paragraph 24 of the Act[90], the Minister of Petroleum Resources can revoke oil licences for the following reasons if, in his opinion, the licensee or lessee (oil firms) are not conducting their operations or activities continuously, or not conducting their operations in business-like manner in accordance with requirements approved for the lessee and not conducting their activities in accordance with good oil field practices. Also, oil licences can be revoked by the Minister by virtue of this paragraph if the oil firms (licensees and lessees) fail to adhere to the provisions of the Petroleum Act and other allied regulations or laws. Furthermore, oil prospecting or oil mining licences can also be revoked by the Minister if oil companies fail to pay their rent or

[88] Ekhato E.O. *Public Regulation of the Oil and Gas Industry in Nigeria: An Evaluation, Annual Survey of International and Comparative Law.* Vol. 21 Iss.1, Article 6.
[89] Schedule 1 to the Petroleum Act
[90] ibid

royalties within the specified period and if they fail to submit reports on its operations or activities as the Minister may require of them[91].

The powers of revocation of oil licences vested in the Minister are provided in paragraphs 25-26[92] Paragraph 25[93] states "That the Minister shall inform the licensee or lessee of the grounds on which the revocation is made or contemplated and shall invite the lessee or licensee to make any explanation if he so desires[94]. Para-graph 26[95] posits that if the Minister is satisfied with the explanation given (by the licensee and lessee), he may invite the firms to rectify the matter complained of within a specified period of time. By virtue of paragraph 27[96], if the licensee or lessee provides insufficient explanation or does not rectify the matter complained of within a stipulated period, the Minister may revoke the license or lease. Furthermore, a notice sent to the last known address of the licensee or lessee or his legal representative in Nigeria and published in the federal gazette shall be sufficient notice to the licensee or lessee of the revocation of the license or

[91] Ekhato E.O. *Public Regulation of the Oil and Gas Industry in Nigeria: An Evaluation, Annual Survey of International and Comparative Law.* Vol. 21 Iss.1, Article 6.
[92] Schedule 1 to the Petroleum Act
[93] ibid
[94] ibid
[95] Ekhato E.O. *Public Regulation of the Oil and Gas Industry in Nigeria: An Evaluation, Annual Survey of International and Comparative Law.* Vol. 21 Iss.1, Article 6.
[96] Schedule 1 to the Petroleum Act

lease (paragraph 28)[97]. Additionally, by virtue of paragraph 29[98], the revocation shall be without prejudice to any liabilities which the licensee or lessee may have incurred or any claim against them which may have accrued to the Nigerian government[99].

The revocation procedure, as enunciated in the Petroleum Act, "encapsulates in a nutshell the principle of due process and the concept of 'natural justice' as enshrined in se Section 44(1) of the Constitution states that no moveable property or interest in an immovable property shall be compulsorily acquired except in the manner prescribed by law. Also, Section 36 of the Constitution provides for the right to fair hearing in determination of a person's civil rights and obligations in any matter for or against government or authority and such a person is entitled to fair hearing within a reasonable time by the courts (or any other tribunal)[100]

Oil prospecting or oil mining licenses can be classified as 'property' by virtue of Section 44(1) of the Constitution[101]. Thus, licenses confer on the licensees or lessees, economic and commercial value or rights. The Minister

[97] ibid
[98] Ibid
[99] Ekhato E.O. *Public Regulation of the Oil and Gas Industry in Nigeria: An Evaluation, Annual Survey of International and Comparative Law.* Vol. 21 Iss.1, Article 6.
[100] Kolo A, Legal Issues Arising From the Termination of Oil Prospecting Licences by the Nigerian Government, J. ENERGY NATURAL RESOURCES & ENVIRONMENTAL. L. 164, 172 (2001).
[101] Ibid at note 15

of Petroleum cannot unilaterally revoke or change the terms of such licenses. Any breach or unilateral revocation of an oil prospecting or oil mining license can be argued to be a breach of contract and against the tenor of Section 44 of the Constitution.[102] A licensee can approach the courts to get redress if the procedure (on revocation of oil licensees) enshrined in the Petroleum Act is jettisoned and such revocation may be held to be void, invalid or unconstitutional by courts. Under the administration of late President Yar'adua, the oil prospecting licence of the Korean National Oil Company (KNOC) was revoked in January 2009[103]. In August 2009[104], the Federal High Court sitting in Abuja declared President Yar'Adua's action to be illegal and unconstitutional. The Court held that KNOC complied with the terms of the agreement and the Minister of State had no constitutional power to revoke the licence. It further held that the President, acting through the Minister of State for Petroleum, has acted beyond his powers (ultra vires) in the agreement. The Court held that the President had no authority to revoke the oil prospecting licenses because the Minister of Petroleum is the legal custodian in the revocation of oil leases in Nigeria. The Court also held that

[102] Ekhato E.O. *Public Regulation of the Oil and Gas Industry in Nigeria: An Evaluation, Annual Survey of International and Comparative Law.* Vol. 21 Iss.1, Article 6.
[103] Ibid
[104] Ibid

notwithstanding the provisions of Section 5(1) of the Constitution, which grants the President the power to revoke the licence by virtue of the Petroleum Act, only the Minister of Petroleum (and not a Minister of State) can validly revoke an oil prospecting licence. The Court dismissed the preliminary objection of the defendants by stating that the power of revocation of oil licences by the Minister must adhere to the principles of fair hearing as enshrined in the Constitution[105].

Recently in 2012, the Supreme Court in *NNPC & Attorney General of the Federation v. FAMFA Oil Ltd*[106]. held that the Nigerian government must adhere to the process enshrined in the Petroleum Act and the Constitution when exercising its right to participate in any oil block or well in the oil and gas industry. The stake by the Nigerian government in the Oil Mining Licence (OML) originally ceded or granted to FAMFA. The basis for the Court's decision was that the acquisition contravened paragraph 35[107] and Section 44(1) of the constitution.

[105] Court Voids Yar'Adua's Revocation of Korean Oil Prospecting Licence, VANGUARD (Aug. 2009), http://www.vanguardngr.com/2009/08/court-voids-yaraduas-revocation-of-korean-oil-deal/ (last visited Dec. 20, 2015)
[106] [2012] 17 NWLR 148
[107] 1st Schedule of the Petroleum Act

Discretionary powers of public officers can be controlled by various mechanisms. Some of these mechanisms include subjecting such decisions to public enquiry or scrutiny through publication of guidelines and approval of such guidelines by an independent body, amongst others. Also, discretionary powers (or delegated legislation) exercised by public officers are subject to the tenets of administrative law. The decisions of public officers are subject to administrative fairness and may be held to be void by courts if the appropriate procedures are not followed. Decisions of public officers are subject to judicial review and judicial review in Nigeria is by virtue of Section 46(1) of the 1999 Constitution, which states that "any person who alleges that any of the provisions of this Chapter has been, is being or is likely to be contravened in any State in relation to him may apply to a High Court in that State for redress." In *Abdulkarim v. Incar Nigeria Ltd*[108]., the court held that judicial review gave the opportunity to courts in Nigeria to review administrative decisions with regards to their constitutionality, legality, rationality and regularity. In judicial review cases, the courts may grant remedies. These remedies may include an order of mandamus, order of

[108] Supra

injunction, declaration of rights, and the award of damages, amongst others, against the public officers[109].

With regards to the Petroleum Act and its ancillary regulations, it is contended that the language used in the various regulations "permits regulatory discretion" by the Minister. However, in exercising the discretionary powers, the Minister could be influenced by different considerations[110].

Furthermore, a major weakness in the allocation of oil licences in Nigeria is the susceptibility of the process to corrupt practices. This is mainly due to the fact that allocation process is not well regulated and the absence of consultation. The lack of consultation was highly pronounced during the military era in Nigeria. Allocation of oil licences and blocks should more competitive and transparent by allowing the government to advertise the available blocks, the selection standards and the number of different bids received including the selection criteria.

[109] Ekhato E.O. *Public Regulation of the Oil and Gas Industry in Nigeria: An Evaluation, Annual Survey of International and Comparative Law.* Vol. 21 Iss.1, Article 6.
[110] Ekhato E.O. *Public Regulation of the Oil and Gas Industry in Nigeria: An Evaluation, Annual Survey of International and Comparative Law.* Vol. 21 Iss.1, Article 6.

Essentially, the Act does not address the environmental effect of petroleum exploratory activities. Most of the regulations are concerned with the safety of the personnel working in the oil wells and the safety precautions to be observed in the course of oil exploration activities and the Department of Petroleum Resources DPR, under the Ministry of Petroleum Resources which is charged with the power to enforce the Petroleum Regulations. The Petroleum Act and Regulations created offences and imposed penalties for non-compliance, which include short term imprisonment and payment of meager amount as fine. It is submitted that these penalties were not deterrent enough as it is cheaper, economical and desirable for defaulting company to violate these regulations and pay the necessary the imposed fine as specified by the Act than to comply with these regulations[111].

3.3 Oil Pipeline Act

The Oil Pipeline Act[112] was enacted to make provision for licenses to be granted for the establishment and maintenance of pipelines incidental and supplementary to oil fields and oil mining for purposes ancillary to such pipelines. Section 4 (1) of the Act[113] made provisions for the grant of a permit

[111] Ekhato E.O. *Public Regulation of the Oil and Gas Industry in Nigeria: An Evaluation, Annual Survey of International and Comparative Law.* Vol. 21 Iss.1, Article 6.
[112] Oil Pipeline Act, CAP 07 LFN, 2004
[113] [113]G.DEINDUOMO In: F.EMIRI and G.DEINDUOMO, Law and Petroleum Industry in Nigeria. Malthouse Publication, Lagos, 2009

to survey the route for an oil pipeline for the transport of mineral oil, natural gas or such other products[114]. Although not expressly stated, the Act[115] has as part of its set goals the protection of the environment. Principally, the holder of a permit to survey is expected to take all reasonable steps to avoid damage to any land entered upon. Where there is any damage done, the holder is expected to compensate the owner, objection can be made by any person whose land or interest in land may be injuriously affected by the grant of a license but, where a licensee is granted, the holder is expected to pay compensation to any person whose land or interest in land has been injuriously affected or any person suffering damage by reason of or as a consequence of the holder's negligence to make good a damage. Additionally, the Act[116] prohibits. the alteration in the flow of water in a navigable waterway, or the construction of works, in, under or over any navigable waterway that might obstruct or interfere with the free arid safe passage of vessels, canoes or other craft, by an oil pipeline licensee. A licensee is also prohibited from making any construction in, under or over, or depositing materials in or altering the flow of water required for domestic, industrial or

[114] ETIKERENTSE G. (2nd Edition) Petroleum Law in Nigeria, Lagos Nigeria
[115] S.EABILA and D.KDERRI In: F.EMIRI and G.DEINDUOMO, Law and Petroleum Industry in Nigeria. Malthouse Publication, Lagos, 2009
[116] Ibid

irrigational use, thereby diminishing or restricting the quantity of water available for these purposes, or constructing works or making deposits in any waterways that would cause flooding or erosion without the prior permission in writing of the Minister. There are restrictions on venerated land while there are also specific Provisions allowing access to government officials to inspect and be sure things are being done in accordance with the licence. In addition, subsection 4 of section 17 of the Act[117] also made every oil pipeline licenses granted under the Act subject to the provisions of the Act and any regulations in force concerning the prevention of pollution of land and waters. Much as it can be said that the Act made adequate provisions for the protection of individual interests and concerns, its weakness, lies in its failure to make the restoration of land upon which compensation is paid mandatory[118] in a way that[119] is commendable, the Act made provision for courts to play roles that would ensure just assessment of compensation not only for damage done to buildings, profitable trees or crops, disturbance, or damage suffered by reason of or as a consequence of a holder's negligence, but also for loss in value of the land or interests in land. The grant of a licence is also deemed to include

[117] G.DEINDUOMO In: F.EMIRI and G.DEINDUOMO, *Law and Petroleum Industry in Nigeria*. Malthouse Publication, Lagos, 2009
[118] FAGBOHON O (2010) *The Law of Oil Pollution and Environmental Restoration*, Odade Publishers, Lagos.

among others a condition to indemnify the Minister against any claims arising from injury to any person or damage to any public or private property as a result of any act or thing done by the holder of the licence or his agents, servants or workmen in accordance with the licence[120]. The problem, however, is the faith in and the assumption that man is capable of fulfilling his responsibilities towards nature without much prompting. Thus, a provision like section 21 of the Act[121]which provides that where the interest injuriously affected are those of a local community, the court may order the compensation to be paid to any chief, headman or member of that community on behalf of such community or that it be paid in accordance with a scheme of distribution approved by the court or that it be paid into a fund administered by a person approved by the court on trust for application to the general, social or educational benefit and advancement of that community or any section thereof[122]. The above approach, for failing to provide a clear guide as to how compensation received would mandatorily be applied to the respective heads of claim under which it is received is too simplistic an approach to tackle the challenges on ground. To start with, the low standard of living of

[120] OMOROGBE Y (2001). *Oil and Gas Law in Nigeria, Malthouse Publication*, Lagos.
[121] Oil Pipeline Act, CAP O23 LFN, 2004
[122] FAGBOHUN O. The Law of Oil Pollution and Environmental Restoration, Odade Publishers, Lagos, 2010

Nigerians is such that restoration of land from harm done to it is the least of a land owners' priority when compensation is paid. Furthermore, the widespread ignorance of many land owners and communities is such that technical data and detailed evaluation of natural system (which is usually complex) cannot easily be undertaken[123].

3.4 Petroleum Profit Tax Act

This Act was enacted in 1958 when the activities in the petroleum industry began to increase and the government then under the colonial administration saw the need to tax petroleum activities differently from companies engaged in other enterprises. Taxation or tax as usually understood, is the compulsory levy on a person's or a subject's property (including income) by an appropriate governmental authority[124]. This understanding of the nature of a tax does not differ much from its legal definition or meaning. See Black's Law Dictionary 7th Edition in which taxation is defined as *"a monetary charge imposed by the government on persons, entities or property to yield public revenue"*. Taxation in its broader sense includes governmental impositions like duties, excises, levies and rates.

[123].FEMIRI, O In: F.EMIRI and G.DEINDUOMO, Law and Petroleum Industry in Nigeria. Malthouse Publication, Lagos, 2009

[124] OLISA M.M (2003) *Nigerian Petroleum law and Practice* (2nd edition) Jonia Ventures Limited Lagos.

The sources from which incomes are derived under the Petroleum Profit Tax Act as follows;

a) Direct Tax**:** on the Profits of the Oil Company, This is levied in accordance with the provisions of the PPTA

b) Signature Bonuses: Paid upon grants of Oil Prospecting Licences, Production Sharing and Service Agreements as well as marginal fields allocation.

c) Fees: These include those charged and paid in connection with the application. grant, assignment, etc. in respect of the following:

i. Oil Exploration and Oil Prospecting Licences

ii. Oil Mining Leases

iii. Permits to Survey the route of proposed oil pipelines.

iv. Oil Pipeline Licences.

v. Production Sharing and Service Agreements.

vi. Marginal fields allocations.

(d) Rents: In respect of concessions and grants made to oil companies under the Petroleum Act.[125]

[125] CAP P10 LFN, 2004

(e) Premiums: Paid (if not waived) in respect of approved assignments of Oil Prospecting Licences and Oil Mining Leases or of interest therein[126].

(f) Revenue from Royalties**:** Paid on crude oil, casinghead petroleum spirit and gas produced from on-shore and off-shore concessions.

(g) Payments**:** made under the provisions of the Oil Terminal Dues Act[127].

(h) Bank Charges or Commissions: Paid to the Central Bank of Nigeria in connection with petroleum profits tax, royalties and concession rentals.

In ascertaining a company's profit in a fiscal year under the PPTA, the computation must be done within 12 calendar months beginning on 1st January and terminating on 31st December of the same year[128]. Be this as it may, the first taxable period of a company could be shorter than one year, commencing from the date it makes its first bulk sale of chargeable oil or liquefied natural gas[129]. It means therefore, that a company whose first bulk sale was effected after 1st January, its accounting period would commence from the date of such first bulk sale and end on 31st December of the same year of such first bulk sale. In the illustrative case where the accounting period covered is less than twelve months, such period would still be regarded

[126] Paragraph 15 of the 1st Schedule to the petroleum Act
[127] CAP, T16 LFN, 2004
[128] ETIKERENTSE G. Petroleum Law in Nigeria, Lagos 2005
[129] Ibid

under the law as the accounting period of such a company. However, such a company's accounting period thereafter must match the statutory twelve months' period of 1st January to 31st December[130]. For a company that ceases its petroleum operations before the end of the year (December) its accounting period is adjudged to terminate on the date of such cessation. It should be noted here that such operative date is the date of the cessation of its operations and not the date of its last bulk sale of chargeable oil or gas[131]. Should the effective date of the cessation of petroleum operations as regards the determination of an accounting period be in dispute, the decision of the Director of the Department of Petroleum Resources in the matter would be final.[132] In this connection, the submission is made that the issues involved are those of fact and that not much difficulty would be encountered in leading evidence that would satisfactorily establish such dates. As regards the accounting period of a "reconstituted company" that is to say, a company, which is incorporated locally to carry on the petroleum operation of a foreign company, which had such business in Nigeria, the provisions of section 16(2)(a)[133] would apply to it. As earlier pointed out, the principle applied in

[130] OMOROGBE Y. (2001) *Oil and Gas law in Nigeria*, Malthouse Publication, Lagos.
[131] OLISA M.M (2003) *Nigerian Petroleum Law and Practice*, Jonia Ventures Limited Lagos.
[132] ETIKERENTSE G. (2005) *Petroleum Law in Nigeria*, Lagos.
[133] Petroleum Profit Tax Act CAP P13 LFN, 2004

the determination of the actual taxable profits of a company engaged in petroleum operations is the same as with other companies namely, that certain items of expenditure are permitted to be deducted from the company's gross profits. The general guide for identifying an expense or outgoing which qualifies for such allowable deduction is to ascertain if it meets the criteria that it is wholly and exclusively incurred during the subject accounting period for the direct purposes of the petroleum operations, that is to say, in directly generating the income to be taxed. Such expenditure must also have been a necessary one. It is immaterial that the expenditure was incurred outside Nigeria[134]. The deductable expenses are enumerated under section 10 (1) (a)-(e) of the Petroleum Profit Tax Act. Every company engaged in petroleum operations is required by section 28[135] to "make up accounts of its profits and losses arising from those operations," for each accounting period. Under section 31(1)[136], it is stipulated that not later than two months after the commencement of each accounting period of a company, the company shall deliver to the Federal Inland Revenue Service (in the form prescribed by the FIRS) the company's estimated tax for the period. Section 35 (1)[137] authorizes

[134] ETIKERENTSE G. Petroleum Law in Nigeria, Lagos 2005
[135] Petroleum Profit Tax Act, CAP P13 LFN, 2004
[136]Ibid
[137] Ibid

the FIRS to make assessments of the tax (in the form and manner provided by it) of a company for its accounting period based on the amount of chargeable profits, assessable tax and chargeable tax. None of the foregoing provisions or in any other provisions of the PPTA is the currency in which the accounts estimates, returns or computations are to be made, stipulated[138]. However, arising from certain problems associated with currency gains and losses experienced by the Federal Government and the oil companies in the fulfillment of the oil companies financial obligation, an agreement was finally executed in 1992[139] that these computations, estimates and returns be made in U. S. dollar currency, since this currency features prominently and generally in most transactions in the industry.

Cooking of company's audited account is one of the major problems of taxations generally in Nigeria. Before any company can be assessed for the purposes of taxation, such a company must submit its audited account in a financial year (January-December). It is the audited accounts submitted by the companies that guides the tax authorities in the assessment of chargeable taxes due to the company. Under the PPTA particularly section 9[140] thereof, which is to the effect that any company engaged in petroleum operation must

[138] ibid
[139] Ibid
[140] Ibid

submit its audited accounts showing it profits and losses to the FIRS to enable them assess chargeable taxes due to the company. So, for the purposes of taxation under the PPTA there is presumption of regularities in the audited accounts as presented by the companies and the FIRS not being an auditing firm may not deem it fit to re-audit the already presumed audited accounts submitted to them but rather merely assess the chargeable taxes due to the company from the information they have before them whether or not the information contained therein is true or false.

The PPTA understandably did not specify the currency in which the petroleum profit tax should be paid but ordinarily the tax being a Nigerian statute it is expected that the currency should be in Naira. However, the practice is that the assessment of the profit tax for companies engaged in petroleum operations is done in US Dollars on the possible reason that most of the companies engaged in petroleum operations in the upstream sector of the petroleum industry are foreign companies mostly refered to as International Oil Companies (IOCs). The originators of this practice did not however avert their minds to the deductable expenses which are usually done in Naira. Because it is believed that some of the items under the deductable expenses are local transactions of which such transactions are paid for in

Naira. For example, rents, customs and excise duties, tenement rates and any other tax other than the tax imposed by this Act are all remitted in Naira.

The penalty prescribed under sections 51-55 of the PPTA are so insignificant in term of cost in the modern day Nigeria to a company engaged in petroleum operations. Although these sanctions as at the time of promulgation this Act [141] in 1958 might have been a weighty sanction on the defaulters but with the passage of time these amounts mentioned in the Act is nothing to go by this days. So the need to review this sanctions in pertinent to the enforcement of this Act.

3.5 Nigerian Oil and Gas Industry Local Content Development Act

Most African countries, at post independence, recognised the need for their indigenes to take ownership and control of their natural resources for exploitation and transformation into economic growth[142]. In order to achieve this goal various policies and laws have been pursued by the Governments[143]. Petroleum industry in Nigeria was not immune from these Government policies. Some laws enacted in Nigeria include the Petroleum (Drilling & Production) Regulations[144], Industrial Training Fund[145], Petroleum

[141] Petroleum Profit Tax Act, CAP P13 LFN, 2004
[142] Http://www.akindelano.com : Review of Nigeria's Local content Act. accessed in December, 2015.
[143] Ibid
[144] Schedule I of the petroleum Act, CAP P10 LFN 2004
[145] 1971

Technology Development Fund[146] and National Office of Technology Acquisition Act[147]. The Nigerian Petroleum industry was originally the exclusive domain of the International Oil Companies (IOCs) in areas ranging from exploration to production, refining and trading. Even the downstream operations were initially controlled by expatriate companies. Intervention by the Federal Government resulted in the nationalization of assets of the major oil players in 1991[148], the Federal Government sought to demystify the oil industry by awarding onshore and offshore oil blocks to Nigerian entrepreneurs through competitive bidding. Despite the seeming progress narrated above, the "Nigerianisation" process in the lucrative upstream has been comparatively negligible[149]. The primary reason is the absence of legal or statutory frameworks for Nigeria to harvest the technological industrial and economic intangible capital assets being generated by oil and gas activities for diffusion into the local economy. The enactment of Nigerian Oil and Gas Industry Content Development Act[150] seeks to increase indigenous participation in the Oil and gas industry by prescribing minimum thresholds

[146] 1973
[147] CAP N123 LFN 2004
[148] Http://www.akindelano.com: Review of Nigeria's Local content Act. Accessed in December, 2015.
[149] Ibid
[150] CAP N124, LFN 2004

for the use of local services and materials and to promote transfer of technology and skill to Nigerian staff and labour in the industry.

The Act[151] is comprehensive in nature, running into 107 sections and applies to all operators, contractors and other entities involved in any project in the oil and gas industry. It takes precedence over all other existing enactments and laws in respect of all matters and operations industry pertaining to Nigerian content carried out in the oil and gas. A Nigeria Content Development and Monitoring Board (the Board) has been established and vested with the responsibility to implement the provisions of the Act, make procedural guidelines and monitor compliance by operators within the oil industry. The Act set out general obligations which are applicable either by reference to the operators and participants in the Oil and Gas Industry or activities taking place in the Oil and Gas industry. The overall local content policy objective and obligation imposed in respect of transactions within the oil and gas industry are set out in Section 3(1) of the Act[152] which provides that Nigerian independent operators shall be given first consideration in the award of oil blocks, oil field licenses, oil lifting licenses and all projects for which contract is to be awarded in the Nigerian oil and gas industry subject to

[151] Http://www.akindelano.com: Review of Nigeria's Local content Act. Accessed in December, 2015.
[152] CAP N124 LFN, 2004

the fulfillment of such conditions as may be specified by the Minister. Sub-section (2)[153] of the same section states 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 this Act. Sub-section (3)[154] is with regards to the compliance with the provisions of this Act and promotion of Nigerian content development shall be a major criterion for award of licenses, permits and any other interest in bidding for oil exploration, production, transportation and development or any other operations in Nigerian oil and gas industry. In furtherance of this objective, the Act[155] gives preferential treatment to all Nigerian companies operating in the industry. As a basic principle, the Act requires that promotion of Nigerian content development shall be a major concern in all projects and operations in the oil industry. It then goes on to say that Nigerian independent operators shall have first consideration in the award of oil blocks, lifting licenses etc and in all projects for which contracts are to be awarded. This principle applies to all sphere of the industry not only "contracting" but also

[153] ibid
[154] Http://www.akindelano.com: Review of Nigeria's Local content Act. Accessed in December, 2015.
[155] Nigerian Oil and Gas Local Content Development Act CAP N124 LFN, 2004

employment of staff and labour, staff training and procurement of goods, materials and services etc. By Section 3 (2)[156], exclusive consideration is given to Nigerian indigenous service companies which demonstrate ownership of equipment, Nigerian personnel and capacity to execute such work on land and swamp. This section incorporates a significant pre-condition for getting the coveted exclusive preferential treatment. It stipulates "demonstrable capacity to perform" as a key criterion for preferential award of jobs. Supporting provisions for the policy objectives of Section 3 and for Nigerian companies are contained primarily in Section 11, 15 and Section 16.The main support granted in favour of Nigerian companies is contained in Sections 15 and 16 which deals with the bidding process. Other benefits to be enjoyed by Nigerian companies under the Act are technology transfer as contained in Sections 44 and 45 of the Act. Section 44 stipulates that operators are required to have a program of incentives to promote transfer of technology and Section 45 encourages the formation of joint ventures and other forms of alliances. Section 3(2) is developed further in Section 11 of the Act which sets out the minimum level of Nigerian Content required for various activities carried out in the Oil and gas industry. Section 11 of the Act

[156] ibid

states that the "minimum Nigerian content in any project to be executed in the Nigerian Oil and Gas industry shall be consistent with the level set out in the Schedule to the Act" The promotion of 'Nigerian human material' as an aspect of Nigerian Content is dealt with in Section 28 to 35 of the Act. The general clause in this regard is Section 28(1) of the Act which stipulates that "Nigerians shall be given first consideration for employment and training in any project executed by any operator or project promoter'. Based on the above foundation the Act requires that the Nigerian Content Plan submitted by operator or project promoter shall include and employment and training Plan which complies with Section 29 of the Act. Section 30 and 31 also make it an obligation on operators to provide training to Nigerians where Nigerians are not employed because of lack of training and to provide a succession plan for a Nigerian to understudy to an expatriate for a maximum period of 4 years. By Section 32 the expatriate workforce for an operator or project promoter is limited to a maximum of 5% of its management positions as may be approved by the Board. Further in this regard Section 33 requires that all applications for expatriate quota must first be referred to the Board. The Act requires in Section 34 that a "Labour Clause" be inserted in "projects or contracts" mandating the use of a minimum percentage of Nigerian workers as may be

stipulated by the board. Finally all operators and companies operating in the Nigeria oil and gas industry shall employ only Nigerians in their junior and intermediate cadre. With regards to legal and financial services section 51 provides that the operators and other investors in any operations, business or transaction in Nigeria oil and gas industry can only retain a Nigerian Legal Practitioner or a firm of Legal Practitioners located in Nigeria whereas section 52 provides that all operators and investors in need of financial services can only retain the services of Nigerian financial institutions expect in situations to the satisfaction of the Board it is impracticable to do so. Section 53 on the other hand provides that all operators and investors engaged in Nigerian oil and gas industry must carry out all fabrications and welding activities in the country.[157]

[157] Http://www.akindelano.com: Review of Nigeria's Local content Act. Accessed in December, 2015.

CHAPTER FOUR

INSTITUTIONAL REGULATORY FRAMEWORKS OF THE PETROLEUM INDUSTRY IN NIGERIA

4.1 Introduction

With the increasing growth in the activities of the petroleum industry consequent upon crude oil discovery, there became a need to properly regulate the industry through legal and institutional frameworks. This development gave birth to the creation and evolution of the regulatory institutions in the petroleum industry. This chapter will therefore, attempt to focus on these institutions, their roles, challenges and how they regulate the industry.

4.2 Ministry of Petroleum Resources

It will be revealed that in 1977, the Ministry of Petroleum Resources and the Nigerian National Oil Corporation were merged to form the Nigerian National Petroleum Corporation under the Nigerian National Petroleum Corporation Act 1977[158]. In 1985, the Ministry of Petroleum and Energy was established and in 1986 the Ministry was renamed the Ministry of Petroleum

[158] OLISA M.M. (2003) *Petroleum Law and Practice in Nigeria* (2nd edition) Jonia Ventures Limited Lagos.

Resources[159]. The responsibilities assigned to the Ministry by law are as follows[160]:

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 survey to drilling, production, construction and operation of process plants like refineries, petrochemical and liquefied natural gas plants 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 operations and the administration and enforcement of environmental protection statutes and statutory provisions affecting such operations.
e. Fixing of production allowable and prices for crude oil, natural gas, petroleum products and their derivatives;

[159] *Opcit at note 140*
[160] Federal Government of official Nigeria Gazatte No.15, Volume 70, 3rd March, 1984

f. Enforcement of oil and gas conservation laws and practices and monitoring petroleum activities to ensure proper conservation of oil and gas.

g. Giving such assistance to the petroleum industry as would enhance the industry in the overall interest: of Nigeria; 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.

The ministry is headed by the Minister of Petroleum Resources who in practice is the supervisory Minister in the petroleum industry. The ministry is also responsible for the enforcement of the Petroleum Act. One of the problems that have been observed in the Ministry's inefficiency to enforce the enabling laws regulating the petroleum industry is the beauracratic bottle neck that slows down decision making. Another factor which is considered a challenge is the excessive fusion powers granted to the minister by the

Petroleum Act to carry out certain sensitive and very important roles as contained in sections 2, 3, 4, 6, 7, 8, 9, 10 and 12. For instance the Minister is empowered to grant oil Lincences, oil prospective Lincences, Oil Mining Leases. No Refinery can also be constructed without a licence granted by the Minister. Importation, storage, distribution of any petroleum products cannot be done without a grant by the Minister. The Minister also determines the Price at which these petroleum products can be sold. The Minister also has the general supervisory roles over all operations carried under licences and leases granted under the Petroleum Act. Regulations on the general activities being carried out in the Petroleum Industry are also made by the Minister. The Minister also has the right of Pre-emption under this Act. Payment of any fees, rents, royalty, premium or other types of payments imposed under this Act is made to the Minister. These powers in our view are too excessive and can breed corruption and nepotism which the industry has mostly been accused of in the recent past.

4.3 Department of Petroleum Resources

In the beginning, Petroleum matters were handled by the Hydrocarbon Section of the Ministry of Lagos Affairs, which reported directly to the

Governor-General[161]. The Unit kept records on matters relating to exploration, and importation of petroleum products. It also enforced safety and other regulations on matters which were then mostly products importation and distribution. As the activities of the petroleum industry expanded, the Unit was upgraded to a Petroleum Division within the Ministry of Mines and Power[162].The Petroleum Division grew to become the Department of Petroleum Resources in 1970. In 1971, a new body called Nigerian National Oil Corporation (NNOC) was established to handle direct commercial operational activities in the oil industry on behalf of the Federal Government, while the Department of Petroleum Resources under the Federal Ministry of Mines and Power continued to exercise statutory supervision and control of the industry[163]. In 1975, the Department was upgraded to a Ministry and named the Ministry of Petroleum and Energy which was later renamed the Ministry of Petroleum Resources[164]. In 1977, the Ministry of Petroleum Resources and the Nigerian National Oil Corporation (NNOC) were merged to form the Nigerian National Petroleum Corporation (NNPC) by virtue of the enactment of NNPC Act[165], in order to conserve the then scarce manpower in

[161] History of DPR: http//www.dpr.gov.ng. Accessed on 15th December, 2015
[162] *Ibid*
[163] *Ibid*
[164] *Ibid*
[165] *Op cit* at note 2

the oil industry. The law also created the Petroleum Inspectorate as an integral part of the NNPC Act[166], and entrusted it with the regulation of the petroleum industry[167].

In 1988 DPR was separated from NNPC and it became the technical, supervisory and enforcement arm of the Ministry of Ministry of Petroleum Resources subject to the privileges, exemptions and restrictions provided for the benefit of the Corporation. The NNPC is by law under the control and supervision of the DPR in so far as the activities of the Corporation are concerned with regards to the issuing of licenses, leases, and other operational requirements as stated under the Petroleum Act[168] and the Oil Pipelines Act[169]. The Ministry of Petroleum Resources is now the supervisory ministry of the Corporation[170]

Upon DPR's separation from NNPC which although is not statutory, certain roles[171] were assigned to it in addition to the ones it statutorily

[166] Section 10, *ibid*
[167] Olisa, M.M. (1997) Nigerian Petroleum Law and Practice, 2nd Edition, Jonia Ventures Limited, Lagos, pp.227-230
[168] *Op cit* at note 1
[169] *Op cit* at note 2
[170] Olisa, M.M. *op cit* at note 9
[171] The roles given to Ministry of Petroleum Resources under the FGN official gazette no.15, Vol.70, of 3rd March, 1989 are being enforced by DPR for and on behalf of the Ministry of Petroleum Resources as delegated by the Minister.

possesses under the NNPC Act[172]. One of the roles assigned to DPR is the responsibility for the supervision of all petroleum industry operations being carried out under licences and leases in the country.[173]This role is to the effect that the DPR is expected to carry out an oversight function on all Petroleum Industry operations by the players in the industry by those under license and leases in the country. This role by implication will mean supervision of all the activities in the upstream, midstream and downstream sector of the petroleum industry. However, while the role mentioned above suggests to be a clear and a functional role, the reality is a bit removed from this picture. Nigerian National Petroleum Corporation (NNPC) is for all intent and purpose expected to be under the supervision of DPR but the relationship between these two institutions have compromised the DPR's ability to effectively supervise NNPC on the ground that both institutions are in fact and in law[174] characterized as one single entity[175]. NNPC and its supposed regulator DPR sometime share the same facilities, and employees of both institutions are often sent on secondment from one to the other[176]. Another factor that may bedevil the enforcement of this particular role is the inadequate manpower

[172] Section 10 (1) ,(2), and (3) NNPC Act, CAP 123 LFN, 2010
[173] *Ibid*
[174] Section 10, NNPC Act, *op cit* at note 2
[175] Odujirin, A.(1998) Critical Analysis of Institutional Reforms in Nigeria's Oil and Gas Industry. *Energy Law Journal* 12:pp 1-5
[176] *Ibid*

and facilities, because the role is by extension referring to the supervision of all petroleum industry operation in the upstream, mid-stream and downstream sector of the industry of which the downstream sector alone consists of all the filling stations in the 36 states of the federation and their local governments. The feasibility of effectively monitoring and supervising these activities is very doubtful and the resultant effect of their inability to carry out this function becomes visible anytime the country experiences acute fuel scarcity due to hoarding.

Another role assigned to DPR is the monitoring of the petroleum industry operations to ensure that they are in line with national goals and aspirations including those relating to flaring and domestic gas supply obligations[177]. This role also suggests that DPR shall be responsible for ensuring that Petroleum Industry operations are in line with national goals and aspirations including those relating to gas flaring and domestic gas supply obligations. Apart from this role being too wide for just a department under the Ministry of Petroleum Resources, the role is also in conflict with the functions carried out by the Federal Ministry of Environment and that of National Environmental Standards and Regulatory Enforcement Agency

[177] Olisa, M.M. *op cit* at note 9

(NESREA) in ensuring that environmental laws are strictly complied with by the operators in the Petroleum Industry. The later instutions issue environmental impact assessment license to any Oil and Gas company willing to start Petroleum operations and they also carry out a periodic environmental audit exercise on those companies in order to ensure compliance with environmental laws in their operations.

DPR is also to ensure that health, safety and environment regulations conform with national and international best oil field practice[178.] This is actually one of the fundamental roles of DPR. However, the effectiveness of this role has been affected by the fact that there exist multiple involvement of various agencies all established by different laws with the same duplicating functions. For example, overlap of functions occur at two levels (Federal and State). At the Federal level, the conflict between DPR and Federal Ministry of Environment (FME)[179], National Oil Spill Detection Agency (NOSTDRA)[180], National Environmental Standards and Regulatory Enforcement Agency (NESREA)[181], is mainly motivated by overlapping functions. While FME is statutorily required to collaborate with various agencies including DPR on the

[178] *Ibid*
[179] A Ministry under the Minister of Environment in Nigeria.
[180] An agency of the Federal Government of Nigeria created for emergency response and clean up of oil spill by Petroleum operators
[181] An agency of the Federal Government of Nigeria that is created by statute to solely regulate environmental users either for commercial or private use

matters and facilities relating to the protection of the environment and the conservation of natural resources, the extent of or the form of collaboration remains largely unclear. Furthermore, as noted the provisions of NESREA Act, despite being the main regulatory environmental agency, attempt is being made to relegate the agency in the context of Oil and Gas activities by DPR. Conflicts also exist between National Emergency Management Agency (NEMA)[182], Federal Fire Service Department[183], Federal Road Safety Commission, (FRSC)[184] and DPR at Federal and State level over competency and jurisdiction in prevention, enforcement and prosecution of companies involved in environmental degradation without restoration while carrying out petroleum operations due to unclear definition of regulatory powers and jurisdictions. This has led to limited applicability and effects within the Petroleum Industry. Lack of comprehensive regulatory framework affects enforcement of the laws, for instance, DPR and NOSDRA have a conflicting role when it comes to the enforcement of environmental laws for instance Section 6 (1) (a)-(e) of the National Oil Spill Detection and Response Agency

[182] An agency of the Federal of Nigeria, charged with the responsibility of Managing Disaster in Nigeria.
[183] A department of Federal Government Saddled with the responsibilities of Fighting and to a large extent preventing fire.
[184] A commission engaged in enforcing and prosecuting road traffic offenders.

(establishment) Act[185], NOSDRA is empowered to do the following among others:

a. Responsible for surveillance and ensure compliance with all existing environmental laws and detection of oil spill in the petroleum sector
b. Receive reports of oil spillages and coordinate oil spill response activities throughout Nigeria

Whereas DPR on the other hand is also empowered to administer and enforce all environmental laws on oil and gas industry operations throughout the federation. The two agencies also have differing interpretations of Environmental Standards and Guidelines for Petroleum Industry in Nigeria (EGASPIN). This has enabled the oil industry players to discontinue remediation processes in the oil spill contaminated site before they have been fully restored to an ideal environmental status[186].

Maintaining records on petroleum industry operations, particularly on matters relating to petroleum reserves, production, exports, licences and leases is yet another function of DPR[187]. Apart from inadequate manpower and human resource to carry out this supervisory role, finance is also a bottle neck. The role also involves DPR maintaining records particularly on matters

[185] CAP N157, LFN, 2004
[186] Section 6 (1)
[187] Olisa, M.M. *op cit*

that pertain to reserves, production, exports, license and leases. This role is again duplicated between DPR and other bodies on the issue of reserves, it can conveniently be said that the role is centred on petroleum products or crude oil storage facilities (both Public and privately owned) including tank farms and jetties in Nigeria. However, it is well known that the that NNPC through one of its subsidiary companies, Petroleum and Pipelines Marketing Company Limited (PPMC)[188] has been the company managing and keeping records of some of the petroleum reserves in the country. On the issue of production and exports, the Nigerian Petroleum Development Company (NPDC)[189] is responsible for production of crude oil, the Crude Oil marketing Division[190] of NNPC is in charge of marketing, sale and exportation of crude oil and PPMC on the other hand is in charge of importation, marketing and distribution of petroleum products when the refineries are down, or where products from refineries are not enough to cater for the daily domestic consumption in the country.

Advising government and relevant government agencies on technical matters and public policies that may have impact on the administration and

[188] A fully owned subsidiary of NNPC that is saddled with the responsibilities of maintaining government owned depots, maintenance of petroleum pipelines and marketing of petroleum products in Nigeria.
[189] A fully owned subsidiary of NNPC in charge of exploration and production of crude oil in Nigeria.
[190] A division in NNPC that is responsible for sale and marketing of crude oil in Nigeria.

petroleum activities is yet another function of DPR[191] Th is particular purpose is the reason for the creation of DPR, and to an extent it has effectively performed this function. From time to time the DPR carries out a routine check on all the players in the Industry, advises them on real technical issue particularly as it pertains to Health, Safety and Environment (HSE) in the petroleum Industry. They advice the Minister of Petroleum Resources on Policy issues that may be of importance to the industry.

DPR is also saddled with the responsibility of processing industry applications for leases, licences and permits.[192] Without operational license, oil mining and other type of leases and permits issued under the hand and seal of the Minister of Petroleum resources issued to any company, whatever type of petroleum operation that company may choose to venture into, without license such it will be illegal. However, there is no stipulation on how the violators of these provisions will be sanctioned. It can however be presumed that DPR is likely to work with all the necessary law enforcement agencies like the Police Force, Economic and Financial Crimes Commissions (EFCC), Nigerian Army, Navy and Air force to enable them effectively carry out this function.

[191] Olisa, M.M. *op cit* at note 9
[192] *Ibid*

DPR is to ensure timely and accurate payments of rents, royalties and other revenues due to government.[193] This role in our opinion is in contravention of Section 10 (3) of the NNPC Act[194] which specifically proscribes DPR from engaging or concerning itself with the commercial aspect of the petroleum industry since Section 10 (2) restricted its mandate to operational and technical matters only. There are fiscal laws that have been enacted to specifically regulate the Petroleum industry for instance in the upstream sector of the Petroleum Industry we have the Petroleum Profit Tax Act[195] and in the downstream sector quite a number of fiscal laws like the Companies Income Tax Act (CITA)[196] and Capital Gains Act[197] have been put in place to regulate any company be it a company engaged in petroleum activities only or a company engaged in general commercial activities. Apart from the fiscal laws, institution like the Federal Inland Revenue Service (FIRS)[198], Central Bank of Nigeria[199] (CBN), Ministry of Finance[200] are also regulating the fiscal and commercial regimes in the Petroleum Industry. Therefore it is the fiscal laws and the federal government financial instutions

[193] *ibid*
[194] Cap N123, LFN, 2004
[195] Cap P13 LFN, 2004
[196] Cap C24 LFN, 2004
[197] Cap C11 LFN, 2004
[198] A Federal Government Agency involved in Tax Administration and enforcement in Nigeria.
[199] Apex Bank in Nigeria.
[200] A Ministry under the control and supervision of the Minister of Finance and the Coordinating Minister of the economy.

that are responsible for ensuring that accurate payments of rent, royalties and revenues accruing to the Federal Government are paid into the Federation accounts promptly. DPR by its statutory mandate, is merely a technical arm or rather an inspectorate division that is mainly concerned with operational activities and regulations and are not by statute empowered to regulate the fiscal and commercial aspect of the Petroleum Industry[201].

Another role of DPR is to ensure that petroleum products are sold at government approved price and sanctioning defaulters. This role is highly commendable. However, to enable them carry out this role effectively DPR needs, a legal status in order to en able it they can sue or prosecute offenders. As it stands now, before DPR can prosecute any economic saboteur that hordes petroleum products to enrich himself unjustly and create hardship in Nigerians. DPR will have to do that through the office of the Attorney General or the relevant security agencies this has greatly hampered its activities in enforcing sanctions against offenders thereby enabling offenders escape liability.

From the forgoing, it will be observed that DPR suffers lack of clear definition of role and overlap of oversight function between it and other

[201] Section 10 (3) NNPC Act, CAP N123, LFN, 2004

regulators in the industry. For instance, One of the mandates of DPR in the petroleum industry is to monitor and control environmental pollution associated with oil and gas operations and the administration and enforcement of environmental protection statutes and statutory provisions affecting such operations and the same mandate is given by the statute[202] to other regulatory agencies in the same industry like the National Oil Spill Detection and Response Agency (NOSDRA) and the National Environmental Standards Regulatory and Enforcement Agencies (NESREA). This appears to be a clear duplication of function among these agencies and as such, conflicts are bound to arise and this does affect the stakeholders' interest in the sense that a company engaged in oil and gas operations may find it difficult to ascertain the proper agency to report to when an oil spillage occurs during their operations and subsequently whose recommendation it is expected to implement after assessment of damage has been done. In some other cases, the players in the industry may suffer multiple fines on the same offence from different regulators who have been empowered to fine them[203]. Another

[202] Section 6 (1) (a)-(e) of the National Oil Spill Detection and Response Agency (Establishment) Act Cap N157, LFN, 2004

[203] The mandate given to DPR allows them to fine any company engaged in petroleum operations if they have been found guilty non-compliance with any statutes regulating the petroleum industry and at the same time, section 6 (3)(1) of the NOSDRA Act, Cap N157, LFN, 2004 permits them to fine any company that engages in oil spillage during their operations and has refused to clean them up within 24 hours after the occurrence of the spillage.

instance where conflict of functions may also arise is in the area of environmental impact assessment for the players in the industry. DPR, National Environmental Standards Regulations and Enforcement Agency (NESREA) and Federal Ministry of Environment are in one way or the other empowered to conduct and issue Environmental Impact Assessment (EIA) certificates and conduct a periodic environmental audit for the players in the industry. There is another conflicting position between the Weight and Measures Department of Ministry of Trade and Investment when it comes to the documentation and keeping of records of all weights and measurements of crude oil produced and exported per stream daily, petroleum products refined and stored, and petroleum products transported to all the parts of the country. In the midst of all of these, the ability of the Federal Government to properly regulate one of its most lucrative sectors becomes questionable. Also, the interest of the stake holders amidst all these uncertainties surrounding the enforcement of the laws becomes affected.

In the same vein, the significant role being played by DPR in the petroleum industry should have by now earned it a corporate status in the industry and the absence of this has again led to the loss of revenue to the country that would have been generated by suing defaulting players in the

industry and asking the court to award huge sum of money as penalty against the defaulters for non compliance with the relevant laws regulating the petroleum industry instead of the meager monetary sanctions they issue out to defaulters by way of fines. Also, if DPR were a legal personality, it may earn the right in some circumstances to prosecute offenders or companies in the petroleum industry because as it stands now, if they must prosecute any offender, they will have to do that through the Attorney General's office or the relevant security agencies of which the beauracratic bottle neck involved in briefing the Attorney General's Office or the lack of diligent prosecution by the security agencies is enough to frustrate the entire case.

4.4 Nigerian National Petroleum Corporation

As a background to the establishment of the Nigerian National Petroleum Corporation, it is useful to explain the situation and events in Nigeria that led to its establishment in 1977. Prior to 1971, the role of the Federal Government in the petroleum sector of the Nigerian economy was purely regulatory. The regulatory role consisted essentially of issuing permits, licences and leases prescribed by petroleum legislation for various activities and collection of fees, bonuses, rents and royalties laid down by legislation. Policy matters pertaining to the distribution and pricing of crude oil and

petroleum products and the general administration of petroleum enactments governing upstream and downstream operations were also the responsibility of the Federal Government. By then there was serious inadequacy of requisite indigenous technical staff for adequate supervision of field petroleum operations. The government role was performed at various periods by a sector, division or department of one Federal Ministry or another until the Ministry of Petroleum Resources was established in 1975 and the responsibility for petroleum matters was assigned to that Ministry. In 1971, it became necessary to put into statutory form the aspiration and policy of direct national involvement and participation in actual petroleum activities in Nigeria. Thus, the Nigerian National Oil Corporation Decree 1971 was promulgated establishing a national oil entity called the Nigerian National Oil Corporation. The Corporation was charged with the duty of all phases of petroleum activities in Nigeria. The Corporation co-existed with the Ministry of Petroleum Resources, each with its specified duties and powers. In actual fact, the Corporation, as far as actual petroleum activities were concerned, undertook only exploration work solely on its own. In order to have in Nigeria a fully integrated agency of government to engage in all phases of oil and gas operations and to regulate, oversee and monitor the activities of the

Nigerian oil and gas industry, the Nigerian National Petroleum Corporation NNPC was established.

The NNPC was established under the Nigerian National Petroleum Corporation Act[204] which came into force on April 1, 1977. By virtue of the Act, all assets, funds, resources and other movable and immovable property which immediately before April 1, 1977 were vested in and held by the dissolved Ministry of Petroleum Resources and held by it for and on behalf of the Federal Government became vested, without further assurance, in the Corporation. Similarly, NNPC acquired all the rights and interests and assumed all the obligations and liabilities of the Government under all contracts or instruments entered into by the dissolved Ministry of Petroleum Resources for or on behalf of Government for any purpose for which the dissolved Ministry had responsibility immediately before April 1, 1977. Provisions were made in the Act to vest in NNPC, without further assurance, the assets of the dissolved Nigerian National Oil Corporation (NNOC) and for the Corporation to assume all the duties and obligations of NNOC. The Nigerian National Petroleum Corporation Act provides that the affairs of the Corporation shall be managed by a Board of Directors consisting of the

[204] CAP N123 LFN, 2004

Chairman and the following members: the Director General, Federal Ministry of Finance and Economic Development, the Managing Director of NNPC and three persons appointed by the National Council of Ministers. There's is also a Secretary to the Corporation who is not a member of the Board. His appointment is made by the Corporation by means of a resolution of its Board of Directors. This provision has however been overtaken by the 1988 reorganization of NNPC.

Section 3 (1) provides as follows:

> There shall be appointed by the President, a Managing Director of the Corporation who shall be the chief executive officer of the Corporation and shall, subject to Part II of this Act, be responsible for the execution of the policy of the Corporation and the day-to-day running of the Corporation's activities and its associated services.

Notwithstanding and due to some recent past experiences where there were a lot of interferences by the minister of petroleum in the day to day running of the NNPC. So for the purpose of this research, it is sufficient to state that, in practice, the provisions of sub-section 3 (1) of the Act have not always been explicitly followed. Experience has shown that with the re-establishment of the Ministry of Petroleum Resources, the powers of the Director-General of the Ministry vis-a-vis those of the Group Managing

Director in the affairs and day-to-day running of the Corporation could be an additional area of conflict which requires clarification. On one occasion, the issue was whether, in the day-to-day running of the Corporation, the Group Managing Director should report directly to the Minister of Petroleum Resources as Chairman or indirectly through the Director General or even directly to the President who appointed him.

Fusion of Corporate Governance in the petroleum industry is yet another problem that has been identified in the industry. While carrying out a comparative analysis by this writer, between NNPC's style of corporate governance and that of the Central Bank Nigeria[205] it was observed that to ensure independent, transparent and efficient corporate governance in the money market, the Ministry of Finance is clearly separated from the Central Bank of Nigeria. For instance the Minister of Finance does not sit on the board of CBN, the board is chaired by the CBN Governor. Appointment and Removal of CBN Governor and the Deputy Governors[206] are done by the President subject to the confirmation of the Senate. This procedure has shown some level of independence and transparency in the sector. Section 3 of the

[205] Central Bank of Nigerian Act, CAP C13, LFN 2010
[206] Section 10, CBN Act, CAP C13 LFN, 2010

CBN Act[207] also provides that, in order to facilitate the achievement of its mandate under this Act, and the banks and other Financial Institution Act and in-line with the objective of promoting stability and continuity is economic Management the Bank shall be an independent body in the discharge of its functions. This allows for a clear separation of corporate powers in the financial sector and it has thus far led to efficiency in the discharge of their mandate. In the case of petroleum industry, the apex regulators which is the Department of Petroleum Resources DPR (technical and operational regulator) and the Nigerian National Petroleum Corporation NNPC (commercial and investment regulator) are all under the supervision of the Minister of Petroleum who also chairs the NNPC Board of Directors. The Group Managing Directors and other Directors of NNPC are appointed unilaterally by the President as recommended by the Minister of Petroleum without any screening or confirmation by the senate[208]. No section of the NNPC Act empowers it to be an independent body in the discharge of its duties and functions. Between 2010 and 2015 five Chief executives of NNPC have been replaced. This fusion of corporate governance in the industry has led to administrative and operational interference, lack of policy continuity,

[207] CAP C13, LFN, 2004
[208] Section 2(c), NNPC Act, CAP N123, LFN 2004

transparency and growth of the industry because the industry is being corporately governed like a one Man affair. As a matter of fact, the most recent draft of the Petroleum Industry Corporate Governance Bill adopted almost explicitly the CBN's code of corporate governance to ensure transparency, accountability and independence in the petroleum industry.

Since the reorganization of 1988, the duties and powers of the Nigerian National Petroleum Corporation are limited to commercial activities and regulations because of the transfer of the Petroleum Inspectorate arm of the Corporation to the Department of Petroleum Resources under the Ministry of Petroleum Resources.

4.5 Nigerian Extractive Industries Transparent Initiative

The passage of the Nigerian Extractive Industries Transparency Initiative (NEITI) Act[209] sent very positive signals about Nigeria's desire to sustain her leadership in the global initiative to the world. The Nigerian oil and gas industry, like in many resource rich countries, has been largely seen as an avenue to fuel corruption and enrich a few privileged, parasitic elite at the expense of ordinary citizens[210]. The blessings that theorists predict will befall a natural resource rich country has not managed to happen in Nigerian

[209] CAP N17 LFN, 2004
[210] Http://www.NEITI.org.ng accessed in December, 2015

even after more than forty years of the corruption in the said industry[211]. The decision of the Nigerian government to implement wide ranging reforms and openness in payments and receipts, back in 2003, in line with the global multi-stakeholder Extractive Industries Transparency Initiative (EITI) paved a way to enthrone a more open, transparent extractive (oil, gas and mining) industry and to hold governments accountable for public revenue. Indeed the comprehensive financial, physical and process audits conducted by NEITI on the Nigerian oil and gas sector between 1999 and 2004 clearly exceeded the global focus of EITI and have been often referred to as EITI plus.[212] The NEITI Act[213] was conceived therefore to insulate the implementation of EITI in Nigeria against the vagaries of policy reversal and political manipulation. This legislation became the first of its kind where EITI implementation was codified into law. Some EITI implementing countries in Africa have borrowed from the Nigerian experience in crafting their respective national laws[214].

[211] AUWAL M. Implementing Nigeria Extractive Industries Transparency Initiative for Impact: Some Policy options. A paper presented at a conference organised by Civil Society Legislative Advocacy Centre held at National Conference Centre, Abuja

[212] AUWAL M. Implementing Nigeria Extractive Industries Transparency Initiative for Impact: Some Policy options. A paper presented at a conference organised by Civil Society Legislative Advocacy Centre held at National Conference Centre, Abuja.

[213] Ibid

[214] Ibid

One major concern facing the effective implementation of their role is the fact that the objectives of the Act may be too ambitious and open ended. For instance in section 2(c), the Act empowers NEITI to "eliminate all forms of corrupt practices in the determination, payments, receipts and postings of revenue accruing to the Federal government from extractive industry companies". This particular clause gives a very broad range of responsibilities to NEITI. NEITI is designed as a lean bureaucracy and so will be unable to carry out these functions. Furthermore some of these functions are already being carried out by statutory government agencies such as the Federal Inland Revenue Service, Central Bank of Nigeria, Office of the Accountant General of the Federation etc. The fourth objective of NEITI according to the Act in section 2(d) is "to ensure transparency and accountability by government in the application of resources from payments derived from the extractive industry companies". Many complex issues can be deduced from this objective[215]. The unbundling of the word government will mean federal, state and local governments. The federal constitution of Nigeria does not allow a federal government agency such as NEITI to operate beyond the federal level into the state and local government sphere. It is therefore almost impossible

[215] AUWAL M. Implementing Nigeria Extractive Industries Transparency Initiative for Impact: Some Policy options. A paper presented at a conference organised by Civil Society Legislative Advocacy Centre held at National Conference Centre, Abuja.

for NEITI to implement this objective as it is crafted by the Act save and otherwise the states adopt the EITI model in the area of expenditure transparency as has been done by Bayelsa State. This will provide entry points for NEITI and work with such states in an innovative manner.[216]

Another interesting clause is Section 3 (c) which prescribes a function for NEITI to ensure transparency and accountability in the management of the investment of the Federal Government in all extractive industry companies" it has been argued that this function clearly falls within the scope of the functions currently carried out by the National Petroleum Investment Management Services (NAPIMS) which is a unit of Nigerian National Petroleum Corporation. Another obvious weakness in the Act is contained in Section 7 which states that "a person appointed as a member of NSWG shall hold for four years and no more". This means that there is a slim chance for transfer of knowledge. During the four year tenure, it will be expected that board members of NEITI will learn more about EITI and the oil and gas industry. This institutional knowledge will be lost as there will be no chance of reappointing any of them. This will mean that every four to five years, NEITI will witness a change in leadership with may not be in the overall

[216] Ibid

benefit of a new regulatory institution. It is submitted that a possible re-appointment of performing members of the NEITI board as well as relevant professionals reduces the loss of institutional memory and catalyze policy sustainability.

In section 12 (1)-(3), the Act outlines the qualification of the Executive Secretary of NEITI. This ought to be a very important section but sadly there is obvious lack of clarity. The qualification of the Executive Secretary of NEITI said to be "a graduate with relevant qualifications and at least ten years cognate experience". This could be interpreted to mean many things and could be hijacked by mischief makers to impose incompetent crones as has been the case in the past. It important for the Act to clearly qualify the sort of disciplinary affiliation and cognate experience expected of that such persons. It can be submitted that an economist, accountant or engineer with ten years verifiable experience in the oil and gas industry, integrity and pedigree as well as international exposure will be best suited for a demanding position as that of the Executive Secretary of NEITI[217].

[217] AUWAL M. Implementing Nigeria Extractive Industries Transparency Initiative for Impact: Some Policy options. A paper presented at a conference organised by Civil Society Legislative Advocacy Centre held at National Conference Centre, Abuja

The sanction clause as contained in section 16 stipulates a fine of thirty million naira for any company that does not comply with the Act. For a multi-million dollar industry, this is seen by many as inadequate[218].

[218] Ibid

CHAPTER FIVE

PETROLEUM INDUSTRY GOVERNANCE BILL AND THE ENTHRONEMENT OF A NEW REGULATORY REGIME IN THE PETROLEUM INDUSTRY IN NIGERIA

5.1 Introduction

The Petroleum Industry Governance Bill (PIGB) is the latest of the Government's stab at institutionalized reforms within the Nigerian oil and gas industry, and a more cautious approach towards ultimately achieving the initial goals of the infamous Petroleum Industry Bill (the "PIB")[219].

It is crucial for the Nigerian citizenry to take a keen interest in the PIGB particularly since the Industry plays an important role to the nation's economy, contributing about 80% of the country's foreign exchange income. It is even more important, because the journey for an overhaul of Industry legislation into one single document commenced as far back as the year 2002 under the former President Olusegun Obasanjo's Oil and Gas Implementation

[219] Ogunnaike D.O: *Understanding the Petroleum Industry Governance Bill 2016*. An Article Published in the West Africa Energy Segment of Business Day Newspaper on 13th July, 2016.

Committee (OGIC). The OGIC's efforts culminated in the draft of a National Oil Policy in the year 2004[220].

Since then, there have been various attempts to conclude upon an agreeable drafts of legislation which would be wholesome and cater for very area of the Industry, including untested areas such as host community funding, a viable fiscal regime for gas and incentives for midstream and upstream petroleum operations. This gave rise to the PIB, which was first introduced in 2008 with specific objectives to: (i) increase petroleum exploration and production, (ii) boost domestic gas supply, (iii) deregulate the downstream sector of the Industry, (iv) establish a viable national oil company, (v) create an efficient regulatory entity, (vi) enhance transparency and accountability in the Industry, among other objectives. Unfortunately, the PIB has gone through 2 past administrations and has not been able to pass the litmus test of legislation. This is partly due to its length (comprising 222 pages and 362 sections) and its far- reaching provisions that cut across fiscal, governance and regulatory matters[221].

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[220] Omorogbe Y. *Learning From the Past to Predict the Future. A Paper Presented at the Conference Organized by Nigerian Law Reform Commission and House of Representatives Held at the Sheraton Hotel and Towers, Abuja,* From Monday 18th – 20th July, 2016 at Page 1-10

[221] Ogunnaike D.O: *Understanding the Petroleum Industry Governance Bill 2016*. An Article Published in the West Africa Energy Segment of Business Day Newspaper on 13th July, 2016.

The non-enactment of the PIB almost 8 years after its introduction, created legislative uncertainty which left Industry stakeholders uncertain as to the future of Nigeria's Industry and the sustainability of business under the threat of proposed radical legislative changes. Along with this uncertainty was the restive situation in the Niger Delta which resulted in the vandalism of crude production/transportation facilities, as well as the global crash in crude prices. As a result, the Industry started to grind to an alarmingly slow pace, to the extent that the Minister of State for Petroleum Resources announced in October 2015 that the country loses about 3 trillion Naira worth of investment annually due to the non-enactment of the PIB[222].

In reaction t this desperate situation, the Buhari-led administration has adopted a logical and tactical approach to split the PIB into 4 bills namely: the PIGB (the subject matter of this chapter), the Fiscal Regime Bill, the Upstream and Midstream Administration Bill, and the Petroleum Revenue Bill. The PIGB is the only bill that is currently in circulation and has passed its first reading at the Senate. There is an expectation that the PIGB will go through its second reading at the National Assembly in the coming days[223].

[222] Ogunnaike D.O: *Understanding the Petroleum Industry Governance Bill 2016*. An Article Published in the West Africa Energy Segment of Business Day Newspaper on 13th July, 2016.

[223] Ibid

Upon the successful implementation of this first phase of regulatory reforms in the Industry, the Government would then proceed to the other 3 bills. The PIGB deals exclusively with the governance and institutional framework of the Industry and we will be considering the most salient of the provisions of the PIGB[224].

From the long title of the Bill, it would appear that same makes provision for the governance and institutional framework for the petroleum industry and other related matters[225].

5.2 The Main Objectives of the Bill

The objectives of this bill include;

1. The creation of efficient and effective governing institutions with clear and separate roles for the petroleum industry.
2. Establishment of a framework for the creation (out of existing government-owned entities) of commercially oriented and profit driven entities that will ensure value-add and internationalization of the petroleum industry.

[224] Ogunnaike D.O: *Understanding the Petroleum Industry Governance Bill 2016*. An Article Published in the West Africa Energy Segment of Business Day Newspaper on 13th July, 2016.

[225] http://www.linkedin.com/company/benwo-&-Ighodalo: Review of the Petroleum Industry Governance and Institutional Framework Bill. 2006

3. The promotion of transparency and accountability in the petroleum industry.
4. Creation of a conducive business environment for operators in the petroleum industry.

Presumably, the intent of the proponents of the Bill is to ensure that there is a high level of transparency in the Nigerian Petroleum Industry whilst at the same time ensuring that the industry is commercially driven and attractive to potential investors. Highlighted below are salient provisions of the Bill, which may impact the Nigerian Petroleum Industry, if same is passed into law in its current form[226].

5.3 Powers of the Minister

Section 2 of the Bill[227] sets out the functions and powers of the Minister of Petroleum Resources (the "Minister") Specifically, Section 2(1) (g) provides that the Minister shall upon the recommendation of the Nigerian Petroleum Regulatory Commission (the "Commission"), grant, amend, renew,

[226] http://www.linkedin.com/company/benwo-&-Ighodalo: Review of the Petroleum Industry Governance and Institutional Framework Bill. 2006

[227] Petroleum Industry Governance Bill, 2016.

extend or revoke petroleum exploration and production licenses and leases pursuant to the provisions of this Act or any other enactment[228].

The Bill in its current form seeks to fetter the discretion of the Minister by subjecting the exercise of his powers to grant, amend, renew, extend or revoke petroleum exploration and production licenses and leases to the recommendation of the Commission, which is not the case under the Petroleum Act. Under the Act, the Minister has an absolute discretion to grant, amend, revoke and extend oil prospecting licenses and oil mining leases to applicants that satisfy statutorily prescribed conditions[229]. The foregoing is particularly significant because most of the members of the Commission's board would be appointed by the President of the Federal Republic of Nigeria and not the Minister, which in our view, further dilutes the power vested in the Minister. Furthermore, the above presupposes that there will be a new process for applying for an amendment, renewal, extension or revocation of a license or lease, which will involve applying through the Commission and not directly to the Minister. However, the Bill is silent on the procedure for applying for an amendment, renewal, extension or

[228] Ibid

[229] http://www.linkedin.com/company/benwo-&-Ighodalo: Review of the Petroleum Industry Governance and Institutional Framework Bill. 2006

revocation of a license or lease. The Bill, in Section 3[230], retains the Minister's power as currently preserved in the Extant Act, to exercise a right of pre-emption on all petroleum and petroleum products obtained, marketed or otherwise dealt with under any license or lease granted under the Act in the event of a state of national emergency or war. Although the Extant Act imposes a fine of N2, 000 (Two thousand Naira), payable as a penalty by any person who, without reasonable excuse (the burden of proof of which shall lie on the defaulter), fails to comply with a requisition made by or on behalf of the Minister or fails to conform to or obey a direction issued by the Minister in exercise of his right of pre-emption, the Bill, prescribes more stringent penalties and stipulates a fine of –N- 10,000,000 (Ten Million Naira) or imprisonment for a period not exceeding 6 months or both for any of the above identified infractions. Further, any person who obstructs or interferes with the Minister or his servants or agents in the exercise of the pre-emptive powers conferred on the Minister under paragraph 8 of the Second Schedule to the Extant Act shall be guilty of an offence and shall on conviction be liable to a fine not exceeding N200 (Two Hundred Naira) or to imprisonment for a period not exceeding six months, or to both. However, the Bill increases

[230] Petroleum industry Governance Bill, 2016

the fine to an amount not exceeding N5, 000,000 (Five Million Naira) or to an imprisonment for a period not exceeding 6 months or both[231].

5.4 Establishment of the Nigerian Petroleum Regulatory Commission

The Bill seeks to establish a body to be called the Nigerian Petroleum Regulatory Commission (the "Commission") which shall assume the rights, interests, obligations and liabilities of the Petroleum Inspectorate and the Department of Petroleum Resources ("DPR") and the Petroleum Products Pricing Regulatory Agency ("PPPRA") as well as serve as the regulator of the upstream, midstream and downstream sub-sectors of the oil and gas industry. The Bill also seeks to vest the Commission with the assets, funds, resources and other movable and immovable properties, which are held by the Inspectorate, DPR and the PPPRA[232].

Although, the Petroleum Inspectorate (the "Inspectorate" which was a unit under the Nigerian National Petroleum Corporation (the "NNPC") was excised from the NNPC, and transferred to the Ministry of Petroleum Resources as the Technical arm and renamed the Department of Petroleum

[231] http://www.linkedin.com/company/benwo-&-Ighodalo: Review of the Petroleum Industry Governance and Institutional Framework Bill. 2006.

[232] http://www.linkedin.com/company/benwo-&-Ighodalo: Review of the Petroleum Industry Governance and Institutional Framework Bill. 2006

Resources, the Inspectorate still exists fictionally under the Nigerian National Petroleum Corporation Act. From our reading of the Bill, the objectives of the Commission, include, the promotion of (i) a healthy, safe and efficient conduct of petroleum operations; and (ii) an efficient, safe, effective and sustainable infrastructural development of the petroleum industry. The Bill also seeks to vest the Commission with technical, commercial and environmental regulatory functions[233].

Pursuant to the provisions of Section 4[234], the Commission shall specifically be empowered to administer and enforce policies, laws and regulations relating to all aspects of petroleum operations, which are assigned to it under the provisions of the Act or any regulations made in pursuance of the Act or any other enactment[235]. In addition to the foregoing, the Commission is empowered to define and approve standards of design, procurement, construction, operation and maintenance of all plants, installations and facilities utilized or to be utilized in petroleum operations. Furthermore, the Commission shall be empowered to establish, monitor, regulate and enforce health and safety measures relating to all aspects of

[233] Ibid
[234] Petroleum Industry Bill, 2016.
[235] http://www.linkedin.com/company/benwo-&-Ighodalo: Review of the Petroleum Industry Governance and Institutional Framework Bill. 2006

petroleum operations. The development and publication of tariff and pricing methodologies relating to third party access to petroleum facilities from time to time as specified in any regulation shall also be within the remit of the Commission[236]. Also, advising the Minister on fiscal and other issues pertaining to the petroleum industry is intended to be within the remit of the Commission. The Bill also seeks to charge the Commission with responsibility for issuing licences, permits or other authorizations necessary for all activities connected with, but not limited to, seismic, drilling, design and construction of all facilities for upstream petroleum operations. Furthermore, the Commission shall be conferred with powers to regulate the activities of the downstream petroleum industry in a non-discriminatory and transparent manner in addition to being empowered to make regulations necessary to give proper effect to the provisions of the Bill. It is clear from the provisions of section 4 of the Bill that the draftsman intends to reduce the number of regulators in the petroleum industry by subsuming the powers of the PPPRA and the DPR into the regulatory purview and the remit of the Commission. Additionally, any decision or order of the Commission shall

[236] Ibid

contain the basis of the decision or order, recorded in writing and shall be accessible to the public at reasonable times and places[237].

Unlike in the case of the NNPC where members of the board are appointed by the President, members of the board of the Commission are appointed by the President, and their appointments are subject to the confirmation by the Senate. The Board of the Commission will consist of a non-executive chairman, a non-executive commissioner, an executive vice chairman, and three executive commissioners.[238]The Bill seeks to ensure that the Commission conducts public hearings prior to issuing Regulations whilst also empowering it to issue Regulations without necessarily seeking public participation, where the exigencies of the circumstances require. Regulations issued in such circumstances shall however be deemed spent after six (6) months, where no public hearing is conducted in that period. The commission shall also include representatives of the Ministry of Petroleum Resources, the Ministry of Finance and the Ministry of Environment, all of whom shall not be below the rank of director[239]. It is also pertinent to note that the Bill does not require the Minister of Petroleum Resources to sit on the Board of the

[237] http://www.linkedin.com/company/benwo-&-Ighodalo: Review of the Petroleum Industry Governance and Institutional Framework Bill. 2006.

[238] Ibid

[239] http://www.linkedin.com/company/benwo-&-Ighodalo: Review of the Petroleum Industry Governance and Institutional Framework Bill. 2006.

Commission. There is, therefore, a presumption that the Commission shall be independent and shall not be subject to the influences of the Minister. To further underscore the intent of the Bill to imbue the Commission with independence, the Bill specifically provides that members of the Commission may only be removed or suspended by the President.

Nonetheless, it is noteworthy that section 15 of the Bill still empowers the Minister to issue directions to the Commission on matters pertaining to the petroleum industry and the Commission is bound to implement such directions, provided that same are not in conflict with the provisions of the Bill.

Section 26[240] makes provision for the funding and revenue generation of the Commission. Specifically, the Commission is entitled to keep for its use a percentage of the income generated by the Commission for the federal government of Nigeria, as may be appropriated to the Commission by the National Assembly. Whilst the Commission may accept gifts, loans and grants-in-aid, Section 27 (2) prohibits any member of its board or any of its employees from accepting gifts for his/her personal use. In this regard, we are of the view that a proper watchdog will need to be established to ensure that

[240] Petroleum Industry Governance Bill, 2016.

Commission's board members and/or employees do not use any gifts, accepted for and on behalf of the Commission for personal gain. Exemption from Income Tax By virtue of section 30, the Commission is exempt from paying income tax. Similar to the provisions in the NNPC Act, Section 31 provides for issuance and service of a one (1) month pre-action notice as a condition for instituting and commencing any suit against the Commission. Furthermore, the said section seeks to assure that no suit may be commenced against the Commission and/or, any member of its board and/or its employees unless: (i) such a suit is instituted within three (3) months3 after the act, neglect or default complained of; or (ii) in the case of a continuing damage or injury, the suit is instituted within six (6) months after the damage or injury ceases. The NNPC enjoys a similar privilege. However, unlike the period specified herein, there is a longer period of twelve (12) months enjoyed by the NNPC[241]. For a continuing event there is a twelve (12) month period within which the NNPC must institute such matters. Similar to the privilege accorded the NNPC, Section 33 seeks to preclude the execution or attachment of the Commission's physical property in satisfaction or enforcement of any Judgment against the Commission. However, judgments against the

[241] http://www.linkedin.com/company/benwo-&-Ighodalo: Review of the Petroleum Industry Governance and Institutional Framework Bill. 2006

Commission may be enforced by means of attaching its Funds in the custody of a 3rd Party provided that a judgment creditor gives at least three (3) months' notice of its intention to commence garnishee proceedings against the Commission[242].

5.5 Establishment of the Nigerian Petroleum Assets Management Company and the National Petroleum Company

Similar to the previous drafts of the PIB, which sought to split the NNPC into three commercial entities, Section 36 of the Bill provides for the incorporation of two entities to be known as the Nigerian Petroleum Assets Management Company ("NPAMC") and the National Petroleum Company ("NPC"), which will be vested with certain liabilities and assets of the NNPC. The NPAMC shall be responsible for the management of the NNPC's oil and gas investment in assets where government is not obligated to provide any upfront funding (essentially the production sharing contracts), whilst the NPC shall be an integrated oil and gas company operating as a fully commercial entity across the energy value chain. Section 37 provides that, the initial shares of the NPAMC at incorporation shall be held by the Federal Ministry of Finance Incorporated ("MOFI") and the Bureau for Public Enterprises

[242] http://www.linkedin.com/company/benwo-&-Ighodalo: Review of the Petroleum Industry Governance and Institutional Framework Bill. 2006

("BPE") in a ratio of 99% to 1% respectively. Further, Section 40[243] provides that within 3 months of incorporation, the Minister shall make an order that the assets, rights, obligations, employees and liabilities of the NNPC shall be transferred to the NPAMC. The Bill does not specify which assets, rights, obligations, employees and liabilities will be transferred but we presume that these will be specified in the said Order. Additionally, Section 47 provides that the company shall be entitled to charge the Federal Government of Nigeria ("FGN") fees for the management of its oil and gas investments/ interests and such fees shall be a percentage of the revenue generated by the NPAMC for the Federal Government, as determined and appropriated by the National Assembly. All income of the NPAMC (other than its operating funds provided by its shareholders, fees earned from the FGN, gifts and donations it receives) shall be paid into the Federation Account. Section 60 provides in relation to the NPC, that its initial shares as in the case with the NPAMC will be held by the MOFI and the BPE at incorporation.. Further, the Bill provides that within 6 years from the date of incorporation of the NPC, it shall divest of not less than 30% of its shares to the public in a transparent manner. It is

[243] Petroleum Industry Governance Bill, 2016.

however, unclear; as the section is silent, if the contemplated divestment of the NPC's Shares will be limited to Nigerians[244].

Section 62[245] provides that the Minister shall, in consultation with the MOFI and BPE no later than 6 months from the date of incorporation of the NPC, present through the MOFI, a request for funds to be appropriated for the initial capitalization of the NPC. This amount shall not be less than the five (5) year average of amounts appropriated by the National Assembly for the funding of the NNPC's share of cash calls in all its joint venture operations. Unlike in the case of the NNPC, section 64 provides that the NPC, shall be entitled to retain revenue from its operations(without remitting same in the first instance to the Consolidated Federation Account), and shall defray its joint venture cash call obligations as well as loan and other repayments to its lenders and financiers from such revenues. The Bill also provides that the dividend policy of the NPC is to be determined by its Board of Directors in accordance with the provisions of Companies and Allied Matters Act (CAMA) and such dividend policy is subject to the approval of the shareholders. It is useful to note that under CAMA, dividends are not generally subject to the approval of the shareholders, however, under section

[244] http://www.linkedin.com/company/benwo-&-Ighodalo: Review of the Petroleum Industry Governance and Institutional Framework Bill. 2006.

[245] Ibid

379(3)[246], the members in general meeting have the power to decrease the amount of dividend recommended by the directors but they shall have not have the power to increase the recommended amount.

Section 66 provides that the Minister shall within 3 months of incorporation of the NPC make an order to transfer the assets, employees, liabilities, rights and obligations of the NNPC including those held by the Federal Government of Nigeria to the NPC and as with the NPAMC we presume that such Order will be more granular as to which assets and liabilities will be transferred to NPC. Further, the Bill provides that with effect from the date of the order, all agreements, contracts, instruments and working arrangements subsisting prior to the transfer date and relating to the assets to be transferred, to and which NNPC was a party shall be fully effective or enforceable against or in favour of the NPC, as if it had been named as a party therein. The Minister may also, by order, require that certain employees, assets, rights, liabilities and obligations of the NNPC be transferred to any successor entity created by the Minister, and such shall be binding on the NNPC, the successor entities and any other persons[247].

[246] Ibid

[247] http://www.linkedin.com/company/benwo-&-Ighodalo: Review of the Petroleum Industry Governance and Institutional Framework Bill. 2006.

Section 79[248] provides that upon incorporation, the NPC shall be organised and managed on the basis of the provisions of the CAMA and its Memorandum and Articles of Association. This further emphasizes the intent of the legislature to ensure that the NPC operates as a separate commercial entity.

The Bill seeks to remove the NPC from the purview of the PPA and FRA. Whilst the PPA requires that a competitive bid process must be undertaken prior to any procurement (except in a very few cases) by public bodies, the FRA stipulates stringent financial reporting obligations. Although both the PPA and FRA appear to encourage transparency, the provisions of both legislations will arguably, slow down business operations. In our view[249], the intendment of Section 61 of the Bill is to engender efficiency and businessman-like operations, such that NPC operates in a similar manner as other international national oil companies. These provisions are set out in Part 6 of the Bill. Specifically section 84 provides that the provisions of all existing enactments or laws including but not limited to the Petroleum Act, the Pipeline Act, the Petroleum Profit Tax Act4 and the Companies and

[248] Petroleum Industry Governance Bill, 2016.

[249] http://www.linkedin.com/company/benwo-&-Ighodalo: Review of the Petroleum Industry Governance and Institutional Framework Bill. 2006

Allied Matters Act are to be read with modifications to bring them into conformity with the Bill and where any inconsistency is found the provisions of the Bill shall prevail. Although, the above mentioned modifications to the Petroleum Act, the Pipeline Act, the Petroleum Profit Tax Act and the Companies and Allied Matters Act, as well as the repeal of the Petroleum Products Pricing Regulatory Agency (Establishment) Act ("PPPRA Act"), will take effect upon the enactment of the Bill into law, section 85 of the Bill specifically provides that the NNPC Act, the Nigerian National Petroleum Corporation (Projects) Act and the NNPC Amendment Act will only become repealed on the date the Minister issues the legal notice vesting the assets and liabilities of the NNPC in the relevant successor entities. The Bill also seeks to modify the provisions of the Oil Pipelines Act ("OPA") by stating that all references to Minister in the OPA should be deemed to refer to the Commission; whilst Section 31 of the OPA which relates to fees payable for application of a permit and licenses or its variations shall be amended to provide that such fees shall be determined by regulations made by the Commission. Additionally, Section 86 provides that every permit or license issued by the DPR before the commencement of the Bill will continue to be effective as if same was issued by the inclusion of the Petroleum Profits Tax

Act herein would appear curious as the Bill does not make fiscal arrangements[250]. The Minister may also make further transitional or savings provisions consistent with the transitional or savings provisions contained in the Bill within three months from its effective date. Given the intention to repeal the PPPRA Act, Section 87 provides for the transfer of staff from the PPPRA and the DPR to the Commission whilst Section 89 provides for the vesting of, all assets, funds, resources and other moveable or immovable property hitherto vested in the Inspectorate or the DPR and the PPPRA in the Commission. Further, any proceeding or cause of action pending or existing, which could have been taken by or against the DPR before the effective date may be commenced, continued, enforced or taken by or against the Commission. Also, Section 89 (5) and (6) further provides that all rights, interests, obligations or liabilities under any contract in equity or law and entered into by the PPPRA and the DPR or Petroleum Inspectorate existing immediately before the effective date which shall have been held by or on behalf of or have accrued to or incurred for its own benefit or use shall be assigned to or vested in the Commission, such contract shall also be enforceable as fully and effectively as if the Commission had been named as a

[250] http://www.linkedin.com/company/benwo-&-Ighodalo: Review of the Petroleum Industry Governance and Institutional Framework Bill. 2006

party thereto and any proceeding or cause of action in relation thereto may be commenced, continued, enforced or taken by or against the Commission[251].

It is evident from our review of the Bill that the draftsman seeks to ensure that the petroleum industry is run in an efficient and transparent manner for the benefit of the country and we can only hope that this is ultimately achieved[252].

[251] Ibid

[252] http://www.linkedin.com/company/benwo-&-Ighodalo: Review of the Petroleum Industry Governance and Institutional Framework Bill. 2006

CHAPTER SIX

SUMMARY AND CONCLUSION

6.1 Summary

Consequent upon the discovery of crude oil, Agriculture which used to be the mainstay of Nigerian economy was relegated to the back ground. The increasing growth in the petroleum industry operations and the need for a formidable regulatory regime that will ensure compliance to standards and ethics that is in line with local and international best practices in the petroleum industry led to the creation of legal and institutional frameworks for the industry. The effect of this gave birth to the enactment of the Petroleum Act[253], NNPC Act[254] and other related laws. The establishment of Ministry of Petroleum Resources, Nigerian National Petroleum Corporation, Department of Petroleum Resources and other institutions to effectively and efficiently enforce compliance with the enabling laws also became expedient.

6.2 Findings

In view of the above, this work finds as follows:

1. **Obsolete Petroleum Industry Laws:** Most of the regulatory laws of the petroleum industry are obsolete in nature with the exceptions of the

[253] *Ibid*
[254] *Ibid*

Nigerian Oil and Gas Industry Local Content Development Act[255] and Nigerian Extractive Industry Transparency Initiative Act[256] which were enacted in 2007 and 2010 respectively (although they are not the principal legislations on petroleum industry). The first comprehensive principal legislation on petroleum industry dates are far back as 1968[257]. Other legislations include the NNPC Act which came into being in 1978, while the Profit Tax Act had been in existence since 1958 even before the commencement of Petroleum Act. Oil Pipelines Act, Oil in Navigable Waters Act and others have been in force before 1960. To this end, these legislations can no longer synergize itself with the dynamic legal and technological sophistications the industry currently offers through the use of technological advancement in exploration and exploitation of crude oil and other international best practices including corporate governance. Therefore, the need for an entirely new law to regulate the petroleum industry is long overdue.

2. **Poor Sanction regime in the industry:** The existing regulatory regime of the petroleum industry does not provide for a stiffer penalty on defaulting companies neither is there executive will to sanction

[255] CAP N124A LFN, 2004
[256] CAP N130 LFN, 2004
[257] Petroleum Act, CAP P10, LFN, 2004

defaulting companies in the petroleum industry. This particular shortfall cut across almost all the existing laws regulating the petroleum industry and the common denominator with regards to the sanction regime is that the penalty is inadequate compared to how much the company is making in the industry. The Penalties contained in the Petroleum Act, Petroleum Profit Tax Act, NEITI Act and other laws like the National Oil and Gas Detection and Response Agency are inadequate and may not be deterrent enough. Some of the regulatory laws prescribes a sanction in form of a fine of an amount as low as N200.00 (Two Hundred Naira). This, in our view is grossly inadequate and it makes a mockery of the entire industry.

3. **Excessive administrative powers granted of the Minister of Petroleum:** The powers granted to the Minister under the Petroleum Act is not healthy for the industry if there must be transparency and accountability. Out of 16 Principal sections in the Act, Nine (9) sections clearly empower the minister to carry out certain important and sensitive duties as contained in Section 2, 3, 4, 6, 7, 8, 9, 10 and 12. For instance the Minister is empowered to grant oil Lincences, oil prospective Lincences, oil Mining Leases. No Refinery can also be

constructed without a licence granted by the Minister. Importation, storage, distribution of any petroleum products cannot be done without a grant by the Minister. The Minister also determines the Price at which these petroleum products can be sold. The Minister also has the general supervisory roles over all operations carried under licences and leases granted under the Petroleum Act. Regulations on the general activities being carried out in the Petroleum Industry are also made by the Minister. The Minister also has the right of Pre-emption under this Act. Payment of any fees, rents, royalty, premium or other types of payments imposed under this Act is made to the Minister. This excessive powers in the recent past has led to gross abuse of office, corruption, mismanagement of public funds to the detriment of the entire country.

4. **Fusion of Corporate Governance in the regulatory regime:** The corporate governance of the petroleum industry is yet another problem that has been discovered in the course of this research work to be responsible for the ineffective management of the industry. The Minister is the head of the Ministry of Petroleum Resources which is the overall supervisory ministry in the industry. The Department of

Petroleum Resources DPR which is presumed to be an independent regulator when it comes to the technical and operational aspect of the industry is under the control and supervision of the ministry and minister of petroleum. The NNPC which is an independent body as far as petroleum industry corporate governance is concerned has a Board of Directors that is being chaired by the Minister of Petroleum Resources. The group managing director of NNPC reports to the Minister on the day to day running and operations of the corporation. This we have found to be an abuse of corporate governance practice in a sensitive industry like the petroleum industry. This fusion of corporate governance powers cannot guarantee transparency and accountability in the industry.

5. **Overlap of oversight functions and weak enforcement of extant laws by the regulatory institutions:** Most of the roles of the regulatory institutions are conflicting with each other while enforcing the enabling laws. DPR and other agencies like National Oil Spill Detection and Response Agency NOSDRA, National Environmental Standards Regulatory and Enforcement Agency NESREA have conflict of roles when it comes to enforcement of environmental laws in the

petroleum industry. Another conflict occurs when it comes to keeping records with the statistic of the volumes of crude oil that has been produced or petroleum products available between the Weight and Measures Department of Ministry of Trade and Investment and DPR. Nigerian Extractive Industries Transparency Initiative (NEITI) and National Petroleum Investment Management Services (NAPIMS) suffer the same fate of conflicting roles when it comes to management and accountability of federal government's investment in the petroleum industry. It has also been found that the regulators institutions are weak in enforcing the extant laws. This could partially be blamed on poor funding of the said institutions, beauracratic bottle neck, understaffing etc.

6.3 Recommendations

In view of all of the above, the following recommendations became necessary:

1. Considering the obsolete nature of the existing legal frameworks of the current regulatory regime governing the petroleum industry, we recommend a speedy passage of the current Petroleum Industry Governance Bill PIG Bill, 2016 version that is currently before the

National Assembly. The bill is comprehensive in nature and has addressed so many lacunas that have been created by the existing petroleum laws in the industry ranging from corporate governance, to fiscal regime, to environmental management and overall protection the of the stake holders interest in the industry.

2. Separation of the fused corporate governance can be done by amending the NNPC Act to separate the Minister of Petroleum or his office from the control and supervision of the activities of the NNPC. However, the current PIG Bill if passed into law has succeeded in addressing this issue a great deal by separating the regulatory institutions from the office of the Minister in order to guarantee their independence in the discharge of their mandate. Just like we have identified earlier in this work by making comparison with CBN's mode of corporate governance, the new PIG Bill has adopted a similar model and if eventually passed, it is believed that it will promote transparency and good corporate governance.
3. The excessive ministerial powers granted to the minister of petroleum resources in the petroleum can also be addressed through the amendment of the Act by transferring some of those functions like

issuing of licenses of any kind in the petroleum industry to an independent body in order to ensure transparency in the petroleum industry. However, it has been observed by this writer, that this issue has been sufficiently addressed in the current PIG Bill, 2016. `

4. While the passage of the PIG Bill might be in a long run, the amendment of the existing petroleum industry laws to reflect a stiffer penalty regime is long overdue. We recommend that criminalization of defaulting companies alongside huge sum of money as fine will serve as a deterrent to others Also, no amount money should be mentioned as penalty in the case damage to the environment, air and water pollution but rather, the penalty should be awarded after accessing the extent of a company's damage to the environment, life, properties or the gravity of a company's offence to the economic life of the community or country.
5. The relevant Acts should be amended to provide a functional separation of roles and functions between DPR and other agencies responsible for the enforcement of legislations on environmental matters in the petroleum industry. The separation should be done in such a way that DPR should be excluded from implementation of any environmental laws in the industry and should concentrate on the implementations of

Petroleum Act, Oil Pipeline Acts and other regulations while NOSDRA, NESREA and Federal Ministry of Environment should continue to enforce the enabling environmental laws governing the petroleum industry. Again, this ill has been addressed in the PIG Bill, 2016.

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