

**RESOURCE CONTROL, COMMUNITY PARTICIPATION AND NIGERIA'S
PETROLEUM INDUSTRY BILL***

BY

ONDOTIMI SONGI**

ABSTRACT: Nigeria's legal regime denies host communities (HCs) of ownership rights and excludes them in their right to active participation in the management of mineral resources found on their homeland. Resource control and community participation are examined with a view to ascertaining whether the Petroleum Industry Bill (PIB) currently before the National Assembly offers any hope to host communities regarding ownership, participation and management, particularly the proposed 10% equity stake for communities under the PIB in the interest of peace and stability that fosters exploration and production. An analytical approach is adopted in examining the domestic legal regime on mineral resource ownership rights; issues of resource control and community participation, and the provisions of the PIB are also analysed. The paper concludes that the PIB as originally proposed is exclusionary as it denies host communities the right to ownership and control, and did not provide for their active participation. If the proposed 10% percent equity participation is eventually included as a substantive provision in the PIB, it will be a great step towards achieving resource control rights and active participation by HCs. The paper looks at the alternatives of Equity Participation (EP), and Community Development and Participation Agreements (CDPAs) in striking a balance between the conflicting interests of the communities and the government in line with best international practice.

Key Words: Community Participation, Host Communities, Indigenous Peoples, Resource Control

LIST OF ABBREVIATIONS

CDPA -	Community Development and Participation Agreements
CP –	Community Participation
EP –	Equity Participation
E&P –	Exploration and Production
FGN –	Federal Government of Nigeria
HCS -	Host Communities
IYC –	Ijaw Youth Council
MEND –	Movement for the Emancipation of the Niger Delta
MOSOP –	Movement for the Survival of Ogoni People
MOU -	Memorandum of Understanding
ND –	Niger Delta
NDDC –	Niger Delta Development Commission
OMPADEC –	Oil Mineral Producing Areas Development Commission
PIB –	Petroleum Industry Bill
PSNR –	Permanent Sovereignty over Natural Resources

1. INTRODUCTION

Nigeria is a major producer and exporter of petroleum and its petroleum industry is about five decades old with a plethora of exclusionary laws with regards to active participation of host communities (HCs) in the control, ownership and management of resources on ‘their’ land.¹ Even the guaranteed right of active participation under international law² is denied host communities, mostly in the Niger Delta (ND) region of the country. There is also problems environmental degradation suffered by these indigenous communities in the form of oil pollution and gas flaring³ that is beyond the scope of this paper.

At present, Nigeria is on a path to reviewing its hydrocarbon laws with the Petroleum Industry Bill (PIB) currently before the National Assembly. Although the PIB is welcomed to among other provide more upside to the government in terms of taxes and royalties, it appears that the PIB does nothing to address key grievances of the oil producing communities, particularly around active participation, environmental liability, revenue distribution and socio-economic development. Nonetheless, the government announced a ten percent equity stake in petroleum

* The article (as amended) was one of the author’s research papers in partial fulfillment for the requirements of Professor Peter Cameron’s course on “International and Comparative Petroleum Law and Policy” that was graded excellent (A Grade). The author wishes to inform the reader that there have been recent developments since then that are not included in the paper. Please see the postscript at the end of the article detailing the developments.

** LL.B (Hons); BL; LL.M (Distinction) in Natural Resources Law and Policy, Centre for Energy, Petroleum and Mineral Law and Policy (CEPMLP), University of Dundee, Scotland, United Kingdom; Barrister and Solicitor of the Supreme Court of Nigeria; Research Student and CEPMLP Scholar in the PhD programme at the CEPMLP, formerly Research Associate, Centre for African Legal Studies; formerly Legal Assistant, High Court, Rivers State Judiciary, Nigeria. I am grateful to Hope Ogunmwonyi-Krukru, PhD candidate at the University of Reading, United Kingdom for her useful comments and suggestions on the initial draft of the paper, and to my mother Mrs. Freeborn Songi for her support. E-mail: ondotimisongi@yahoo.com; O.Songi@dundee.ac.uk

¹ Itse, S., “Ownership and Control of Nigerian Petroleum Resources: A legal Angle”, in Eromosele, V. E (Ed), *Nigerian Petroleum Business: A Handbook*, (Lagos: Advent Communications Limited, 1997)

² Duval, C., et.al (eds.) *International Petroleum Exploration and Exploitation Agreements: Legal, Economic, & Policy Aspects*, 2nd Edition, (New York: Barrows Company Inc, 2009) at p. 395

³ Akpan, G.S, “The Failure of Environmental Governance and Implications for Foreign Investors and Host-States – A Study of the Niger Delta Region”, *International Law and Taxation Review*, Issue 1, 2006, pp. 1 - 12

exploration and production (E&P) for indigenous communities that is now being included in the provisions of the PIB.

This paper examines the question of whether the PIB together with the proposed ten percent equity stake offers any hope to host communities with respect to their active participation and control of resources that they have long agitated for. In other words, can it be said that the PIB has promoted the participation of the host communities in relation to previous legal frameworks in the oil industry in Nigeria?

This is imperative as both the Federal Government of Nigeria (FGN) and the International Oil Companies (IOCs) need a stable and peaceful environment to carry on their business. Where the age long demand and agitations of HCs on the platform of ethnic-based organisations such as Movement for the Survival of the Ogoni People (MOSOP) and the Ijaw Youth Council (IYC) are not met, then it is likely that exploration and production activities cannot take place due to likely protests, demonstrations, conflict, and in extreme cases hostage taking and vandalism of petroleum installations by armed groups such as the Movement for the Emancipation of the Niger Delta (MEND).

In addressing the issue of whether the PIB and the proposed 10% equity stake offers any hope for HCs in the participation, management and ownership of mineral resources in their homeland, the paper shall adopt an analytical approach in answering the research question. The domestic legal regime on resource rights and participation of host communities shall be examined with the aim of showing the exclusionary nature of the regime with respect to community participation

and resource control. This will be followed by a discussion on CP and resource control in its meaning, scope and implications within the context of this paper. Nigeria's experience on issues of community participation and resource control is then examined. The paper shall then discuss the provisions of the PIB on community participation (CP) and resource rights with a view to ascertaining whether it has provided any hope for indigenous oil bearing communities in the Nigeria in the ownership, control, participation and management of these resources. Finally, the research looks at the alternatives of Equity Participation (EP), and Community Development and Participation Agreements (CDPAs) in striking a balance between the conflicting interests of the communities and the government. A major limitation of this paper is that there are various versions of the PIB so that sections cited in this paper are tentative.

2. MINERAL RESOURCE OWNERSHIP REGIMES

Prior to colonial era, host communities were involved in decisions and were partakers in benefits of the trade of their kingdom, and resources were utilised for the benefits of the community in question.⁴ However, the colonialists declared upon arrival that the land they were to settle was a Terra Nullius, a no man's land.⁵ The people were thus stripped of their 'natural sovereignty'. Interestingly, even after independence Nigeria's political elite have maintained the status quo of exploration, exploitation and expropriation of the people's natural resources without regard to their 'natural sovereignty'.⁶

⁴ Omorogbe, Y., "The Legal Framework for Public Participation in Decision-Making on Mining and Energy Development in Nigeria: Giving Voices to the Voiceless", in D.N. Zillman, et al (eds.) Human Rights in Natural Resource Development: Public Participation in the Sustainable Development of Mining and Energy Resources (Oxford: Oxford University Press, 2002), pp. 551 - 552

⁵ Bunter, M.A.G., Host Communities, Native Title and Petroleum Licensing, CEPMLP Publication CP 2/05 (Dundee: CEPMLP) 2005, p. 9

⁶ CDLF, "Justice NOT Charity Manifesto of the Niger Delta", Port Harcourt, Community Defence Lawyers Foundation, May 2007 @ pp. 7 – 8 available at: http://cdlfn.org/documents/The_Niger_Delta_Manifesto.pdf (accessed 2 October, 2009)

Section 44 (3) of the 1999 Constitution of Nigeria states that the entire property in and control of all minerals, mineral oils and natural gas, under or upon any land in Nigeria or in, under or upon the territorial waters and the Exclusive Economic Zone of Nigeria shall vest in the Government of the Federation and shall be managed in such manner as may be prescribed by the National Assembly. Similar provisions are contained in *Section 1(1) of the Petroleum Act, 1969*⁷, *Section 1(1) of the Minerals and Mining Act, 2007*, and under the **Exclusive Economic Zone Act of 1978**.⁸

Although land means so much to the average Nigerian because their whole existence and activity is tied to land and its ownership,⁹ yet in an attempt to strengthen its ownership of mineral rights, the FGN enacted the Land Use Act 1978¹⁰ that vests all land in the territory of each state in the federation in the Governor of that state to be held in trust and administered for the use and common benefit of all Nigerians.

Consequently, the combined effect of the above mentioned provisions is that minerals, petroleum and natural gas are absolutely vested in the FGN and cannot be the subject of ownership by individuals, families or communities.¹¹ In the case of *Attorney-General of Federal of Nigeria V. Attorney-General of Abia State & Ors*¹² the Supreme Court of Nigeria affirmed the Federal Government's exclusive ownership and control of all natural resources within its territory.

⁷This Act repealed the 1914 Mineral Oils Ordinance which had forbidden the participation of non-British citizens or companies in oil prospecting and exploitation.

⁸ CAP 116, L.F.N. 1990

⁹ Hon. Justice A.G. Karibi-Whyte, "*Nigerian Common Law*", in J.A. Omotola (Ed), University of Lagos Faculty of Law Silver Jubilee Lectures (1989), Ado Press Ltd., Lagos, 27@p. 40

¹⁰ Cap.202, L.F.N., 1990 (referred to as LUA 1978)

¹¹ *Attorney-General of Federal of Nigeria V. Attorney-General of Abia State & Ors* [2002] 6 N.W.L.R. (Pt. 764) 542

¹² [2002] 6 N.W.L.R. (Pt. 764) 542

It must be noted that the above legal position appears to be in conformity with principles of international law on permanent sovereignty over natural resources (PSNR).¹³ Thus it appears there is no general international law on private mineral resource ownership. However, international law and practice recognises the right of indigenous peoples over their natural resources, as well as their right to self determination and sustainable development.¹⁴

3. RESOURCE CONTROL AND COMMUNITY PARTICIPATION

3.1 MEANING AND IMPLICATIONS

The term "resource control" denotes a compelling determination by communities and peoples whose resources have been taken away to regain ownership, control, use and management of resources for the primary benefit of the first owner (the communities and people) on whose land the resources originate".¹⁵ Resource control, however, does not foreclose the future spreading of the benefits of resources to the non-owners in a manner acceptable to the vision of a greater humanity.¹⁶ But as will be shown subsequently, the term means something different to the FGN. There is a distinction between "resource control" and "revenue allocation" or "derivation", and payment of compensation but it is not within the scope of this paper to discuss these formulations.

¹³ See UNGA Resolution 1803 (XVII) of 14 December, 1962 ('the landmark resolution')

¹⁴ Convention concerning Indigenous and Tribal Peoples in Independent Countries, Sept. 5, 1991, 169 I.L.O. 1989 [hereinafter No. 169], Article 15; See also Articles 26 and 27 of the UN Declaration on the Rights of Indigenous Peoples 2007.

¹⁵ Douglas, O., "A Community Guide to Understanding Resource Control", available at: http://www.waado.org/nigerdelta/Essays/ResourceControl/Guide_Douglas.html (accessed 20 December, 2010)

¹⁶ *ibid*

The concept of participation originating from international environmental soft law¹⁷ has now been recognised in various international law documents.¹⁸ Participation is the right of citizens to be heard in decisions that affect them; it is any process, including problem-solving mechanisms which use public input in decision-making. It is a framework for strengthening governance, especially grassroots democracy.¹⁹ A more comprehensive description of participation that will guide this paper is given by Cohen and Uphoff who think in terms of dimensions of participation:

- (1) What kind of participation is under consideration (is it participation in decision-making, participation in implementation, participation in benefits (or harmful consequences), or participation in evaluation? ;
- (2) Who is participating in it (local residents, local leaders, government personnel or foreign personnel); and
- (3) How is participation occurring (basis of participation, form of participation, extent of participation and effect of participation)?²⁰

Although Cohen and Uphoff's typology is rather broad, it encapsulates the array of things that people usually think about when they speak at a conceptual level about participation²¹. This research is only concerned with CP in decision-making regarding petroleum development, and participation in benefits from petroleum development with more emphasis on the latter.

¹⁷ Principle 10 of the Rio Declaration states that "environmental issues are best handled with the participation of all concerned citizens at the relevant level". See United Nations Conference on Environment and Development: Rio Declaration on Environment and Development, 31 ILM 874 1992

¹⁸ See Article 2(5) of the Aarhus Convention (Convention of the United Nations Economic Commission for Europe (UNECE) on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters 1988)

¹⁹ Bristol-Alagbariya, E.T., Participation in Petroleum Development: Towards Sustainable Community Development in the Niger Delta (Dundee, CEPMLP) 2009, p. 17

²⁰ Cohen, J.M., and Uphoff, N.T, "Participation's Place in Rural Development: Seeking Clarity through Specificity", 8/3 *World Development*, 1980 at p. 214 cited in Nwapi, C., "A Legislative Proposal for Public Participation in Oil and Gas Decision-Making in Nigeria", *Journal of African Law*, Vol. 54, Issue No. 2, p. 187

²¹ *ibid*

Michael Bunter proposes that to solve the problems which arise from dislocation of HCs from the central government and in order to promote greater progress in sustainable development, there should be a sharing or pooling of authority over the petroleum licensing process to the extent that government and IOCs take into account the views of host communities to secure IOC's title.²² In addition, IOCs should be more comfortable in dealing with highly developed local institutions in petroleum licensing as their title will become more secure than when IOCs licensing was applied from the centre top-down. If native people grant consent for a sustainable development through some substantial benefit, they will be less likely to want to reopen negotiations later²³.

3.2 NIGERIA'S EXPERIENCE

The adverse effects of natural resource development on the social, cultural and economic life of a people was well narrated by Daniel Yergin when he captured the experience of the people of Beaumont in Texas when crude oil was discovered on 10 January, 1901 referred to as the Texas oil boom. The town experienced high cost of living, high cost of leases and land, high crime rate and other social vices, an exponential growth in population, etc.²⁴ In *Ominayak and the Lake Lubricon Bank v. Canada*²⁵ the UNHRC held that expropriation and destruction of indigenous tribes land for oil and gas exploitation threatened the way of life and culture of the tribe and consequently, an infringement of their right to enjoy their culture. Similarly, In *Yanamani*

²² Bunter, M.A.G., (supra) note 5 at pp. ix - x

²³ *ibid*

²⁴ Yergin, D., *The Prize: The Epic Quest for Oil, Money and Power*, (New York: Free Press, 1991) pp. 85 - 86

²⁵ United Nations Human Rights Commission, 26 March, 1990 reprinted in UN doc CPR/C/38/D/167/1984 (1990)

*Indians v. Brazil*²⁶, the Inter-American Commission on Human Rights held that harm arising from mining activities violated the rights to life and health. Similar situation was the experience of some communities in the Niger Delta that ‘successfully’ sought environmental justice.²⁷ In that case, the Federal High Court, Benin granted a declaratory relief to the effect that continues gas flaring by the defendant violated the people’s right to life, dignity of the human person, and to a clean and healthy environment.

Nigeria’s experience on resource control and CP has been a tale of exclusion, environmental degradation, human rights violations, agitations and conflicts, and declaration of rights by HCs. The exclusionary character of the petroleum regimes in Nigeria since oil was discovered has been identified and it has been maintained by successive governments resulting in limited participation or total exclusion of host communities reinforced in all frontiers of public policy and governance matters. Ownership rights are defined by these regimes in specific modes that reveal the colonial governance systems and the provisions of the constitution do not have the capacity to ease access to resource control by oil-producing communities mainly in the Niger Delta²⁸.

The wealth that has flowed from oil exploitation in the region has hardly benefited the people of the area which is believed to have gone to the country’s elites, soldiers and oil companies, and environmental degradation and human rights violations have been perpetrated by IOCs and the government respectively. All of these activities by the oil and gas companies and the FGN have not gone without agitations by HCs. Host communities have continued to mobilise their people to express dissention over the reckless plunder of their environment by the activities of the oil

²⁶ Case No. 7615, IACHR Res. No. 12/85 (5 March, 1985), OEA/Ser.L/V/II.66, doc.10 rev. 1 (1 October, 1985)

²⁷ *Gbemre v. SPDC*, Unreported Suit No FHC/B/CS/53/05

²⁸ Sofiri Joab-Peterside, “Resource Control and the Petroleum Industry”, being paper presented at conference on *Communities and the Petroleum Industry Bill*, Creek Motel, Yenagoa, Bayelsa State, 27-28 November, 2009 at pp. 4

companies. The various texts of declaration of rights by these communities reveal one central theme – resource control and CP.²⁹ In recent times, the agitations became violent particularly with the emergence of a militia group called Movement for the Emancipation of the Niger Delta (MEND).

3.3 GOVERNMENT’S RESPONSE

The Government’s response to these agitations has been mixed with brutal force to suppress these agitations; the use of state-interventionist agencies to alleviate the sufferings of the HCs; and increasing the revenue sharing to oil producing ‘states’. The FGN views demands for resource control as "separatist tendencies" that must not be tolerated. Traditionally, host government’s opposition to issues of resource control by host communities is that it impinges on their claim to sovereignty and ownership of natural resources in accordance with the international principle of PSNR and ultimately constitutes a hindrance to petroleum resource development.³⁰ Thus in some instances, agitations have been met with brutal force leading to the loss of lives and destruction of property. Interestingly, in other instances the FGN has set up interventionist agencies such as Oil Mineral Producing Areas Development Commission (OMPADEC) and Niger Delta Development Commission (NDDC) to provide basic infrastructures and amenities in the ND with the resultant effect of reducing the incessant

²⁹ See the aspirations of the various ethnic nationalities as contained in their various Bill of Rights and Declarations such as The Ogoni Bill of Rights (1990); The Charter and Demands of the Ogbia People (1992); Kaiama Declaration (1998); The Resolutions of the First Urhobo Economic Summit (1998); The Akalaka Declaration (1999); The Warri Accord (1999); The Ikwerre Rescue Charter (1999); The First Niger Delta Indigenous Conference (1999); The Oron Bill of Rights (1999); and the Niger Delta Peoples’ Compact (2008) be addressed in the Petroleum Industry Bill.

³⁰ Esan, A.O., “Public Participation in Petroleum Resources Development on Indigenous Homeland: Challenges and Implications”, LL.M Dissertation (Dundee: CEPMLP) 2004, p. 7

disputes between the HCs and the IOCs.³¹ Similarly, the FGN has increased the derivation revenue to oil producing states to 13% that goes directly to the state governments, not HCs.³²

However, it has been argued that these interventionist agencies will not be enough to cater for the problems of HCs, or give the people the feeling that they are a part of the management of the use of their resources.³³ The same thing applies to revenue given to the state governments. One of the reasons for this is the massive corruption within the Nigerian state so that whereas the people are agitating for good governance and community participation, some of their traditional and political leaders are unable to deliver this to their people. For instance it was reported that out of a total of N16.447 trillion distributed among the federal, states, and local governments from June 1999 to May 2007 from the Federation Account, over N2.5 trillion was allocated to the states in the ND implying that six states of the region received over 12.25% of the above-stated total amount.³⁴ In the words of Nuhu Ribadu, former chairman of the Economic and Financial Crimes Commission, ‘the Niger Delta is the richest segment of Nigeria, but it is not translated into infrastructures...Resources that go into the Niger Delta only feed the patterns of corruption’.³⁵

4. RESOURCE CONTROL AND COMMUNITY PARTICIPATION UNDER THE PETROLEUM INDUSTRY BILL

³¹ See Ajayi, A., “Review of the Niger Delta Development Commission Act 2000”, [2001] *J.E.L.T.R.*, Issue 3, p. 39

³² See section 162 of CFRN 1999

³³ See Atsegbua, L., *Oil and Gas Law in Nigeria: Theory and Practice* (Benin-City: New Era Publications, 2004) pp. 7 – 8; see also Iwere, O., “What Effect Does the Ownership of Resources by the Government have on its People: A Case Study of Nigeria?” *CAR (CEPMLP Annual Review)* Vol. 11, 2006/2007 available at <http://www.dundee.ac.uk/cepmlp/gateway/index.php?news=29307> (accessed 22 December 2010)

³⁴ Bristol-Alagbariya, E.T (supra) note 20 at p. 15

³⁵ See Human Rights Watch interview with Ribadu on 18 August, 2006 cited in E.A. Anwana, *How can Oil Contribute to Sustainable Development in Resource Producing Communities in Nigeria? The Niger Delta Region as a Case Study*, LL.M Dissertation (Dundee, CEPMLP) 2007, p. 39

An examination of the PIB discloses that it is not different from the past legal and regulatory framework with regard to the participation of oil producing communities in the oil and gas sector. On the contrary, the PIB reaffirms the disadvantaged positions of oil producing communities. The wide local content provisions in the PIB do not recognise the strategic position of oil producing communities. It lumps the participatory interests of the oil producing communities with the generality of Nigeria which is against the agitation for reform of the oil sector laws to reflect the interest of the oil producing communities.³⁶ However, it went further than previous legislation to provide vaguely for some form of participation, consultation, and community development but failed to define the scope of implementation. For the first time, the PIB formally albeit literally recognises HCs as stakeholders in the petroleum industry to be consulted.³⁷

Section 1 retains the existing resource ownership structure by providing that “property and sovereign ownership of petroleum within Nigeria, its territorial waters, the continental shelf, the Exclusive Economic Zone and the extended continental shelf shall vest in the sovereign state of Nigeria for and on behalf of the people of Nigeria”. Although *section 3(1)* states that the management and allocation of petroleum resources and their derivatives in Nigeria shall be conducted strictly in accordance with the principles of good governance, transparency and sustainable development of Nigeria, the main criterion for the management of petroleum

³⁶ Kikile, E.D., Sami, E., and Ogunmwoyi, H., “Analysis of PIB 2008 from the Perspective of Communities”, being paper presented at conference on *Communities and the Petroleum Industry Bill*, Creek Motel, Yenagoa, Bayelsa State, 27-28 November, 2009 p. 16

³⁷ Specific section not stated in the version of the Bill author possesses

resources shall be the total benefits that will accrue to the sovereign state of Nigeria.³⁸ *Section 4* talks about government participation to reinforce the provisions of *section 3*.

On community development, *section 7* states that “the Federal Government shall, in co-operation with the state and local governments and communities, encourage and ensure the peace and development of the petroleum producing areas of the Federation through the implementation of specific projects aimed at ameliorating the negative impacts of petroleum activities”. And *section 413* provides that every year all licenses, lessees, contractors and service companies in the upstream petroleum industry shall publish the criteria used for the allocation of community development projects and other social investment initiatives within their restrictive areas of operation. There are some environmental remediation provisions in the PIB which are beyond the scope of this paper.

From the foregoing provisions, it appears that while the drafters of the PIB recognise HCs as critical players in the petroleum industry, they have failed to make specific provisions that will foster CP and sustainable development. This is unlike the case in the *2007 Minerals and Mining Act* where *section 116* specifically provide for Community Development Agreements to the effect that the Holder of a Mining Lease, Small Scale Mining Lease or Quarry Lease prior to the commencement of any development activity within the lease area, shall conclude with the host community where the operations are to be conducted an agreement referred to as a Community Development Agreement or other such agreement that will ensure the transfer of social and economic benefits to the community. The Community Development Agreement shall contain undertakings with respect to the social and economic contributions that the project will make to

³⁸ section 3(2) of PIB

the sustainability of such community. The Community Development Agreement shall address all or some of the following issues when relevant to the host community-

- (a) educational scholarship, apprenticeship, technical training and employment opportunities for indigenes of the communities;
- (b) financial or other forms of contributory support for infrastructural development and maintenance such as education; health or other community services, roads, water and power;
- (c) assistance with the creation, development and support to small scale and micro enterprises;
- (d) agricultural product marketing; and
- (e) methods and procedures of environment and socio-economic management and local governance enhancement..

Under *section 116(4)* where after several attempts, there is a failure of the host community and the lessee to conclude the Community Development Agreement, the matter shall be referred to the Minister for resolution. The Community Development Agreement is subject to review every five years and shall have binding effect on the parties. Under *section 117* the Community Development Agreement shall specify appropriate consultative and monitoring frameworks between the Mineral title Holder and the host community, and the means by which the Community may participate in the planning, implementation, management and monitoring of activities carried out under the agreement.

It is pertinent to note, however, that there is an attempt to include in the provisions of the PIB, the proposed 10% equity stake or participation for HCs proposed by the FGN. Whether this is true or not cannot be ascertained at the time of writing as there are conflicting views on the issue. This will be discussed shortly.

4.1 RESOURCE CONTROL AND INDIGENOUS PEOPLE'S RIGHTS REVISITED: MATTERS ARISING

International law and practice recognises the right of indigenous peoples over their natural resources, as well as their right to self determination and sustainable development. The operational policies of the World Bank even recognize the inextricable link of Indigenous peoples with their lands and their natural resources and make specific provision for Indigenous peoples regarding natural resources development by insisting on its borrowers making provision for Indigenous peoples to share equitably in the benefits of commercial development.³⁹

However, some sovereign States including Nigeria, have asserted overriding control upon the resources, to the exclusion of the host communities in the Niger-Delta⁴⁰. Two schools of thought have therefore emerged – one championed by governments and people in the oil-producing area, with the active support of environmental NGOs, argues that considerably more financial resources from oil revenue should be allocated to the area in order to compensate for environmental risk and damage. The cliché 'resource control' is commonly associated with this school. The opposing school, made up mainly of the central government and the governments and people of the northern states and other majority ethnic groups, asserts that the current level of compensation is adequate⁴¹.

The question that has consequently re-echoed is whether any ethnic group in the Niger Delta can claim to be indigenous to be entitled to rights of resource ownership, control and management

³⁹ See WorldBank Operational Manual (OP4.10 July 2005) paragraph 18; See Robert Pritchard, Participation of Indigenous Peoples in Natural Resource Development in Australia, OGEL Advance Publication, September 2009 available at: <http://www.ogel.org/journal-advance-publication-article.asp?key=202> (accessed 14 January 2011) for a full discussion of the World Bank operational guidelines

⁴⁰ J. Ejegi; "Indigenous Peoples Rights over Natural Resources - How has it been accommodated within Sovereign States?" OGEL 5 (2004), URL: www.ogel.org/article.asp?key=1677

⁴¹ C.O., Ikporukpo, "Petroleum, Fiscal Federalism and Environmental Justice in Nigeria", Space and Polity, 8: 3, 2004, pp. 321 – 354

under international law. Many scholars have taken the view that no ethnic group in the region can claim to be indigenous than the other, and as such communities in the Niger Delta are not indigenous people but minorities⁴². This is strongly debatable particularly with the recognition of indigenous peoples' rights in Africa by the recent landmark decision of African Commission on Human and Peoples' Rights in the case of *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*.⁴³

Furthermore, a report of the Working Group of Experts under the African Commission on Human and Peoples' Rights (ACHPR) on Indigenous Populations/Communities in Africa concluded that a strict definition of indigenous peoples is "neither necessary, nor desirable", and would risk excluding certain groups. The Report also addressed the common argument that "all Africans are indigenous", which it saw as an argument relative to European colonization that is not the current understanding of the term⁴⁴.

The Nigerian constitution does not appear to be favourably disposed towards the recognition of community or group rights.⁴⁵ This is based on a strong feeling that giving recognition to community or group rights would not only be a source of discrimination among the citizenry, but also a setback to the efforts for nation-building, and may eventually be a recipe for the

⁴² Yinka Omorogba, *Oil and Gas law in Nigeria*, Lagos, Nigeria, Malthouse Press Ltd; 2001 at 146-151; Nasirdeen Usman, *The Rights of Indigenous Peoples and Mineral Resource Development: Global Trends and the Nigerian Question*, PhD Thesis (Dundee: CEPMLP, University of Dundee) 2003, p. 135 - 141; see also Chilenye Nwapi, *A Legislative Proposal for Public Participation in Oil and Gas Decision-Making in Nigeria*, *Journal of African Law*, Vol. 54, Issue No. 2, pp. 184 – 211 at p. 188

⁴³ 276/2003, African Commission on Human and Peoples' Rights, 4 February 2010, available at: <http://www.unhcr.org/refworld/docid/4b8275a12.html> [accessed 13 January 2011]

⁴⁴ Report of the African Commission's Working Groups of Experts on indigenous Populations/Communities, adopted by the ACHPR, at its 28th Session, 2005

⁴⁵ For instance Section 15(4) of the CFRN states that: 'the state shall foster a feeling of belonging and of involvement among the various peoples of the federation, to the end that loyalty to the nation shall override sectional loyalties'.

disintegration of the country along ethnic divides⁴⁶. Rather, the constitution has opted for the provision and protection of strong individual rights such that individual citizens would feel secure enough not to require any special protection through ethnic cleavages.⁴⁷

In fact with the existing constitutional framework grating ownership rights to the Government, then it becomes ridiculous for host communities to clamour for resource control as only the FGN can exercise control⁴⁸. This further raises the question of as to what political right has the whole state, to assume control or ownership of the resources as against the particular local government or community where the resources are actually found.⁴⁹ Therefore, it has been argued that if the derivation principle must be applied it is only fair that it goes direct to the community from where the resource is exploited and not the state as a whole.⁵⁰ But as presently constituted, communities are non-institutional parties in the federal structure, and have no opportunity to participate in fashioning the revenue sharing policy for federally collected revenue.

Furthermore, it appears international law does not grant indigenous peoples absolute resource ownership rights but recognises instances where the state may retain ownership and control rights⁵¹.

4.2 STRIKING A BALANCE

All of these foregoing restrictions to community ownership of resources adds to the growing dissatisfaction among the communities and raises a fundamental case for the application of the concept of indigenous peoples' rights in the search for solution to the problem because the situation in which host communities in the Niger Delta find themselves today similar to that in

⁴⁶ Usman, p. 142

⁴⁷ Ibid; see Chapter IV CFRN 1999

⁴⁸ Ibid, p. 171

⁴⁹ Ibid, p. 173

⁵⁰ Ibid, 185

⁵¹

which “indigenous peoples” find themselves in their countries⁵². Thus is it possible to strike a balance between the exclusive resource ownership rights by the FGN and the demands for resource control and participation by host communities? How can the FGN guarantee rights of participation without altering its international right to natural resource ownership? This will form the basis for discussion in the next sections where alternative solutions are suggested. These include the implementation of the equity participation scheme, and the use of community development and participation agreements.

4.3 EQUITY PARTICIPATION SCHEME

It is agreed that increasing that merely increasing the derivation revenue to state governments may not translate into sustainable development of host communities because of the problem of corruption. It would appear that where public financial management is poor at the national level it is often also poor at the sub-national level.⁵³ Thus one of the better options is the proposed ten percent equity participation for communities, which if eventually included in the PIB and international petroleum agreements between the IOCs and the FGN will be a great step towards achieving resource control for host communities. However, the question still remains on how this will work in achieving sustainable development of HCs.

The case in Papua New Guinea, however, provides an example of a developing country where this is practiced. In a gold mining project in the district of Porgera, the community (comprising local landowners) has a 2.5% shareholding in the operating company, which is majority-owned

⁵² Chilentye Nwapi, p. 187

⁵³ Dietsche, E., “The Challenge of Mineral Wealth: Using Resource Endowments to Foster Sustainable Development”, in Dave Prescott, (ed.) *Minerals Taxation Regimes, A Review of Issues and Challenges in their Design and Application: Analysis and Observations*, (London: International Council on Mining and Metals (ICMM), 2009) p. 54 available at: <http://www.icmm.com/page/10049/minerals-taxation> (accessed 13 January 2011)

by Placer Dome; and on the Island of Lihir, the community holds 6.7% of the shares in an operating company owned by Rio Tinto, Newmont and others. Although, the structure of the communities' shareholding has gone through many changes since 1997, but small holdings still remain.⁵⁴

4.4 COMMUNITY DEVELOPMENT AND PARTICIPATION AGREEMENTS

While noting that it is necessary to appreciate the limits of what IOCs can do, and what civil society can reasonably ask them to do as IOCs are out to make profit, Thomas Waelde argues, however, that MNCs should pay attention to the results of their social, economic, and environmental context.⁵⁵ Interestingly, natural resource companies are at the forefront of attempts to promote what have become known as “Tri-Sector Partnerships” among the companies themselves, communities and civil society organisations, and local and central governments. Thus the the traditional extractive company-host government relationships is giving way to pressures from local communities and indigenous peoples involvement in various aspects of resource development process.⁵⁶ Case studies from Canada, the United States, Australia and South Africa reveals that there is a trend towards developing formal contractual arrangements by companies and other stakeholders to act as a framework for satisfying public demands and local communities for benefits from natural resource development.⁵⁷ This form of

⁵⁴ Economic Commission for Africa (ECA), “Improving Public Participation in the Sustainable Development of Mineral Resources in Africa”, ECA/SDD/04/02 (Addis Ababa: ECA) 2004

⁵⁵ Waelde, T., “Natural Resources and Sustainable Development: From “Good Intentions” to “Good Consequences”, in Nico Schrijver and Friedl Weiss (eds.), International Law and Sustainable Development (Leiden, Netherlands: Martins Nijhoff Publishers) 2004, pp 146 - 147

⁵⁶ Cameron, P.D., and Correa, E., “Towards Contractual Management of Public Participation Issues: A Review of Corporate Initiatives”, in D.N. Zillman, et al (eds.) Human Rights in Natural Resource Development: Public Participation in the Sustainable Development of Mining and Energy Resources (Oxford: Oxford University Press) 2002, pp. 213 – 230 at p. 216

⁵⁷ *Ibid*, p. 219; *see also* Godden, L., et.al., “Accommodating Interests in Resource Extraction: Indigenous Peoples, Local Communities and the Role of Law in Economic and Social Sustainability”, 26 *J. Energy Nat. Resources L.*

contractual arrangements should be included in the provisions of the PIB to replace the informal and voluntary Memorandum of Understanding (MOUs) that IOCs usually have a penchant to dishonour in the ND.

As earlier noted, even in Nigeria a similar provision is contained under the Mineral and Mining Act 2007 where the Holder of a Mining Lease, Small Scale Mining Lease or Quarry Lease is obliged to conclude with the host community where the operations are to be conducted Community Development Agreements that will ensure the transfer of social and economic benefits to the community.⁵⁸

5. CONCLUSION

Host communities have strong links with the extractive industry and the development of natural resources has socio-cultural and economic impact on the people. This elevates HCs to the position of active stakeholders that must be included in the active participation and management of resources found on their homeland. However, it has been shown that the provisions of the PIB have not changed the status of the HCs in their involvement and or participation in oil production activities, rather it has further alienated the communities from the benefits that should accrue to them considering the impact on the communities.⁵⁹ But CP is one of the solutions to the crisis in the region and this paper has noted that while it may arguably be impossible to actualise resource control demands of HCs in the ND, community participation through Equity Participation, and Community Development and Participation Agreements with host communities and the

2008, p. 28; and Warden-Fernandez, Janeth, Indigenous Rights Versus Development of Natural Resources: Which will be the Best Solution to Resolve Conflict? CEPMLP Paper CP 5/2000 (Dundee: CEPMLP) 2000, pp. 22 - 23

⁵⁸ See section 116

⁵⁹ Kikile, et al, (supra) note 37 at p. 17

international oil and gas companies are viable options in striking a balance between the demands of the host communities and the position of the FGN.

POSTSCRIPT

The proposed ten percent (10%) equity participation for HCs that was announced by Dr. Emmanuel Egbogah, then Special Adviser on Petroleum Matters to the late Umaru Musa Yar'adua administration promised to oil producing communities has been included in the current Petroleum Industry Bill (PIB)⁶⁰, and the 'Inter Agency Team ("IAT")' version. The aim here is only an attempt to mention the salient provisions of these versions, and not to critique them.

In the Senate version, sections 168-191 (Chapter G) make provision for a Petroleum Producing Host Communities Fund (PPHCF). Under section 168 the PPHCF is established for every Petroleum Mining Lease (PML) and is a corporate body with perpetual succession, common seal capable of suing and be sued and owning/disposing property. 10% equity participation described as 'nominal' in upstream operations is held by the PPHCF in trust for the host communities that are enclosed partly or fully within a PML.⁶¹ Although, it is the company holding a contractual right in the respective PML that contributes to the community equity participation, such contributions will be credited to the company's fiscal rent obligations under the Act.⁶² The contribution shall be on a monthly basis pro rata its production entitlement on certain stated criteria depending on whether the operations are onshore, shallow offshore waters and deepwater.⁶³ It is stated that the PPHCF shall be used for the development of the economic and social infrastructure of the communities within each PML, and for the strategic projects in non-producing PMLs to enhance the living conditions of these communities within these areas.⁶⁴ The Governing Council established to supervise the management of the PPHCF shall provide for the

⁶⁰ Senate Version (SB 236) available at: <http://resources.revenuewatch.org/sites/default/files/SenateDraftCombined.pdf> (last accessed 30 July, 2011)

⁶¹ Section 169(1) of the Petroleum Industry Bill 2008

⁶² See section 169(2) and (4) PIB 2008

⁶³ See section 169(3)

⁶⁴ Section 171

allocation of the funds to communities within each PML based on certain factors. There is a Governing Council that will, among other things, supervise the management of the Fund

The second version to the proposed equity participation for host communities is based on a comprehensive proposal to amend the PIB prepared by the Inter Agency Team (“IAT”) that consists of certain government agencies and ministries. In the view of the IAT the Senate version as earlier discussed creates an unconstitutional 10% royalty for the Niger Delta communities that are actually located in producing petroleum mining leases.⁶⁵ In the words of the IAT, “since the 10% revenue ownership right is unquestionably a royalty and since under the Nigerian constitution all royalties have to be paid to the Federation Account, it is highly questionable whether the proposal is constitutional”.⁶⁶ In the IAT’s memorandum, it is stated that the objective is to establish ‘direct dividends payments’ to host communities in the Niger Delta that are directly impacted by the petroleum developments in order to create a more positive relationship between the petroleum industry and the local population. It is further stated that the dividends will be based on the impact value of the assets which impact on the communities in the onshore and offshore, and precise dividend amounts are established for each asset, such as wells, PPL acreage, gas processing plants, etc. The main criterion for determining ‘impacted communities’ will be based on an environmental and social impact assessment (ESIA) studies required under the Bill. Impacted communities are those that an ESIA study clearly and unambiguously identifies serious and direct environmental impacts whether onshore or offshore. Community and Regional Cooperatives shall be established and the Boards of these cooperative shall decide on the manner in which distribution of dividends shall be used or distributed based on certain stated criteria. Interestingly, because the payment of dividends is tied to securing peaceful operations in the ND, it is proposed that where there are acts of vandalism, sabotage or other civil unrest causing damage to wells, pipelines and other facilities allocated to a particular community, such impacted community will forfeit the community dividends for such year.⁶⁷

⁶⁵ Government Memorandum on the Petroleum Industry Bill, 2009, p.9 available at: http://resources.revenuewatch.org/sites/default/files/IAT%20PIB%20memo_2009.pdf (accessed 30 July 2011)

⁶⁶ *Ibid*, p.11

⁶⁷ *Ibid*, p.92

Suffice it to say that none of the two proposed 'equity participation' frameworks fully complies with an equity participation framework in its entirety. Community equity participation in strict terms will make HCs part owners of the extractive venture, entitle HCs the right to share in dividends as part owners of the extractive venture, and also participate in boardroom decision-making, etc. The proposed frameworks do not actually make HCs part owners of the extractive venture to be represented in the board of the extractive venture and also participate in boardroom decision-making, etc. In fact, even the dividends proposed by the IAT are already fixed and not based on the profit or loss of the extractive venture that shareholders are subjected to.

Finally, these frameworks pose lots of practical implementation issues such as proper fund utilisation, local elitist capture of funds, fragmented communities and its attendant consequences, and the lack of capacity at the local level, and so on. However, the practical implementation challenges should not be interpreted as reason(s) for not conferring some form of benefits to local communities. It may seem that there should be local capacity building by civil society organisations and other development agencies to help local communities deal with these implementation challenges. In this paper, the use of equity participation and agreement-making has been suggested as possible ways of meeting local community demands. The Nigerian government should not be, however, be restricted to these approaches in meeting community demands but try to look at benefit sharing practices with communities in other countries. There are instances where governments and extractive companies have experimented with the use of Foundations, Trusts and Funds (FTFs) in addressing community needs for socio-economic development. Interestingly, the use of FTFs is being promoted by Staoil with the help of Pro-Natura International (Nigeria), an NGO working to bring about sustainable community development in the Niger Delta. The Akassa Development Foundation (ADF) is aimed at improving the livelihood of Akassa people through capacity building, education, natural resources management, micro credit, infrastructural development through a participatory development process.