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CONCESSION IN INTERNATIONAL ECONOMIC LAW: AN OVERVIEW OF THE CONTROL OF MINERAL PRODUCTION AND DISTRIBUTION

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ABSTRACT

At the turn of the last century, international oil companies, rather than the oil producing countries themselves, controlled petroleum exploration and exploitation in developing countries because the latter lacked the capital, technology and management necessary for the extraction of these resources. During this period, it was perceived by the said developing countries and colonies that the control of the minerals by the international oil companies was a political anachronism. At the present time, however, with limitations in both local supply of capital and the realisation of gains from the acquisition of technology, the situation has not altered substantially, nor does it seem set to alter, due inter alia to the corrupt practices of the leaders of the developing countries. Moreover, this pattern is set to persist as long as developing countries continue to require foreign risk capital and technology investment, and foreign companies will still need the authorisation of the host countries to carry out exploration and production operations. This article examines concession in international law and the attendant control of mineral production and distribution.

Keywords: Concession, Law, Minerals, Nigeria.

INTRODUCTION

Foreign investment inevitably involves loss of economic independence for host countries to the extent that ultimate decision-making resides with the parent firm abroad, and it is alleged by some that as a result, the ability of the host country to pursue its desired policies in areas such as taxation, trade, etc. is drastically reduced. Commentators are of the view, however, that empirical evidence on these issues indicates that the postulated adverse effects of multinational operations have perhaps been over-stressed, and that equally the gains from foreign investment are demonstrably less than hypothetical[3].

Whatever the pros and cons of the benefit equation, it is still the norm for some developing countries' mineral production to be carried out through contractual arrangements between foreign firms and the governments of their host countries. In recent years, however, most mineral contracts negotiated differ significantly from those of earlier times and most of those earlier agreements have been revised to reflect the standard of more recent agreements.

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[3] N Hood and S Young, *The Economics of Multinational Enterprise*, (London: Longman, 1994), p.180.

Some may feel it surprising that the attainment of political independence by most developing countries and their joining the United Nations and other world bodies, particularly OPEC, have had little impact on the world economic order. However, after the attainment of political independence and the euphoria associated with such attainment, developing countries were quick to realise the fact that sovereignty is not synonymous with economic self-sufficiency or development and that the rich industrialised nations still substantially control the production and distribution of the world's resources.

There is no gainsaying the fact that, with their joining of the world bodies, the hands of most developing countries have in no small way been strengthened through improved access to information and advancement of technology. For instance, the activities of OPEC to reverse the obsolete patterns in the production and distribution of financial benefits are well documented.

In addition, changes in the structure of various industries as well as increased awareness amongst host countries of issues relating to permanent sovereignty have affected most relationships, although in most cases, improvement has been uneven.

The principle of permanent sovereignty over natural resources is recognised as a fundamental principle of contemporary international law. It tends to be invoked by states in support of positions and actions taken by them in a wide range of situations and one could argue that this situation arose in the context of relations between host governments and oil companies with regards to exploitation of mineral and natural resources.

NEED TO ASSESS THE LEGACY OF CONCESSION AGREEMENTS

The view is that unequal type arrangements, known as Concession agreements, which were made between host countries and transnational corporations resulting from inequality of bargaining power and lack of negotiating capability were still prevalent even after countries became politically independent. The fact is that these newly independent developing countries lacked capital, technological know-how and marketing capability, and as a result the multinationals corporations and other foreign investors could use their superior bargaining positions to secure concessions or concession type contracts.[4] This type of arrangement gave them extensive control over operations, including the power to take critical decisions on matters such as the levels of investment, production, and pricing. Under such arrangements, the host countries remained the passive recipients of certain modest financial benefits in the form of royalties and taxes. Significant are (a) the notable role played by the principle of permanent sovereignty in efforts by newly independent countries to restructure inequitable and onerous concessions granted during the colonial period, (b) the concern of host countries with issues relating to sovereignty and control, and (c) the information and negotiating skills which each party brings to the bargaining table. These factors influence both the form and the substance of the agreements.[5]

To avoid being permanently marginalised, it behoves the developing Countries to recognise the need for change and respond accordingly. Concerted and cooperative action amongst the several African states is crucial in order to meet contemporary challenges and to engage in arms-length transactions with the major blocs or their member countries.[6]

This chapter examines the background to the evolution of the concession arrangements, showing the underlying motives for their

[4] Kamal Hossain, and Chowdhury, Subrata Roy *Permanent Sovereignty over Natural Resources in International Law*, (New York: St Martin's Press, 1984), p. X.

[5] David N Smith, & Wells, Louis T 'Conflict Avoidance in Concession Agreements' *17 Harv. Int'l. L. J.* 51, (1976) p. 560.

[6] P.E. Bondzi-Simpson 'Transnational Corporation in Africa: A framework of Regional Regulatory Arrangements' (1989) in *The Law and Economic Development in the Third World*, Bondzi-Simpson, P.E. (ed.) (New York, Westport, CT, and London: Praeger, 1992), p. 84.

adoption and content. First, a historical background to the concession is provided, showing how the traditional concession regime contained a number of terms and features which reflected the imbalance in the bargaining powers of the contracting parties since the commencement of de-colonisation, and how it has been on the wane in recent years. Secondly, merits and the demerits of such concession type arrangement will be discussed. Thirdly, the thesis will examine the major improvements that have been made in the intervening years and factors that facilitated these changes.

THE TRADITIONAL CONCESSION REGIME

Historically, the exploration and exploitation of the mineral resources of developing countries which was commenced by entrepreneurs in the 19th century was overtaken in the early 20th century by large corporate entities with headquarters in many metropolitan countries, primarily in America and the European countries, acquiring substantial exploration, production and distribution rights in respect of the petroleum, mineral and timber resources of the developing countries. The period 1901-1957 was characterised by the granting of concessions to such major oil companies; this resulted in effective control by the companies of the entire range of petroleum activities.

THE D'ARCY CONCESSION OF 1901

The exploitation of petroleum by foreign companies in developing countries dates back to the activities of the royal Dutch company (later Royal Dutch Shell), the international oil companies' entry into the Middle East, and subsequently with the grant in 1901 by the Persian Government of an oil concession to W.K. D'Arcy. Under the terms of the concession, D'Arcy was given the exclusive privilege to carry out all petroleum exploration and other related activities throughout the whole of the Persian Empire for a period of 60 years. D'Arcy, in return, was required to pay the government a small bonus and 16 percent of the company's annual profits.[7] Under this system, the host country acquired no proprietary interest in the petroleum produced, other than a right to purchase occasionally a small percentage of the production for its domestic needs. This concession opened the era of concessions in Saudi Arabia, Kuwait, Bahrain, Iran, and Iraq.

THE PROLIFERATION OF CONCESSIONS

The concession granted to the Iraq Petroleum Company (IPC) in 1925 is of particular importance in the history of concessions since it served as a model for concession agreements in the Middle East and all over the globe.[8] Saudi Arabia followed suit in 1933 by granting a concession to the Standard Oil Company of California, which concession was later assigned to Aramco. In 1934 Kuwait and Bahrain granted concession to the Kuwait Oil Company and Bahrain petroleum company respectively. Qatar granted a concession to the Anglo Persian oil company in 1935.

It is noteworthy that the conditions in which these early concessions were granted were substantially similar and the nature of the agreement was, to a considerable degree uniform.[9]

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[7] The Agreement between the Government of His Imperial Majesty, the Shah of Persia and William Knox D'Arcy, Appendix to Annex 1419c, in the League of Nations, Official Journal, XXII, 1932, pp. 2305-307.

[8] N Ely, 'Changing Concepts of the World's Mineral Development', in International Bar Association (IBA), ed,. *World Energy Law* (Proceedings of the IBA Seminar on World Energy Laws held in Stavanger, Norway, 1975), p.25. Also quoted by Zhiguo Gao (1994), *International Petroleum Contracts: Current Trends and New Directions* International Energy & Resources Law & Policy Series (London: Graham & Trotman), (1975) p.10.

[9] For instance the original D'Arcy concession, granted in 1901 in what is now Iran, included the whole of the Persian Empire with the exception of five provinces, covered an area of 480,000 square miles and was to last for 60 years. Renegotiation of the concession with the Anglo-Persian Oil Company in 1933 reduced the area to 100,000 square miles and provided for the concession to extend until 1963. The Consortium agreement

Furthermore with time, British companies because of their influence in Middle East and Asia, gained substantial control in petroleum activities in these areas. American firms, by virtue of the political influence of United States, started acquiring petroleum rights in Mexico and Latin America and as a result secured for themselves a monopoly on petroleum operations in these countries.

DISCUSSION OF THE TERM CONCESSION

The term 'concession' is not a term of art[10] and in the general sense embraces franchise, license, patent, charter, monopoly and grant. The underlying fact is that there is no legal significance that can be attached to the term applied to the instrument embodying the concession.

The word concession, as history has it, has its root in the Latin word *concessio*, which means: to permit or to allow. When the word is used it connotes mainly the phenomenon of foreign participation, and concerns permits or licenses in particular, especially exclusive ones from an authority. The term concession is very wide and may connote different concepts. It is particularly used to refer to either the privileges or rights conceded by a government to carry out an activity and the Act under which the right is conceded.

Sometimes, it can also be applied to a formal deed whether it is a contract, a convention or an agreement. In whatever form, it attributes a right or privilege to the concessionaire. In some countries the terms is referred to as administrative contracts and in others, such as the common law jurisdiction, a concession may take the form of a grant, a license or a lease or, even sometimes "concession" is an all-embracing term, covering any agreement between the government and an investor (MNOC) for exploration and production of mineral resources.

The term concession is universally acknowledged as a difficult word to define. Legal writing and jurisprudence has not helped matters, since divergent definitions have been adopted and there has been a tendency to shifts in emphasis over time.

THE FRENCH SCHOOL

Several authors have attempted a definition of concession. There is a tendency on the part of writers trained in the school of thought of French administrative law to stress the inequality of the parties in concessions and the unilateral right of the state to modify or revoke concessions in the furtherance of public duty. However, in the study of the Suez Canal nationalisation an enquiry was made into the nature and the legal status of concession agreements. The following definition was offered:

> *Juridically, the term concession might signify: 1) in international law a grant by a state to another of political rights within its territory, as in the case of international concession in China; or in municipal law, a grant of exclusive or non-exclusive rights, privileges or franchise, affecting public interest, to an individual, or public or private corporation, a state or other governmental body, or a*

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negotiated in 1954 following nationalisation provided for an initial 25 years until 1979, with three five-year extensions, each at the option of the Consortium, assuming certain specified conditions had been satisfied. The IPC concessions covered an area of 172,000 square miles, virtually all of Iraq, and were to last for 75 years (until 2000). The Aramco concession in Saudi Arabia, dating back to 1933 covered an area of 371,000 square miles and was to last for 60 years. Renegotiation in 1939 enlarged the area to 496,000 square miles, over half of Saudi Arabia, and provided for the concession to last until 1999. The Kuwait Oil Company concession of 1934 included the whole of Kuwait, 6000 square miles, and was to last for 75 years. The IPC-owned concession granted in what is now Qatar in 1935 covered the whole country and was to last until 2010. See H. Cattan (1967), *The Evolution of Oil Concessions in the Middle East and North Africa*, Parker School of Foreign and Comparative Law (Dobbs Ferry, NY: Oceana Publications), 1-3.

[10] S Toriguian, *Legal Aspects of Oil Concessions in the Middle East* ((Lebanon, Beirut: Hamaskaine Press, 1972), p. 34.

> *mixed 'public private' corporation with the State and the private party as joint concessionaires … An outstanding characteristic of the concession is that the grant is not made under legal compulsion, but at the absolute discretion of the conceding State. If this element of discretion is lacking, then in the strict sense, the grant is not a concession… The subject matter of concessions falls into two main categories: - 1) Public utilities and 2) the exploitation of natural resources… In the more important concessions the principal grant may be supplemented by auxiliary rights, such as rights over land, right of eminent domain, exemption from taxation and customs dues for a stipulated period, or for the duration of the concession, right to exploit mines together with the operation of railways, stations and other appurtenances.*[11]

PROFESSOR CARLSTON'S AND OTHER DEFINITIONS

Professor Kenneth S. Carlston, another writer from the other side of the Atlantic, defined concession in an article as follows: -

> *It seems to be generally conceded that one of the accepted elements in definition of a concession agreement is that it involves an agreement by a State to grant a privilege to conduct an enterprise of some sort for a defined period. This agreement may be made pursuant to constitutional or legislative authority, but such is the nature of the enterprise which is desired to be established that it becomes essential to function through contract as well as through general rules of law … the concession agreement, whatever its form, its formulated sometimes in the context of a rather comprehensive set of regulations, as in Venezuela, or at other times is a rather complete statement or body of law which is to apply the joint enterprise of the sovereign and the concessionaire. The latter situation is found in a number of the Middle East governments; with the personal sovereign acting partially in his capacity of legislator, within the limits of Islamic law generally, partially as executive, and partially in his contractual capacity.*[12]

Another scholar has observed that a concession is:

> *…an agreement (usually from a host government) permitting a foreign petroleum company to prospect for and produce oil in the area subject to the agreement. The terms ordinarily include a time limitation and a provision for royalty to be paid to the government.*[13]

Furthermore, it is a remarkable feature of most definitions that they look on the concession as being a discretionary act of the conceding state:

> *An outstanding characteristic of the concession is that the grant is not made under legal compulsion, but under absolute*

[11] T.T.F. Huang, 'Some International and Legal Aspects of the Suez Canal Question,' *A.J.I.L.* (1957) 51:2, pp. 227-307.

[12] K S Carlston,. 'International Role of Concession Agreements', *North-Western University Law Review*, (1957) p. 635.

[13] H.R Williams and C.J. Meyers, *Oil and Gas Terms*, (1962) p.150.

> *discretion of the conceding state.*[14]

Similarly, another author comments that a concession is simply

> *a synallagmatic act by which a state transfers the exercise of rights or functions proper to itself to a private person, state owned enterprise or a consortium which, in turn, participates in the performance of public functions and thus gains a privileged position vis-à-vis other private subjects within the jurisdiction of the state concerned.*[15]

Also, one writer regarded the concession as "a privilege granted by a government to an individual or group for developing certain resources or constructing certain public works."[16]

Yet another writer defines a concession as the "grant of a privilege, usually exclusive but not necessarily so, to conduct an economic enterprise for a defined period and usually within a defined area."[17]

In the light of the above study, it is apparent that there is no agreed upon definition of the term concession in international law. A wary comparison of the various definitions nonetheless discloses little substantive difference between them and their divergence appears to be mainly laissez-faire.

[14] Pierre Barraz, 'The legal status of oil concessions'. 5 *J. World Trade* 609 (1971) .

[15] P Fischer 'Concessions' in R. Bernhardt (ed.) *Encyclopedia of Public International Law* vol.8, (Max Planck Institute of Comparative Public Law and International Law, Heidelberg. Amsterdam / Lausanne / New York / Oxford / Shannon / Tokyo: North Holland - Elsevier), (1985) p. 100.

[16] R.L. Buell, *International Relations*. (New York, H. Holt and Company), (1929) pp. 397-98.

[17] Toriguian *op. cit.* (n.10), p.38.

SIGNIFICANCE OF DISCRETION AS OPPOSED TO CONTRACT

The traditional concession agreement was a comparatively simple document, the main provisions of which were an outright grant of the rights to exploit and market minerals recovered within the area of concession by a sovereign in return for which the concessionaire provided the necessary capital and know-how, and bore the risk of exploitation. A commentator has remarked that the grant, however, has a dual character.

1) It consists of a discretionary act exercised by the state under the general rules of law or pursuant to constitutional or legislative authority or by the head of state in his private capacity, as in the case of some Middle Eastern countries.

2) It includes a contractual part, which is either in the context of general rules of law regulating the exploration and exploitation of the specific field involved or, in the absence of such rules; it comprises a body of law to regulate the enterprise in question.[18]

There is a growing recognition, however, that the object of a concession need neither be a public utility nor the exploitation of natural resources and as such may not affect public interest. The concession is a varied administrative and contractual act. The grant takes the form of (1) a public unilateral act, or (2) a contract under private law, or 3) a contract under public law of the grantor. The more the concession swings to a private contract the stronger the position of the grantee in law. The more it swings towards unilateral public act, the weaker the position of the grantee, because a unilateral administrative act gives privileges with no rights as correlatives,[19] while a contract

[18] *Ibid.* p.38.

[19] *Ibid.*

necessarily creates rights and duties.[20] It would appear that the nature of the actual interest (whether proprietary title or contractual right) which the concessionaire acquires is determined by the legal system under which the concession is granted. The concession might consist wholly in the permission to engage in a certain kind of activity with no proprietary rights i.e. a *jura facienti*. However, there exist different scenarios. In a situation whereby the grantor consents to the operation of such concession under a legal system other than its own or that of the grantee, e.g. under international law, if that be the case, the submission shows unambiguously the intention of the contracting parties that the concession should not be affected by any successive change in law under the concessionaire's domestic law nor be subject to any form of meddling by the state organ or grantor. If this element of discretion is lacking, then, in the austere sense, the grant is not a concession.

The concessions that are granted by a state may vary in their object, type and legal nature. This issue came up for consideration in the arbitration between Aramco and the government of Saudi Arabia, where the Arbitration Tribunal held that:

> *As was pointed out in the Memorandum of the Reparation Commission in the arbitration proceedings which took place between that Commission and Germany…The concept of the concession is very wide and varied. It may extend according to the legislation and the doctrines concerned, from the grant of titles of nobility or of a burial ground to that of certain public functions…"*[21]

EARLY DISINTEREST IN MARINE EXPLORATION

All of the main early concessions such as the D'Arcy and the IPC Iraq Petroleum Company concessions made no mention with regard to offshore waters.[22] As time went on, the concessions that included territorial waters were the Arabian American Oil Company (Aramco) concession from Saudi Arabia (1933), and the Kuwait Oil Company (KOC) concession from Kuwait (1934).[23] The submarine issues were not of specific interest to the oil companies. Since exploration of oil in submarine areas at that time was almost unknown, the offshore technology was underdeveloped, and vast land areas were unavailable.[24]

As time went on, successive agreements began to make specific references to marine areas, when the intention of the parties was to include them within the concession area. An example of this would be the Abu Dhabi first concession. This concession between the ruler of Abu Dhabi and the Trucial Coast Petroleum Development Company[25] owned by the IPC Shareholders was signed in January 1939. The duration of the concession was 75 years and it covered the entire onshore and offshore areas of Abu Dhabi. Following preliminary exploration after the Second World War this Company relinquished the offshore areas and kept all the onshore areas. Production of oil started under this concession in 1963.

[20] Feilchenfeld, Ernst H. in *Encyclopedia of Social Sciences* writes under the word concession: - … a private property right to grantee, a contract relationship to which a government is a party and a right affecting governmental interests. See also Guldberg, T. (1944) 'International Concessions, A Problem of International Economic Law,' *15 Acta Scandinavia Juris Gentium.*

[21] Aramco v Government of Saudi Arabia Arbitration Tribunal, *ILR*, Vol.27, p. 157.

[22] Gao, Z. (1994), *op. cit.* (n. 8), p. 10.

[23] Art.2 of the Original Concession Agreement of May 29, 1933, in Barrow Company, *Middle East Contracts: Basic Oil Laws and Concession Contracts*, vol.2. pp. 1-37.

[24] Gao, Z. *op. cit.* (n. 8), p. 10.

[25] The name of this Company was changed to Abu Dhabi Petroleum Company – "ADPC"-1962. Ownership shares in this Company were as follows: BP 23.75 per cent. Shell 23.75 per cent. Exxon and Mobil Oil together 23.75 per cent, and the Gulbenkian Interest (Partex) five per cent.

EARLY ROYALTIES AND RENTS – ABDICATION OF SOVEREIGNTY

Under the concession regime, the foreign Oil Company made a direct equity investment for the purpose of exploiting a particular natural resource.[26] It has been argued that in most of the cases, the concession amounted to an implicit assumption of sovereignty by the foreign Oil Company over the host country's natural resources, an instance of the old international economic order.[27] In the circumstances, it seems fairly reasonable to suggest that the international Oil Company exercised exclusive, extensive and plenary rights to exploit the particular natural resources and was in effect assured ownership of the resources at the point of extraction. The host countries in most cases, were not perturbed that the decision involving exploration and exploitation activities had been abdicated. In most of these cases, the foreign company had assumed complete responsibility for the transportation, refining, and marketing facilities to sell and distribute the petroleum on a global scale and by so doing, they had every right to determine the pace of development programs and production schedules. What this meant was that the host country had no proprietary claim to the petroleum produced and was a passive tax collector.

In colonial Africa, the situation was quite phenomenal and a sorry sight. Some companies from metropolitan countries acquired considerable concessions for the sole purpose of exploiting the minerals, timber and other natural resources of the developing countries. In British Africa, for instance, these concessions were granted by native authorities with the fair consent of the colonial governor.[28] The fact remains that whether formally derived from chiefs or colonial authorities, they share common characteristics – they were a device for obvious economic exploitation.[29] For instance, the Sierra Leone Selection Trust had a diamond concession in Sierra Leone for 99 years, the Ashanti Goldfield in Ghana had a term of 90 years, Consolidated Trust had a cluster of diamond concessions in Ghana for about 77 years.

In Nigeria, the German Bitumen Company in 1908[30] was granted a permit to prospect for oil in the British protectorate at Lagos. Definitive records of such concessions are no longer available and information is only piecemeal. However, we do know for certain that

[26] *Ibid.*
[27] Smith & Wells Jr. *op. cit.* (n. 5), p. 51.
[28] Asante, *op. cit.* (n. 36), p. 338.
[29] *Ibid.*

[30] The first piece of legislation on petroleum in Nigeria was the Petroleum Ordinance of 1889, which was followed in 1907 by the Mineral Regulation (Oil) Ordinance of Nigerian Natural Resources. The 1907 Ordinance stipulated, *inter alia*, that only British subjects or companies controlled by British subjects would be eligible to explore for Nigerian Oil Resources. In fact this provision is a paradox, as the first company ever to undertake exploration in Nigeria was the German Bitumen Company in 1908. Grants to explore for Petroleum may also have been given under the provisions of Order No. 19 of the 1909 Laws of Southern Nigeria. See Omorogbe, Y. (1987) "The Legal Framework for the Production of Petroleum in Nigeria" J.E.N.R.L. 5:4 273 at 273. An examination of Nigerian statutes would, however, reveal that the major constituent of the laws which touch upon the exploration and production of petroleum was the Mineral Oils Ordinance of 1914. (Cap 120 Law of the Federation of Nigeria 1958 edition.) This ordinance was promulgated to regulate the right to search for, win and work mineral oils. See Basic Oil Laws and Concession Contracts, South and Central Africa (Original Text) 1959. It appears that the 1914 ordinance was inspired by the activities of the Germans of the Nigerian Bitumen Company. A New section 10 was added to 1914 Ordinance by the Mineral Oils (Amendments) Act 1950 whereby the Submarine areas of Nigerian territorial waters were brought under the ambit of the 1914 Ordinance. By another amendment in 1959, the legislative competence of Nigeria's Federal Legislature was pronounced over the Submarine areas of other waters which the Legislature may decide to legislate upon in future, in matters relating to mines and minerals. This right is recognised under Article 2 of the Geneva Convention on the Continental Shelf 1958. Section 3 (1) of the Minerals Act 1946, stipulated that: "The entire property in and control of all mineral oils, on under or upon any lands in Nigeria, and all rivers, streams and water courses throughout Nigeria, is and shall be vested in the crown...." See Etikerentse, G. (1985) *Nigerian Petroleum Law* London: Macmillan.

exploration works were carried out for oil, although unsuccessful, over many years until the outbreak of the First World War.

There was a second concession granted to Shell–BP for 30 years for on-shore and 40 years for offshore areas respectively with an option to renew for a further 30 and 40 years respectively. The concession area was very large, covering the whole mainland of Nigeria, even though the viable area lay in the region of the Southern Nigeria Sedimentary Basin.[31] In 1959, the concession area was reduced and the duration to 20 years. Until 1960, Shell–BP had a complete monopoly to select at their leisure any concession which they were granted to prospect oil. The monopolistic position of Shell was to be short-lived with the introduction of other companies into Nigeria. The other companies were able to obtain concessions in those areas which Shell–BP had abandoned.

FREEHOLD, PRIVATE PROPERTY AND ENCLAVE STATUS

In addition to these rights, the companies enjoyed such extensive rights over their concessions as to be hardly distinguishable from a freehold interest.[32] There was no provision for the reversion of any portion of the concession area to the native authorities by way of surrender and the fact is that these concession areas stretched to large spans of land. In most of the cases, these companies were given plenary rights to extract all minerals, not only those found in the concession area. Apart from the mining rights, these companies enjoyed extensive surface rights over the concession area.

Furthermore, it has been commented that the legal relationship between transnational corporations and the important resource over which they had acquired concessions was one of private ownership. In most of the cases, these foreign companies invoke traditional property concepts in asserting ownership, not only of the extractive facilities such as the mine, the shaft the fixed assets, the equipment, and the stores,[33] but also over mineral ores such as petroleum as the natural resource of the host countries.

The concessionaire is usually given certain exceptional powers concerning the use or expropriation of land for the purposes of the undertaking, the establishment of communications, construction of roads and sea loading facilities coupled with other incidental powers intended to facilitate the works of the enterprise.

In addition, the concessionaire had the exclusive responsibility for appropriation of the returns of the undertaking, subject to modest fiscal impositions. Coupled with this, the concessionaire had the exclusive power to manage the undertaking at all levels of operations, to control the production of the resource and all related matters, such as the volume of production, expansion and development.

The traditional concession regime produced an enclave status for the multinational corporation equipped by a regime of economic and legal arrangement so formidable and enveloping that it overtly challenged the sovereignty of the host government over its natural resources.[34]

CONCLUSION

The main provisions of concession contracts were an outright grant of the right to exploit and market minerals recovered within the area of the concession by a sovereign state in return for which the concessionaire provided the necessary capital and know-how and bore the risk of exploration. The concession area was customarily quite large in geographical scope. In some ridiculous cases, it covered substantially the entire territory of the host country. In some instances, this consisted of more than 400,000 square miles. When

[31] R.A Reyment,. 'Aspects of Geology of Nigeria', *Ibadan University Press* cited in Schatzl, H.L. (1969) *Petroleum in Nigeria*. Ibadan: Oxford University Press, (1969) p. 3.
[32] Asante, *op. cit.* (n. 36), p. 338.
[33] *Ibid.* 339.
[34] Asante, *op. cit*. (n. 36), p, 339.

compared to present day practices, the duration of the agreement was very long, frequently extending between 30 to 90 years. The main financial incentive of the traditional concession was the royalty payment. It can be argued that by today's standards, early royalty payment was modest in size. There were also instances in most concessions, whereby there was also an obligation to make periodic rental payments. The rentals were not the only financial consideration, although the amount varied broadly. In some cases, the rental ceased upon establishing commercial production and in others, it rose to a maximum amount where commercial quantities of petroleum were discovered.[35]

However, as time went on and with the scramble for concessions becoming keener, the amount increased. The consideration for these exclusive economic benefits was obviously ludicrous. In many cases the companies paid a normal rent of say E150 for a whole concession, plus one or two bottles of rum. There was no royalty in the modern sense, that is, a fixed percentage of gross proceeds.[36] Royalties were based on volume of output, rather than value. For example, the Iraqi agreements with the Khanaqun oil company in 1926 called for payment of four gold shillings per ton of oil produced and saved; the 1949 agreement between Saudi Arabia and Getty provided for a royalty of 00.55 per barrel.[37]

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[35] Smith & Wells *op. cit.* (n. 5), pp. 560-590.

[36] S.K.B Asante,. 'Restructuring Transnational Mineral Agreements.' *AJIL* Vol. 73, (1979)p. 338 .

[37] *Ibid.*