Legal strategy for resolving the socio-economic and environmental symptoms of the resource curse in Nigeria: the role of impact and benefit agreements (IBAs)

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Abstract

Traditionally, the discovery and exploitation of natural resources can change the destiny of countries in which they are found. However, history shows that in many developing resource-rich states, particularly in Africa, many citizens do not benefit from the resource revenues. This is due to factors such as mismanagement of the resource revenues, lack of transparency and accountability and corruption, amongst others. All of these are characterised by what is known as the '**resource curse**' phenomenon. This article examines the resource curse phenomenon with a jurisdictional focus on Nigeria's oil-rich Niger Delta region (NDR). Further, it considers a potential legal instrument - the Impact and Benefit Agreement (IBA) - that could be used to resolve some of the problems characterised by the resource curse in the region. Using Canada as a reference point, the article demonstrates that the adoption of IBAs could be an alternative legal strategy for resolving socio-economic and environmental symptoms of the resource curse in Nigeria's oil-rich region.

Keywords: Resource development; Resource curse; Oil resources; Impact and benefit agreement; Oil and gas industry; Nigeria.

Introduction

Traditionally, the discovery, exploitation and proper utilization of petroleum or mineral resources are expected to provide benefits, such as socio-economic development, employment opportunities, business creation, tax revenues, and foreign exchange earnings for both State and host communities.[1] Unfortunately, largely due to the resource curse phenomenon, this appears to be different, particularly in the oil-rich Niger Delta region (NDR) of Nigeria. The resource curse phenomenon, which is often referred to as the "paradox of plenty", describes resource-rich countries as performing less economically than countries with fewer resources.[2]

Despite five decades of oil exploration and exploitation in the oil-rich NDR of Nigeria, the region continues to experience the resource curse phenomenon. This implies that the oil is exploited and produced to generate revenues and income, but unfortunately, these revenues benefit only a few. Despite the abundance of oil resources in the region, there is still poor economic development, high unemployment rates, social life challenges, poor infrastructural amenities and weak regulatory institutions that are unable to monitor the management of the oil revenues.[3]

In light of the above, this article argues for the adoption of Impact and Benefit Agreements (IBAs) for petroleum resource development between oil multinationals operating in the NDR of Nigeria and the host communities. Further, it argues that an agreement between the host communities and oil multinationals that specifies the provision of basic social amenities and infrastructures could change the status quo and possibly resolve socio-economic and environmental symptoms of the resource curse in the region. This is because, there appears to be a realisation that 'mere reliance on the cooperation and goodwill of companies without more, does not offer a lasting solution to calming the fears of the indigenous people'.[4] It is therefore suggested that such an agreement should be incorporated into the Nigerian legal system to assuage the plight of the indigenous people in host communities.

Following the above introduction, the article is organised into four sections. Section 1 discusses the resource curse phenomenon generally, and with particular reference to Nigeria. Section 2

[1] A Wigwe-Chizindu; "Are Impact and Benefit Agreements (IBAs) Worth the Hype? An Analysis of the Challenges and Benefits of the Emerging Instrument" (2018) 1 Oil, Gas & Energy Law Intelligence www.ogel.org
[2] P Le Billon *'The Resource Curse'* (2005) 45 The Adelphi Papers 12.
[3] Wigwe-Chizindu (n 1)
[4] J Onele, 'Impact and Benefit Agreements and the Protection of Indigenous Peoples Rights: Any Lessons from Canada?' (2017) Oil, Gas & Energy Law Intelligence 1-12.

examines various international and national efforts aimed at resolving the resource curse phenomenon such as the establishment of the Extractive Industries Transparency Initiative (EITI),[5] the campaign of Publish What You Pay (PWYP) organized by Non-Government Organisations (NGOs) as well as the critiques of these efforts. In section 3, an analysis of the role of IBA as a legal instrument or strategy that could potentially resolve socio-economic and environmental symptoms of the resource curse phenomenon in Nigeria is provided. Using the case of Canadian Aboriginal Communities,[6] while drawing lessons from the First Nation People in Canada and the Canadian mining industry,[7] the article adopts the literature-based research methodology to examine the nature, benefits, and challenges of IBAs vis-à-vis the right of indigenous people in host communities. The article concludes with section 4.

Resource Curse Phenomenon: Fundamental Concept

An in-depth understanding of the term 'resource curse' and its implications would provide a necessary background for further discussions. Debate on the resource curse began in the 1980s, displacing the view that resource development can only be positive for a country.[8] The resource curse phenomenon posits that there exists a negative relationship between endowment with natural resources and socio-economic development.[9] In other words, countries that have deposits of natural resources in abundance have exhibited a gnawing tendency to perform worse than those not similarly endowed on virtually every social and economic indicator.[10] The term has also been referred to as the 'paradox of plenty'. In this regard, Karl describes what she refers to as oil's 'paradox of plenty' in the following;

> Countries that are dependent on petroleum revenues for their livelihood (with the notable exception of Norway) are among the most economically troubled, the most authoritarian, and/or the most conflict-ridden in the world. This is true across regions-in the Middle East, Asia, Africa, and Latin America. Oil-exporting countries grow more slowly than non-oil rich countries over time (between 1965-

[5] Siri Aas Rustad, Philippe Le Billon and Päivi Lujala 'Has the Extractive Industries Transparency Initiative been a success? Identifying and Evaluating EITI Goals' Resources Policy 51 (2017) 151- 162 https://eiti.org/sites/default/files/documents/le_billio_et_al_2916_eiti_evaluations_metastudy.pdf accessed 1 April 2019

[6] T. Isaac and A. Knox "Canadian Aboriginal Law: Creating certainty in resource development" (2011) www.ogel.org accessed on 1 April 2019.

[7] B. Noble and C. Fidler 'Advance Indigenous Community – Corporate Agreements: Lessons from practice in the Canadian Mining Sector' (2011) www.ogel.org accessed 1 April 2019

[8] J Di John 'Is There Really a Resource Curse? A Critical Survey of Theory and Evidence" (2011) 17 Global Governance 167- 184.

[9] E Duruigbo, 'The World Bank, Multinational Oil Corporations, and the Resource Curse in Africa' (2005) 26 (1) U. Pa. J. Int'l Econ. L 5.

[10] Alan Gelb & Associates, *Oil Windfall Gains: Blessing or Curse*? (New York: Oxford Press 1988).

> 1980 PEC members experienced an average decrease in their per capita GNP of 1.3 percent per year, while their non-oil counterparts grew by an average of 2.2 percent per year), and they diversify their economies less easily. They have unusually high poverty rates compared with countries dependent on the export of agricultural products. Their infant mortality, malnutrition, and life expectancy at birth are worse than in non-oil/ mineral dependent countries of the same income level. Their health care and their school enrolment tend to be less than in their non-resource rich counterparts; OPEC countries spend less than 4 percent of their GNP on education compared with almost 5 percent for the world as a whole (1997 figures) But they are more likely to spend from two to ten times more on their militaries and to be ruled by authoritarian leaders. The localities surrounding oil installations are among the most environmentally damaged and conflict-ridden in the world. Worst of all, the probability of having civil war is higher in oil-exporting countries than in their resource-poor counterparts.[11]

The description provided by Karl is a summary of what the resource curse phenomenon entails. More so, it offers an understanding of the state of affairs of countries which are resource-rich, but troubled by the resource curse phenomenon. As stated by scholars, the resource curse seems to feature more in resource-dependent countries than in countries less dependent on resources. In these countries, there is a higher likelihood of conflict,[12] the prevalence of official corruption,[13] corrupt rulers stay in power longer,[14] and a greater likelihood of misallocation of resources.[15]

Ordinarily, the discovery of natural resources such as hydrocarbon in commercial quantity leads to the generation of valued foreign exchange together with the attraction of investors from other parts of the world with much-needed capital and increases the chance of producing goods in view of the availability of raw materials.[16] The implication of this is that resource-rich countries may be able to overcome the predicament of low growth due to lack of access to the necessary capital for development.[17] Thus, money generated from the growing extractive industry in resource-rich countries would be used in the construction of needed infrastructure

[11] T Lynn Karl, The Oil Trap, TRANSPARENCY INT'L Q. NEWSL. (Transparency Int'l, Berlin, Germany), Sept. 2003, at 1, available at http://www.Transparency.org/newsletters/2003.3/tiq-sept2003.pdf. accessed 8 May 2019
[12] S Aslaksen & R Torvik, 'A Theory of Civil Conflict and Democracy in Rentier States', (2006) 108 SCANDINAVIAN J. ECON. 571, 584
[13] A Tornell & P R. Lane, "The Voracity Effect", (1999) 89 AM. ECON. REV. 22, 23
[14] B Smith, Oil Wealth and Regime Survival in the Developing World, 1960-1999, (2004) 48 *AM. J. POL. SCI.* 232, 238
[15] J A. Robinson & R Torvik, "White Elephants", (2005) 89 *J.PUB. ECON.* 197, 198
[16] M Sarraf and M Jiwanji, Beating the Resource Curse: the case of Botswana 3 (World Bank Env't Dep't, Environmental Economics Series Paper No. 83, 2001).
[17] Duruigbo (n 9)

and in the establishment of secondary industries.[18] Unfortunately, this has not been the case for many resource-rich countries, particularly in Africa. This is because the discovery and exploitation of natural resources does not automatically translate into economic growth and prosperity,[19] a fact that contrasts sharply with the prospects of wealth and opportunity that accompany the discovery of natural resources.[20] The underlying truth is that poor countries with significant deposits of natural resources have not resolved their pre-resource discovery miseries.[21] In fact, natural resources discovered in these countries have exacerbated their already pitiable conditions,[22] thereby making them poorer and vulnerable than their counterparts with no natural resources.[23] The concentration on the resources stifles the growth of other export sectors in these countries and causes severe economic problems of unemployment, inflation, and international payments imbalance.[24] Using Nigeria as a case study, while the author of this article will acknowledge that the 'discovery of oil' in Nigeria tremendously changed the status of the country on aglobal scale, particularly at the early stage of development of the country's economy, it appears the discovery of oil resources in the country has done more harm than good. This is attributed to what scholars have described as the 'curse of leadership'[25] and not necessarily the resource curse phenomenon.

In Nigeria, the NDR has remained underdeveloped with severe environmental and socio-economic challenges, notwithstanding the discovery of crude oil in commercial quantity. The bulk of Nigeria's oil is produced and exported from the region. Additionally, the region has generated about US$600 billion from oil and gas resources since the discovery of oil in commercial quantity.[26] This is against the background that the majority of the indigenous people are into farming and fishing with heavy reliance on the environment for their means of

[18] M Ross, Extractive Sectors and the Poor 6 (Oxfam America, Research Paper, Oct. 2001), *available at* http://www.oxfamamerica.org/newsandpublications/publications/researchjreports/art2635.html/pdfs/eireport.pdf . accessed 10 May 2019

[19] D Olcer, 'Extracting the Maximum from the EITI' (2009) OECD Development Centre Working Paper No 276 DEV/DOC http://www.oecd.org/dev/42342311.pdf accessed 5 May 2019

[20] M Humphreys, J Sachs and J Stiglitz, 'Introduction: What is the Problem with Natural Resource Wealth in Escaping the Resource Curse? In Macartan Humphreys, Jeffery Sachs and Joseph Stiglitz (eds) *Escaping the Resource Curse* (Columbia University Press 2007) 1.

[21] Duruigbo (n 9)

[22] Ibid.

[23] Ibid.

[24] F. Ezeala-Harrison, 'Structural Re-Adjustment in Nigeria: Diagnosis of a Severe Dutch Disease Syndrome' (1993) 52 (2) American Journal of Economics and Sociology 193-208

[25] Duruigbo (n 9) 6

[26] G. Wurthmann, 'Ways of Using the African Oil Boom for Sustainable Development' African Development Bank, Economic Research Working Paper Series, No. 84, March 2006. For an overview and analysis of the history and evolution of the oil and gas industry in Nigeria, see Eghosa Ekhator 'Public Regulation of the Oil and Gas Industry in Nigeria: An Evaluation' (2016) 21(1) Ann. Surv. Int'l & Comp. L. 43

livelihood. Consequently, the operations of multinational oil companies in the region have led to severe environmental degradation which has cost them their means of livelihood. This is often viewed as an environmental aspect of the resource curse phenomenon. The resource curse phenomenon has been categorised under two major theories which are of two limbs namely: "Dutch disease" and the "Nigerian disease". A brief discussion of these theories is undertaken below.

The Dutch Disease

The idea behind the Dutch disease came up after the negative experience of the Netherlands in the 1970s when its North Sea gas fields were developed, resulting in a stronger exchange rate and consequent decline in the non-petroleum economy.[27] This led to the contraction of other tradable sectors as a result of a boom in the natural resource sector.[28] The Dutch disease, which is viewed as an economic aspect of the resource curse, refers to the 'detrimental impact of economic distortion that export booms can induce in a mineral-dependent economy' to the extent that non-mining sectors suffer as a result, with other industries or sectors becoming less competitive and lucrative.[29] In this vein, countries begin to experience rising currency exchange rates and associated loss of skilled labour in other sectors like agriculture and manufacturing.[30] It is noteworthy that while there are economic explanations for the existence of the Dutch disease, there are equally political explanations and the Nigerian disease provides a political context to help understand the concept of the resource curse phenomenon.

The Nigerian Disease

The Nigerian disease, on the other hand, refers to the mismanagement of economic revenues. It is aptly characterised by policy failure, waste and 'greater rent-seeking behaviour by individuals, sectors or interest groups as well as the general weakening of state institutions'.[31] Unfortunately, for many years commentators have considered Nigeria a perfect example of a country experiencing the resource curse phenomenon.[32] This is evidenced by the poor

[27] J Shankleman, "Imagine There's No Resource Curse" (2008) 38 Environmental Policy and Law 205
[28] H Takatsuk, DZ Zeng and L Zhao, 'Resource Based Cities and the Dutch Disease' (2015) 40 Resource and Energy Economics 57.
[29] M Langton and O Mazel, 'Poverty in the Midst of Plenty: Aboriginal People, the 'Resource Curse' and Australia's Mining Boom' (2008) 26 Journal of Energy and Natural Resources 35.
[30] P Collier, *The Bottom Billion Why the Poorest Countries are Failing and What Can Be Done About It* (Oxford University Press 2007).
[31] Langton and Mazel (n 29) 35
[32] Obinna Chima, 'Okonjo-Iweala: Nigeria Suffering from Resource Curse' (March 2014) Thisday live news <http://www.thisdaylive.com/articles/okonjo-iweala-nigeria-suffering-from-resource-curse/173113/> accessed 8 May 2019

economic state of the country despite her oil fortunes for over five decades. History shows that the poor state of the economy is attributed to certain factors such as the mismanagement of oil revenues, corruption and lack of transparency and accountability in the country's oil sector. The combination of these factors has over the years sustained the harsh realities of the resource curse syndrome in Nigeria's oil-rich NDR.

Interestingly, the existence of the resource curse is not a law cast in stone, as countries affected can take initiatives to check and address it.[33] In this regard, countries such as the United States of America, Canada, and Australia have conveniently used petroleum and other natural resources to develop and make their economy stronger.[34] More specifically, Norwaywas the poorest country in Europe in 1900, but it is now one of the richest European States primarily due to the utilisation of resources including oil.[35] In the African continent, Botswana has successfully catapulted itself from one of the poorest countries at independence in 1965 to an upper-income society through its diamond mines.[36] The transformation of the economy of these countries as a result of proper utilization of their economic resources justifies the argument by scholars who posit that the discovery of economic and natural resources is a 'blessing' and not a 'curse'. The next section of this article shall turn to international and national efforts aimed at resolving the resource curse.

International and National Efforts to Resolve the Resource Curse in Nigeria

Over the years, there have been some efforts both at the international and national level aimed towards resolving problems associated with the resource curse phenomenon. Beginning with the international community, efforts have been made with a focus on transparency and accountability as key measures that may be used to check the resource curse. In this regard, governments of resource-rich countries and their extractive industries have been encouraged to leverage on the systematic approach adopted at the international level to address the resource curse problem. These approaches are discussed below.

[33] R M. Auty, *Industrial Policy Reform in Six Large Newly Industrializing Countries: The Resource Curse Thesis,* 22 WORLD DEV. 11, 24 (1994) (explaining that resource-rich countries can combat the resource curse with good industrialization policy choices).
[34] G Wright and J Czelusta, Exorcizing the Resource Curse: Minerals as a Knowledge Industry, Past and Present (July 2002) (unpublished manuscript, on file with author).
[35] Save the Children, Lifting the Resource Curse**:** Extractive Industry, Children and Governance 8 (2003), available at http://www.savethechildren.org.uk/temp/scuk/cache/cmsattach/18_EITI.pdf accessed 8 May 2019
[36] Duruigbo (n 9) 10

Extractive Industries Transparency Initiative

One of the foremost international efforts aimed at resolving the resource curse is the establishment of the Extractive Industries Transparency Initiatives (EITI), championed by the United Kingdom in 2002 to promote transparency and accountability in a more coordinated and structured manner.[37] The key idea behind the EITI is to establish a shift to both company and government reporting of activities surrounding the development of economic resources in resource-rich countries. The focus is to encourage resource-rich countries to join the EITI in order to strengthen measures that have been put in place to address the resource curse. EITI aims to strengthen governance by improving transparency and accountability in the extractive sector.[38] Typically, this is carried out through the process of monitoring and reconciling company payments and government revenues at the level of individual countries to be deemed 'EITI compliant'.[39] Therefore, each country needs to implement EITI complaint regulations and establish a multi-stakeholder group of civil society, government, and private industry representatives to oversee implementation.[40] There are expected benefits of joining the EITI and achieving such a status. In this regard, Friedman explains that:

> Compliance and candidacy under the EITI have a vast array of benefits to both countries and corporations. First, complaint and candidate countries use their membership to strengthen the investment. It is a signal to investors and financial institutions that there will be increased transparency, accountability, and governance. It is also possible that this promise will reduce violent conflicts around the natural resource sectors. For corporations and investors, doing business in EITI Compliant countries reduces both political and reputational risk. This, in turn, reduces costs by reducing the need for or lessening the cost of risk insurance. As for the general population, it is generally advantageous to have more information in the public arena through transparency as well as benefits associated with greater foreign direct investment.[41]

It is noteworthy that while the introduction of EITI may have encouraged the publishing of financial transactions between a country's government and multinational oil companies, it has

[37] C Short "The Development of the Extractive Industries Transparency Initiative" (2014) 7(1) Journal of World Energy Law and Business 8-14 The EITI movement was championed by the United Kingdom Prime Minister Tony Blair in the year 2002.
[38] J Kelley, 'China in Africa: Curing the Resource Curse with Infrastructure and Modernisation', (2011) 12 *Sustainable Dev. L. & Pol'y* 35
[39] Ibid.
[40] Ibid.
[41] A Friedman "Operationalising the Rio Principles: Using the Success of the Extractive Industry Transparency Initiative to Create a Framework for Rio Implementation" (2011) 12 University of Botswana Law Journal 73-86.

not come without its own challenges. Firstly, in the area implementation, its relative weakness is evidenced by the limited mandate, voluntary nature, stakeholder resistance and dependence on an active civil society.[42] The implication of this is that the effectiveness of EITI is dependent on several other factors, including the necessary political will of the government of a resource-rich country. Consequently, where this is lacking, it falls short of ensuring real accountability or effective management of the resources. Secondly, EITI remains poorly resourced and relies purely on voluntary reporting by companies and governments.[43] This has significantly affected the impact of EITI, particularly in resource-rich developing countries affected by the resource curse phenomenon. Thirdly, the key limitation of the EITI is their focus on revenues, not spending. In other words, the main weakness of EITI is the lack of reporting and monitoring of the government's spending of oil revenues.[44] According to Frynas, "the premise of the EITI that revenue transparency provides benefits for implementing countries and investors is unproven and speculative, given that existing research focuses on government spending – not revenue transparency".[45] Therefore, there is need to extend the transparency initiatives to issues bothering on the transparency of spending and not just transparency of revenue which is the current focus of the EITI.

Publish What You Pay

Another international effort aimed at resolving the resource curse phenomenon is the coalition created by the Publish What You Pay (PWYP) campaign of more than 190 Northern and Southern NGOs.[46] The idea encapsulated in the PWYP campaign is to promote the publishing of corporate payments by oil companies to governments and to call on governments to disclose their oil receipts. The objective is to ensure that oil revenues are fully accounted for and properly utilized. Relating this to the oil industry, it encourages multinational oil corporations to let members of the public know what they pay to host governments of countries where they operate, and on the other hand, expect these host governments to make public their receipts.

[42] Global Witness `Five Challenges of the EITI to Deliver' online at file:///C:/Users/user/AppData/Local/Temp/five_challenges_for_eiti.pdf accessed on 12 May 2018
[43] Global Witness, 'Time For Transparency' (2004) 2 Oil, Gas & Energy Law Intelligence www.ogel.org accessed on 8 May 2019
[44] Frynas, Jedrzej George 'Corporate Social Responsibility in the Oil and Gas Sector' (2009) 2(3) Journal of World Energy Law & Business pp. 178-195.
[45] Ibid.
[46] Global Witness (n 43)

The underlying principle that has championed this cause is to ensure greater transparency and accountability in the extractive industries of resource-rich countries.

Government Interventions (National Efforts)

At the national level, there have also been efforts by the Nigerian government to resolve some specific problems associated with the resource curse syndrome in the NDR. This has been done through the enactment of several legislations that establish agencies with specific mandates to work towards the development of the region. However, due to lack of political will and sincerity on the part of the Nigerian government, these efforts have yielded little or no results. At best, they have been described as duplication of the functions of each agency established to address the plight of indigenous host communities in the oil-rich NDR of Nigeria. A brief discussion of these measures is undertaken below.

Niger Delta Development Board

Between 1957 to 1960, the colonial government in Nigeria set up the 'Willink Commission' with a mandate to find means of developing the oil-rich NDR of Nigeria and to address the issue of victimization, neglect, and the geological problems of the region. The findings of the commission acknowledged the backwardness and neglect of the region. Consequently, the government then set up the Niger Delta Development Board (NDDB) during the period of independence to meet the needs of the Niger Delta people as it has been widely accepted that the region is the 'goose that lays the golden egg'. The establishment of the NDDB was the first significant step taken by the government to look into the socio-economic, environmental and infrastructural challenges of the region. Although the establishment of the NDDB was done with intentions to develop the region, it never actually achieved its mandate as issues that have to do with corruption impeded its effort.

Oil Minerals Producing Areas Development Commission

Due to the failure of the NDDB, the FGN under the military regime led by General Ibrahim Babangida established the Oil Minerals Producing Areas Development Commission (OMPADEC) in 1992 to tackle the problems faced by the people of the NDR. Primarily, OMPADEC was set up to ensure a sustainable development programme for the region, and to rehabilitate the oil mineral producing areas of Nigeria which had been subjected to the

devastating effects of ecological destruction and environmental pollution. The FGN allocated 3% of federal revenue from oil to OMPADEC to address the developmental needs of the people in the NDR. Unfortunately, just like the NDDB and the challenges that befell it, OMPADEC did not achieve much due to the endemic corruption in Nigeria,[47] as most of its officials were more concerned with enriching themselves at the expense of the people in the region.

Niger Delta Development Commission

As a result of the ineffectiveness of the measures taken by OMPADEC, the FGN further established the Niger Delta Development Commission Act 2006. Section 1 provides that 'there is hereby established a body to be known as Niger Delta Development Commission' (NDDC). The Act further mandated every oil company operating in Nigeria to contribute 3% of its budget to the commission annually.[48] There is also a duty owed by the FGN to pay 15% of the statutory allocation of each of the oil-producing states to NDDC.[49] The key mission of the NDDC is to create a master plan for the economic and infrastructural development of the oil-rich region. Unfortunately, the commission is still experiencing the same problems that crippled the initiatives of OMPADEC and NDDB which apparently renders them cosmetic.

Nigerian Extractive Industries Transparency Initiative

In terms of more national efforts, the Nigeria Extractive Industries Transparency Initiative (NEITI) Act, 2007 was promulgated by the Nigerian parliament to ensure greater transparency in the oil and gas sector and to eliminate corruption and mismanagement. Regrettably, the Act inadequately empowers NEITI to compel multinational oil companies to ensure transparency in their dealings with the regulatory authorities.[50] This means that it lacks the mechanism to create an avenue to access reliable information regarding the financial activities between government and companies. Another fundamental problem with the Act is its inability to enforce sanctions against erring multinational corporations operating in Nigeria's extractive

[47] B Obafemi, 'Corporate Social Responsibility in the Nigerian Oil and Gas Sector: Does a Global Memorandum of Understanding Have a Role to Play?' (2016) 4 Oil, Gas & Energy Law Intelligence www.ogel.org accessed 8 May 2019.
[48] Section 14 (2) (a) NDDC Act 2006
[49] Section 14 (2) (b)
[50] V.O.S. Okeke and E.T. Aniche, 'A Critique of the Enforcement of Nigeria Extractive Industries Transparency Initiative (NEITI) Act, 2007 in Nigerian Oil and Gas Sector' (2013) Vol. 14 No. II British Journal of Arts and Social Sciences.

industry. This is largely due to the weakness of the institution and in most cases, it is subdued by the overriding imaginative powers and control of multinational oil companies in the country.

Ministry of Niger Delta Affairs

In addition to the establishment of the NDDC, the FGN under the leadership of Late President Umaru Musa Yar'Adua created the Federal Ministry of Niger Delta Affairs (MNDA) in 2008 to promote and coordinate policies for the development, peace, and security of the NDR of Nigeria. The creation of MNDA appears to be a desperate attempt by the FGN to address the socio-economic problems of the NDR. However, scholars have argued that MNDA is also a duplication of functions of other agencies, as the NDDC has been adequately equipped to address the issue of under-development in the Niger Delta.[51]

In sum, it is apparent that the resource curse syndrome has been a catalyst to the lack of socio-economic and infrastructural development of Nigeria, particularly in the oil-rich NDR. Its effect on the environment of the region is evidenced by the environmental degradation resulting from the activities of multinational oil companies. Arguably, some major characteristics of the resource curse syndrome have been traced down to be the root causes of environmental problems faced by indigenous people of the NDR. Although there have been efforts at the international and national level to resolve some of the problems associated with the resource curse as discussed above, it is clear that these efforts have done little or nothing to change the status quo ante in Nigeria. The next section of this article offers an alternative legal instrument that may be used to resolve some of the problems characterized by the resource curse, particularly as it affects the oil-rich NDR of Nigeria.

Impact and Benefit Agreements: Conceptualisation

The introduction and adoption of Impact and Benefit Agreement (IBA) which is often considered as an emerging legal instrument have become a popular idea in advanced countries with significant natural resources. Admittedly, the decision to develop a resource often comes with negative impacts on Aboriginal lands or peoples.[52] Hence, the need to ensure that these impacts are identified and if possible, mitigated. In Canada, IBAs have been introduced through

[51] Obafemi (n 47)
[52] A Wright, 'Impact and Benefit Agreements: The Role of Negotiated Agreements in the Creation of Collaborative Planning in Resource Development' (Master's Thesis, University of Guelph, Ontario, Canada, 2013)

bilateral negotiations between project proponents and Aboriginal groups whose lands and communities will be affected.[53] The result of this has seen Canada's Aboriginal communities thrive in the country's extractive industry. Due to Canada's increasing use of IBAs, particularly in their mining industry, the concept has become common in the resource development process and is now considered a *de facto* reality in resource development that impacts Aboriginal peoples and community.[54]

Conceptually, IBAs are confidential bilateral agreements, negotiated between mining corporations and aboriginal communities to address a multitude of adverse socio-economic and biophysical impacts that can arise from mining development.[55] According to Kielland, IBAs are 'privately negotiated, legally enforceable agreements that establish formal relationships between Aboriginal communities and industry proponents'.[56] Additionally, they are often described as a type of contract between the extractive company and the host community (including the State in tripartite arrangements), designed to mitigate the negative impacts of mineral resource development and ensure that specified benefits flow directly to the host community.[57] Furthermore, IBAs have been referred to as benefit-sharing agreements, participation agreements, development agreements, protection and benefit agreements, amongst others.[58] The underlying principle in the nature of these agreements is the opportunity created to give back benefits to the host community where the resource development activity is carried out.

Drawing from the definitions above, it would appear that the concept of IBA is specifically meant to address the negative impacts of resource development in host communities. However, a critical examination of the concept reveals that it possesses features that may possibly be used to resolve the socio-economic aspect of the resource curse phenomenon. Particularly, in the

[53] Klein et al. *Environmental Impact Assessment and Impact and Benefit Agreements: Creative Tension of Conflict?* Calgary, Yellowknife: Gartner Lee Limited
[54] Wright (n 52)
[55] C Fidler and M Hitch, "Impact and Benefit Agreements: A Contentious Issue for Environmental and Aboriginal Justice" (2007) 35(2) Environments Journal
[56] N Kielland, 'Supporting Aboriginal Participation in Resource Development: The Role of Impact and Benefit Agreements' (2015), Library of Parliament, Otta, Canada, Legal and Social Affairs Division, Parliamentary and Research Service available on line at http://www.lop.parl.gc.ca/Content/LOP/ResearchPublications/2015-29-e.pdf accessed 13 May 2019
[57] C O'Faircheallaigh, *Earth Matters: Indigenous Peoples, the Extractive Industries and Corporate Social Responsibility* (Green Leaf Publishing, 2008)
[58] Woodward & Company, 'Benefit Sharing Agreements in British Columbia: A Guide for First Nations, Businesses,andGovernments'<http://www.woodwardandcompany.com/wpcontent/uploads/pdfs/4487_benefit_sharing_final_report_-_updated.pdf> accessed 13 May 2019

oil-rich NDR of Nigeria, the adoption of IBAs may be used to resolve issues arising from the mismanagement of oil revenues, consultation and participation of indigenous host communities before and during the execution of the project, direct benefits, environmental assessment and protection and under-development amongst others.

The use of IBAs as a potential legal instrument to resolve some of the symptoms of resource curse became necessary as a result of the agitations of indigenous communities that play host to extractive industries in resource-rich countries. Indigenes of host communities in resource-rich countries have often questioned the concept of sovereign ownership of resources (ownership by the State) discovered in their communities. Consequently, they argued along the line of international instruments that recognize the concept of 'Indigenous Peoples Rights'. By way of recognition of the right, article 27 of the International Convention on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) jointly guarantee the right of all people to '*freely dispose of their natural wealth and resources as an expression of their right to self-determination'*. This idea stems from the fact that there is a strong belief that indigenous peoples in different parts of the world have lost their land and economic resources to colonists, commercial companies and state enterprises. Thus, there is a need to provide indigenous peoples with conditions allowing for sustainable economic and social development.[59] Of great importance to the discourse in this article is the provision of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) which is relatively adequate to protect Indigenous Peoples' Rights. Article 17 (1) stipulates that *'[I]ndigenous individuals and peoples have the right to enjoy fully all rights established under applicable international and domestic labour law'* The significance of this provision lies in the fact that it establishes indigenous people's right to their lands, territories, and resources, which was unattainable in the past.[60]

Presently, IBAs have become very popular, particularly in the mining industry. In Canada, they derive their validity from First Nation and Aboriginal treaties in some instances while in other cases, they are an overall part of the government socio-economic policy to benefit the local communities. It is noteworthy that despite the flexibility of these agreements, there are certain key elements that must be present beyond the introductory elements. These key elements are

[59] P Thornberry, *The International Convention on the Elimination of All Forms of Racial Discrimination: A Commentary* (Oxford University Press 2016) 347-350.
[60] Wigwe-Chizindu (n 1)

the measures that could be used to resolve the different aspects of the resource curse phenomenon.

What Impact and Benefit Agreements Have to Offer in Nigeria's Oil-Rich Region?

The necessity of introducing IBAs in the course of resource development by either the host community or extractive company is based on the fact that the agreement serves dual purposes. Firstly, IBAs are generally used to accommodate aboriginal interests by ensuring that benefits and opportunities flow to the community. In other words, it creates an avenue to give back benefits to the host community which suffers from the negative impacts of extractive operations. Secondly, it addresses the social risk factors within the community, such as adverse socio-economic and biophysical effects of rapid resource development.[61]

Adopting the concept in the oil-rich NDR of Nigeria will lead to the introduction of effective measures that would indirectly resolve some of the problems associated with the resource curse phenomenon. Most importantly, it will seek to resolve the recurrent civil unrest and conflicts in the region resulting from controversies surrounding resource ownership and control. Therefore, in order to avoid such conflicts in the NDR of Nigeria, IBAs could contain provisions that require multinational oil companies to not only minimise the adverse economic, environmental and social consequences of the project, but to also provide contributions of the multinational oil companies to the social development of the host communities such as good roads, hospitals, employment quota, housing and other relevant infrastructure project. On the other hand, the host communities will provide valuable, cost-effective development and operating resources to the project such as infrastructure, access facilitation, and local labour especially with appropriate training and even guarantee some form of social license for the company to operate.

Additionally, IBAs could contain provisions on collaborative efforts and participation between the oil companies and indigenous host communities; provisions that introduce business opportunities; provisions that will ensure training and educational scholarships of indigenous host communities; provisions on employment and economic development; and provisions for sharing resource revenue or profit. Another important provision that could be introduced in an IBA is an environmental assessment and protection. Provisions on environmental assessment and protection can be included in an IBA, which do not undermine applicable environmental

[61] Fidler and Hitch (n 55)

laws, but supplement them. Finally, social and cultural provisions can be included in an IBA. This may include requirements to conduct Social Impact Assessments and other relevant social programmes for the benefit of the community.

Benefits of IBAs to the Oil-Rich Niger Delta Region of Nigeria

Generally, IBAs do not provide any clear-cut rule or format in terms of its content. This typically explains the flexibility of the instrument which is drafted to suit the circumstance surrounding the resource development in different host communities. Over the years, the content of IBAs has deepened to consist of more complex and demanding provisions, requiring both short and long-term commitments from extractive industry proponents.[62] The aim is to, amongst other things, establish a foundation for sustainable resource development outcomes for indigenous host communities living in areas where development projects are carried out.[63] Beyond the fact that the adoption of IBA potentially allows for sustainability, it could also be beneficial to indigenous host communities in Nigeria's oil-rich NDR in resolving some of the problems characterized by the resource curse phenomenon. A brief discussion of the possible benefits is undertaken below.

Resolve Environment Symptoms of the Resource Curse

Notably, the provisions of IBAs vary considerably from project to project. Consequently, there is no set template for the type of impacts and benefits that should be discussed in each negotiation. The implication of this is that IBAs can be used to address the environmental symptoms of the resource curse in the oil-rich NDR of Nigeria. This could be done by way of introducing provisions in the agreement that address the environmental impacts of the operations of multinational oil companies operating in host communities. Such provisions in the IBA could provide for post-environmental impact assessment and compensation where the need arises. The writer believes that the use of IBAs in this regard will go along to address the environmental symptoms of the resource curse in the region.

Transparency and Accountability

Lack of transparency and accountability on the part of the government and oil corporations in resource-rich developing countries has been identified as major characteristics of the resource curse phenomenon. Records show that governments of resource-rich developing countries,

[62] Wigwe-Chizindu (n 1)
[63] Ibid.

such as Nigeria, often do not provide information about their revenues from resource development, nor do multinational extractive corporations publish information about payments made to the governments.[64] Therefore, with the adoption of IBAs that contains provisions that promote transparency and accountability, extractive corporations in Nigeria's oil-rich region can be called to disclose payments made to governments so that ordinary citizens will have adequate information to call their governments to give account over the management of their revenues.

Development of the Local Economy of Host Communities

Economic development and the creation of business opportunities are crucial to the overall economy of indigenous host communities in the resource-rich region. Furthermore, provisions on finance and equity are pertinent as they ensure that indigenous host communities enjoy the economic benefits of a project. Therefore, the use of IBAs presents an opportunity to ensure the development of the local economy of host communities. This is primarily so because resource development by nature is a catalyst for boosting the economy of the place where the project development is being carried out.

Consultation and Participation

The concept of consultation and participation of indigenous host communities in the process of resource development is one of the major features of IBAs. According to Sampson, the right of participation means "active and meaningful involvement of the masses of people at different levels in (a) the decision making processes for the determination of societal goals and the allocation of resources to achieve them; and (b) the voluntary execution of resulting programmes and projects".[65] The significance of this is that the introduction of such provisions is often seen as a strategy to maximize the participation of the indigenous host communities in areas such as training and apprenticeship.[66] Furthermore, such provision gives a sense of belonging to the indigenous host community in the development of proven resources situated in their community. Where an IBA includes provisions that directly calls for consultation and participation of indigenous host community, industry proponents are likely to gain trust, and

[64] Global Witness (n 43)

[65] G Sampson, 'Environmental and Human Rights Problems in Natural Resources Development: Implications for Investment in Petroleum and Mineral Resources Sector' Vol. 6-5 (b), Centre for Energy, Petroleum and Mineral Law and Policy (CEPMLP) Website Journal, 1-29

[66] Mining Facts, 'What are Impact Benefit Agreements (IBAS)?' <http://www.miningfacts.org/Communities/What-are-Impact-and-Benefit-Agreements-(IBAs)/> accessed 14 May 2019

ultimately social acceptability of their projects.[67] Additionally, through consultation and participation, indigenous host communities are given an opportunity to influence the development project on their lands, and through this, they are regarded as 'special subjects of concern'.[68]

Reduce Conflict and Protracted Litigation

The discovery and development of natural resource are often embroiled in conflicts and court litigation arising from boundary disputes in areas where there are proven or probable resources, disputes relating to ownership and control of the resources, compensation for environmental damage amongst others. Therefore, the adoption of IBAs in the course of resource development in the resource-rich regions such as the NDR of Nigeria, which is often conflict-prone, could be a key instrument needed to mitigate conflicts and protracted litigation in the region. Additionally, where indigenous communities are given the opportunity through IBAs to have indirect participation in ongoing projects situated in their communities, risks and delays from costly litigation and conflicts are minimized. This will improve the relationship between industry proponents and communities, while also enhancing their business reputation.[69]

Having discussed some of the benefits of IBAs generally, and the possibility of its introduction in the oil-rich NDR of Nigeria in the preceding section, it is essential to note that the concept of the agreement is not without challenges. This article will proceed to examine the challenges of IBAs.

Challenges of Impact and Benefit Agreements

As mentioned earlier, IBAs are not without challenges, particularly, in the area of implementation. As with many other legal concept or strategy designed to resolve disputes, the practical implementation of IBAs is fraught with a number of challenges. In fact, to a large extent, the challenges continue to impede the effectiveness of the instrument. Notwithstanding, IBAs remains a potential tool for resolving the socio-economic and environmental symptoms of the resource curse in the region. This is evidenced by the implementation of the strategy in countries like Canada and has greatly contributed to the smooth running of the Canadian

[67] M Papillion and T Rodon, "Proponent-Indigenous agreements and the implementation of the right to free, prior and informed consent in Canada" (2016) *Environmental Impact Assessment Review* 5.
[68] J Anaya, "The Protection of Indigenous Peoples' Rights over Lands and Natural Resources under the Inter-American Human Rights System" (2001) 14(33) Harvard Human Rights Journal
[69] Fidler and Hitch (n 55) 57.

mining industry. A discussion of some of the challenges to the implementation of IBAs is undertaken below.

Contravenes Provisions of the Existing Legal Framework

The introduction of IBAs may contravene certain provisions of an existing legal framework in resource-rich countries. Notably, there are legislations that originally empower governments to regulate resource development in resource-rich countries. For instance, section 44 of the 1999 Constitution of the Federal Republic of Nigeria (as amended) confers ownership of mineral resources found anywhere in the country on the Federal Government of Nigeria.[70] Thus, where IBAs are adopted in Nigeria and certain provisions in them are inconsistent with the Constitution, this will lead to a challenge of their enforceability and implementation in a court of competent jurisdiction in which case they may become void. Another instance is the revocation and revocability provisions of the Land Use Act (LUA) in Nigeria. The power of acquisition of "land in which minerals (including oil) have been found in commercial quantities" is exercisable pursuant to the LUA.[71] Its provisions on revocation for public use and (in) adequacy of compensation for revocation remain the most litigated aspect of the LUA.[72] The point being made here is that IBAs seems to naturally recognize the rights of indigenous people. These rights include 'ownership of land' where mineral resources have been found. Thus, this idea may be in conflict with the provisions of the LUA. To resolve this challenge, proponents of IBAs will have to take into account any existing legal framework that may have a future impact on the way the agreement is to be implemented. This will go a long a way to ensure its implementation in Nigeria's oil-rich region pose no conflict with the constitution or any other legal instrument that it is likely to contradict.

Confidentiality

Generally, IBAs are known to be confidential in nature. The introduction of confidentiality in the agreement is usually in line with the standard policy that is applicable to corporations

[70] The section provides that the ownership and control of all minerals, mineral oils and natural gas in, under, or upon any land in Nigeria, its territorial waters, and Exclusive Economic Zone belongs to the Federal Government. See also Section 1 of the Petroleum Act Cap P10 Laws of the Federation of Nigeria 2004

[71] See section 28 Land Use Act, Cap 202, Laws of the Federation of Nigeria 1990.

[72] Y Oke, 'International Law and Natural Resources Investment in Developing Countries: The Challenges of Environmentally Sustainable (Mineral) Resources Management in Africa' Paper Presented at the International Conference on Science and Technology, tagged "Science and Technology for Self-Reliance; Challenges for Developing Countries" August 14-19, (2005), Federal University of Technology Akure, Ondo State, Nigeria

operating in the extractive industries. Although the introduction of such provision is often seen as a barrier to the use of the instrument in extractive industries, it also has its merit as it tends to protect the ideas of corporations. Unfortunately, the confidentiality provision in IBAs, usually imposed by industry proponents is seen as an impediment to transparency. More so, it exacerbates the imbalance of power, which favours industry proponents against indigenous host communities.[73] The implication of this is that it prevents indigenous host communities from sharing and learning from IBAs experiences which are vital for strengthening their capacity.[74]

Enforcement and Implementation Issue

One fundamental problem with the use of IBAs in extractive industries is the controversy surrounding its enforcement and implementation. First, countries such as Canada commonly treat IBAs as private contracts between signatories. The implication of this is that it may be enforced by either party in accordance with the principles of the common law of contract. In the absence of such provision, IBAs may specify that they are applied in accordance with the law of contract. However, issues may arise where the agreements are characterized as purely private contracts given the role that they may play in resource development. This is against the background that IBA in advanced countries such as Canada may be required as a 'precondition' for the granting of a government license or permit.[75] Secondly, the enforcement and implementation of IBAs require conscious effort from the State government with the interest of the host community as the guiding principle and objective.[76] This is so because the government (although a party to the agreement) essentially oversees the agreement. Thus, where an IBA lacks legitimate government support, its enforcement and implementation become difficult to achieve.

Cost

Just as the development of economic resource is a capital-intensive venture, so also is the negotiation, implementation, and enforcement of IBAs for all the parties involved in the agreement. This presents a major challenge, especially for indigenous host communities as they

[73] K J Caine and N Krogman, 'Powerful or Just Plain Power-Full? A Power Analysis of Impact and Benefit Agreements in Canada's North' (2010) 23 (1) Sage Publications 86.
[74] Wigwe-Chizindu (n 1) 12
[75] Wright (n 52)
[76] Wigwe-Chizindu (n 1) 12

will require funding to prepare for the initial consultation process. For instance, Aboriginal communities in Canada have been able to secure funds from extractive industries to prepare IBAs,[77] and such funds cover any expert assistance that is required in the process.[78] This is in addition to the cost of funding other institutions that will be set up to ensure the smooth running and execution of various provisions in the agreement. Therefore, the sourcing of funds from industry proponents for the preparation of IBAs remains the best option for indigenous host communities to offset the cost of IBA.

In sum, it is clear that even with the hype and potentials of IBAs generally, it is still not hitch-free as there are quite a number of factors that pose as a challenge to the smooth implementation of the agreement. Be that as it may, the concept of IBA remains a viable option for addressing the socio-economic and environmental symptoms of the resource curse in Nigeria's oil-rich NDR.

Conclusion

This article set out to examine the role of an alternative legal instrument that could be used to resolve some of the problems characterised by the resource curse phenomenon in the oil-rich NDR of Nigeria. The preceding discussion has shown that natural resource wealth may influence economic development of a country just as it may likewise retard the development of the country. However, the adoption of IBAs in Nigeria may be a potential legal instrument for resolving socio-economic and environmental symptoms of the resource curse in the oil-rich region. Resource-rich developing countries such as Nigeria can learn from Canada's experience with evidence that IBAs do have the potential to continually develop into more powerful and beneficial models for meeting the expectations of host communities. While acknowledging the efforts made in resolving the resource curse in Nigeria, this article has questioned the lack of political will on the part of the government and the strength of its institutions. Regrettably, such efforts have resulted in the renaming or in some cases duplication of institutions for political interests and patronage. On the other hand, the oil multinationals operating in the region appears to be interested in profit at the expense of the host communities. Therefore, this article has argued for a shift towards the adoption of IBA which could potentially resolve the socio-economic and environmental symptoms of the resource curse in the region. As opined by Sands

[77] Ibid.
[78] Ibid.

and Castleson, when IBAs are properly negotiated they can have favourable impact on the overall success of the project for both parties and provide employment, training, as well as economic opportunities for indigenous groups, while motivating them to become actively involved in the success of the venture, by providing essential local resources, rather than just compensated bystanders.[79]

The truth remains that the adoption of IBAs in the oil-rich region of Nigeria will not be a 'walk in the park' as there are many political and business elites with vested interests in avoiding some of the conflicts that the instrument may pose to them. As earlier stated, this article does not suggest that IBAs do not have weaknesses or challenges which have been discussed. Notwithstanding, in the midst of the challenges, IBA remains a fundamental step towards upholding host indigenous peoples' rights to direct benefits and resources, over the course of extractive operations. According to a scholar, 'the adoption of the IBA marks a significant development, as up until its introduction, there was an absence of clear recognition of indigenous projects'.[80]

By way of final remarks, the realities involved in the arguments presented in this article, especially on the socio-economic and environmental symptoms of the resource curse phenomenon in the oil-rich region of Nigeria, it would require obvious sincerity from the government in bringing about the much-desired economic development and poverty reduction in the region. Given the nature and content of IBAs, there is no doubt that if it is adopted in Nigeria, it will certainly go a long way in resolving issues such transparency and accountability, revenue mismanagement and distribution, consultation and participation of host communities, civil conflict and protracted litigation in resource development projects.

[79] H Sands and R Castleton, 'Focus: Business Realities Impact and Benefit Agreement Negotiations (Strategy and Practice)' (2015) (Richter First Nation & Aboriginal Advisory Services, AFOA Canada National Conference Winnipeg, MB) <https://www.afoa.ca/afoadocs/L2/2015Conf/Presentations/V2Richter.pdf> accessed 25 May 2019

[80] Wigwe-Chizindu (n 1) 14