

THE LEGAL CHASM BETWEEN RESOURCE CONTROL AND THE DETERMINATION OF THE SEAWARD BOUNDARIES OF THE LITTORAL STATES IN NIGERIA*

Abstract

Amongst the resources, which abound in Nigeria, crude oil is strategic to Nigeria's economy. The classification of crude oil into offshore and onshore evoked a lot of national concern, which resulted in the suit in the Supreme Court February 2001 between the Federal Government of Nigeria and the thirty-six states. The statement of problem is that the said suit was and has often been erroneously termed as resource control suit, whereas it was a suit based on the determination of the seaward boundary of a littoral State for the purpose of calculating revenue accruable to such state for offshore oil. The focus of this work, therefore, is to address that problem and to direct the thinking of the people along the proper line of nomenclature. In a true Federalism, the component states constitutionally control the resources, which are found within their geographical spread, and they pay a certain percentage of revenue derived from such resources to the Federal Government. Practically, therefore, resource control rests in the component states of the Federation. In Nigeria, the constitution of the Federal Republic of Nigeria 1999 and various other enactments vest the control of mineral resources in the Federal Government of Nigeria. That is anti-federalism.

Introduction

In Nigeria, a lot of mineral and material resources abound. God Almighty in His characteristic generosity has endowed different parts of Nigeria with diverse types of resources. But the resource which attracts the attention of Nigerians more than any other, is crude oil. Since it was discovered in large and commercial quantity in *Oloibiri* in *Bayelsa* State in 1956, it has proved to be a unique resource and has been husbanding and mainstaying the economy of Nigeria. Nigeria is ranked the sixth largest crude oil producer in the world.¹

Admittedly, crude oil is not found in all parts of Nigeria. It is commonly found in the Niger Delta Region or mainly in the South-South flank of Nigeria. This is principally because of the peculiar terrain of the region which is coastal in nature and which is richly endowed with oil and oil-related resources. While a greater percentage of the oil is explored on the land and it is labeled onshore oil, the remainder is drilled from the continental shelf and it is popularly referred to as the offshore oil.

The continental shelf is often rich in minerals, for example, the petroleum deposits under the North Sea, and coastal states have been successful in their claims for exclusive jurisdiction and ownership of such resources. The claim in this respect is over the shelf itself and not the seas above the shelf, and a state's right over the continental shelf does not affect the legal position of the adjacent waters or of the air space above the waters.²

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¹ Oil is the mainstay of Nigeria's economy and Nigeria's ranking is courtesy of Organization of Petroleum Exporting Countries (OPEC), located in Vienna, Austria.

² Law of the Sea Convention 1982, Article 78. See also S. Wheatley, **International Law**, Blackstone Press Limited, London, 1996, p. 143.

Although the extent of the territorial sea has in the past proved contentious, with claims ranging between six miles to 200, the 12-mile limit is now generally considered to represent the customary legal position.³ The apportioning of the territorial sea to the coastal state is automatic because according to McNair J.: “To every state whose land is at any place washed by sea, international law attaches a corresponding portion of maritime territory ... {territorial waters}. The possession of this territory is not optional, not dependent on the will of the state, but compulsory”.⁴ Thus every coastal state, in this context Nigeria, possesses a territorial sea or internal waters to a maximum of 12-miles from the low-water mark (baseline).⁵ The internal waters consist of waters to the landward side of the territorial sea baseline or straight baseline and include harbours, ports, rivers, lake, canals, closed - in bays, gulfs and waters enclosed by *archipelagic* islands. The territorial sea baseline is the lowest water mark but where the coast is deeply indented or marked by a fringe of islands or a delta, straight lines may be drawn linking the outermost points. Such lines shall be drawn from low tide elevations unless permanent installations have been built on them or unless they do not cut off another state from its territorial sea or exclusive economic zone.⁶

The continental shelf is defined as the sea-bed and subsoil of the submarine areas which extend beyond the territorial sea through a natural extension of the land territory to the outer edge of the continental margin (to a maximum of 350 miles), or to a distance of 200 nautical miles from the ‘baseline’⁷ of the territorial sea where the outer edge of the continental margin does not extend up to that distance.⁸ The 1982 Convention gives the coastal state the sovereign right to explore and exploit the natural wealth, both mineral and non-living resources, of the sea-bed and subsoil and any sedentary species of the shelf, with no other state being able to exploit the resources without the consent of the coastal state.⁹

In the same vein, the continental shelf is the prolongation of the land territory seawards beyond the territorial sea:

- (a) But not exceeding 200 nautical miles from the baseline of the territorial sea;
- (b) Beyond the 200 nautical miles it must not exceed 350 nautical miles and
- (c) 100 miles from the 2,500 metres *isobath* , provided this does not apply to submarine elevations that are natural components of the continental margin such as its *plateaux*, rises, caps, banks and spurs.¹⁰

The coastal States exercises exclusive sovereign rights over the area for the purposes of exploration of the natural resources.¹¹

³ **Guinea/Guinea-Bissau Delimitation Case** (1988) 25 ILM 251.

⁴ *Anglo-Norwegian Fisheries Case* 1951 ICJ Rep 116 per McNair J. (dissenting).

⁵ S. Wheatley, *op.cit*; p. 140.

⁶ U. O. Umzorike, **Introduction to International Law**, Spectrum Books Limited, Ibadan, 2005, p. 104.

⁷ The width of the territorial sea is defined from the low-water mark around the coast of the State. This is the traditional principle under customary international law and was reiterated in article of the Geneva Convention 1982 on the Territorial Sea. M.N. Shaw, **International Law**, Cambridge University Press, Cambridge, 2003, p. 495.

⁸ *Ibid*; Article 76.

⁹ *Ibid*; Article 77.

¹⁰ O. U. Umzorike, *op cit* , p. 108.

In international law, Nigeria as a federation is geographically positioned as a coastal state, and within the federation, Nigeria also has some coastal (littoral) states as federating units, which abut the territorial sea. It is these states that are known as littoral (coastal) states in this paper. Such states include *Akwa Ibom*, *Rivers*, *Bayelsa*, *Delta*, etc, which had been agitating and advocating for the strict application of derivation principle as articulated in the Constitution.¹² The agitation heightened at the inception of democratic rule in Nigeria in 1999. The agitation by these states was that the Federal Government of Nigeria had not been allocating adequate derivation fund to them as a result of an obnoxious classification of crude oil exploitation into two categories to wit: offshore oil which is said to be drilled in Nigeria's territorial waters but within the geo-political landscape of the coastal states and onshore oil which is explored from land within the coastal region of Nigeria.

That position of the federal Government did not go down well with the littoral states and they mounted more intensified campaign for resource control according to the practice of true federalism in some parts of the world.¹³ In order to streamline the position of the law with regard to revenue derivable from offshore oil and who is entitled to it based on the seaward boundaries of the littoral states, Chief Bola Ige (of blessed memory), who was the then Attorney-General of Nigeria, on behalf of the Federal Government of Nigeria, commenced a matter¹⁴ at the Supreme Court of Nigeria against the Attorneys-General of the 36 (thirty six) states of Nigeria, in their capacities as Chief Law Officers of the States. The suit was adjudicated upon by the Supreme Court, which gave its judgement on the 5th of April 2002. We shall return to that suit much later in this article.

The main thesis for this article, therefore, is whether the suit, which was adjudicated upon by the Supreme Court¹⁵ between the Federal Government and the thirty-six states of Nigeria was on resource control or better still on advocacy for resource control or on the determination of the seaward boundaries of the littoral states, in order to determine who is entitled to revenue from offshore oil. Having identified the main thesis as set out above, this paper shall attempt a resolution of same by a critical look at and the analysis of the relevant paragraphs of the Statement of Claim, the relief sought thereof, as was filed by the Federal Government in the suit. This paper will also examine the extract of the judgment because extraneous facts and vain imaginations will not be helpful in resolving the conundrum. This piece is not an attempt to provoke a discussion on the Supreme Court judgement on that suit which currently articulates the position of the law on the seaward boundaries of the littoral states.

¹¹ *Ibid* ;

¹² See s. 162 (1) & (2) of the Constitution of the Federal Republic of Nigeria, 1999.

¹³ America's Federalism is an illustrative case in point wherein federating units (states) control resources found and explored in their regions.

¹⁴ See Suit No. Sc/28/2001: **Attorney General, Federal Government of Nigeria v. Attorney General Abia State & 35 Ors** (2002) 6 NWLR (Pt.764), p. 542. This suit was filed on February 6, 2001.

¹⁵ S. 232 (1) of the Constitution underlines the original jurisdiction of the Supreme Court of Nigeria.

Who Controls Resources in Nigeria

At the moment, the control of natural resources including crude oil in Nigeria is within the ambit of the Federal Government of Nigeria.¹⁶ There is no doubt about it. For example, the Constitution of the Federal Republic of Nigeria¹⁷ provides thus: “The State (Federal Government)¹⁸ shall direct its policy towards ensuring (b) that the material (natural) resources of the nation are harnessed and distributed as best as possible to serve the common good”.¹⁹

Furthermore, it is pertinent to note that: “ The State (Nigeria) shall within the context of the ideals and objectives for which provisions are made in this Constitution (a) harness the resources of the nation and promote national prosperity and an efficient; a dynamic and self-reliant economy”.²⁰

The same Constitution also provides that the Legislative powers of the Federal Republic of Nigeria shall be vested in the National Assembly for the Federation and the National Assembly is saddled with the power to make laws for the peace, order and good government of the Federation²¹ and the Exclusive Legislative list²² is being used for that purpose. A critical look at the second schedule to the Constitution on the Legislative powers of the National Assembly shows that: “mines and minerals including oil fields, oil mining, geological surveys and natural gas”²³ are to be legislated upon by the National Assembly.

Similarly, the Constitution provides to the effect that: “Notwithstanding the foregoing provisions of the section (relating to s. 44 of the Constitution on the compulsory acquisition of property), the entire property in the control of all minerals, mineral oils, and natural gas in, under or upon any land in Nigeria or in, under or upon the territorial waters and the Exclusive Economic Zone of Nigeria shall vest in the Government of the Federation and shall be managed in such manner as may be prescribed by the National Assembly”.²⁴

The 1982 Convention acknowledges Exclusive Economic Zone as “an area beyond and adjacent to the territorial sea . . .”²⁵ which “shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured”²⁶. The Exclusive Economic Zone marks a compromise between those States seeking a 200-mile territorial sea and those wishing a more restricted system of coastal state power.²⁷

Against the background of the foregoing discourse, the constitutionality or otherwise of who controls natural or mineral resources in Nigeria at the moment is not in doubt. It is the Federal Government of Nigeria. If that is the correct position, there

¹⁶ See the general intendment of the Petroleum Act Cap. P. 10 LFN 2004.

¹⁷ Hereinafter referred to as the constitution.

¹⁸ Bracket mine for emphasis .

¹⁹ Constitution 1999, s. 16 (2) b.

²⁰ *Ibid* s. 16 (1) a.

²¹ *Ibid*, s. 4 (1) & (2).

²² *Ibid*, Part 1, 2nd Schedule.

²³ *Ibid*, item 39 of the Exclusive Legislative List.

²⁴ *Ibid*, s. 44 (3) .

²⁵ Law of the Sea 1982 , Article 55.

²⁶ *Ibid*; Article 57 . See also R.M.M. Wallace, **International Law** , Sweet & Maxwell, London, 2002, p. 160.

²⁷ M. N. Shaw, *op cit* , p. 517.

was no basis for the Federal Government to have commenced the said suit against the States which clamoured for derivation fund accruing to them, but which according to them, had been unjustly denied by the Federal Government and by extension, for such suit to be labeled as resource control suit even by some Nigerians. The advocacy for resource control can only succeed if the Constitution and other relevant enactments²⁸ are amended in future to give powers to States to control resources including oil which are found within their geo-political entities.

The apostles of resource control and true Federalism posit that States constituting the Federation of Nigeria should be allowed to control resources which are found within their geo-political spread whether on land or the territorial waters of Nigeria and that to do so, is a common feature or characteristic of true Federalism which is the practice in Federalist States all over the world.

The Suit Decided by the Supreme Court

In February 2001, the Federal government commenced a suit at the Supreme Court of Nigeria against all the thirty-six states in the federation. It was the contention of the Federal Government of Nigeria in that suit that natural resources (including oil) located within the territorial waters of Nigeria and even the Federal Capital Territory were or are deemed to be derived from the Federation and not from the geographical confines of the littoral states.²⁹

At this juncture, it is fitting to say that having identified the fact that it is the Federal Government of Nigeria which has the constitutional power for resource control in Nigeria, as we have seen in our earlier postulation, and having critically examined issues on derivation, it is submitted that the suit which was adjudicated upon by the Supreme Court on the 5th of April, 2002 was not on resource control but on the determination of the seaward boundaries of the littoral states on offshore oil revenue derivation. Put it differently, that suit sought to determine whether any revenue accrued to the littoral states from crude oil drilled (on the powers and control of the Federal Government) from the territorial waters of Nigeria but within the geographical spread of the littoral states.

It is therefore, disquieting and even more disconcerting, to observe that a larger percentage of the public including the intelligentsia has slipped and fallen into serious error of nomenclature within the meaning of that suit decided by the Supreme Court. It was, therefore, not uncommon to have seen misleading newspapers' and newsmagazines' headlines³⁰ which referred to that suit as resource control suit or to

²⁸ See Petroleum Act Cap. P. 10 LFN 2004, See again Oil Pipelines Act Cap. O 7 LFN 2004 and Oil in Navigable Waters Act Cap O 6 337 LFN 2004 ; see further Exclusive Economic Zone Act Cap E 17, LFN 2004 which vests the right to explore or exploit the animal and mineral resources of the zone on the Federal Government or persons designated by it . The Territorial Waters (Amendment) Act Cap. T 5 LFN 2004 vests ownership and control of oil and gas on the Federal Government. S. 1 (1) of the said Act provides that the territorial waters of Nigeria shall for all purposes include every part of the open sea within 12 nautical miles of the coast of Nigeria (measured from low water mark), or of the seaward limits of internal waters.

²⁹ See the Statement of Claim filed by the Federal Government at the Supreme Court in *Pioneer Newspaper*, Monday 21, 2001, pp. 10 and 11. See also **AG of the Federation v. of Abia State & ors (supra)**.

³⁰ Commonly found in Newspapers, Newsmagazines and commonly heard and seen on radio and television respectively.

listen to people labeled that suit to have revolved around resource control in Nigeria. It is illuminating that resource control suit does not mean offshore oil derivation suit and offshore derivation suit does not mean resource control suit either. The Supreme Court did not regard them as one and the same suit because they meant or denoted different things entirely, principally because of the issues for determination and the prayers or reliefs sought by the party aggrieved and suing. The nature of judgement in that suit also showed that it was not on resource control.

It is, therefore, a misnomer for some people to have said that the said suit, which was decided by the Supreme Court, was on resource control. To derive revenue from oil explored from the territorial waters of Nigeria but within the confines of the littoral states, within the Nigerian federation, does not mean to control resources which crude oil (onshore or offshore) is an integral part. In our lofty view, it was not and could not have been. Furthermore, in order to determine whether that suit was on resource control or not, one must be reminded that the suit sought to determine the seaward boundary of a littoral state within the Federal Republic of Nigeria, for the purpose of calculating the amount of revenue accrued to the Federal Account directly from any natural resources derived from that State pursuant to the law as articulated in the Constitution and other relevant laws.

For avoidance of doubt, the Constitution provides that: “The president, upon the receipt of the advice from the Revenue Mobilization, Allocation and Fiscal Commission, shall table before the National Assembly proposals for revenue allocation from the Federal Account, and in determining the formula, the National Assembly shall take into the account, the allocation principles especially those of population, equality of states, internal revenue generation, land mass, terrain as well as population density.³¹”

The proviso to sub-section 2 of the main section herein referred to enacts thus: “Provided that the principle of derivation shall be constantly reflected in any approved formula as being not less than 13% (thirteen percent) of the revenue accruing to the Federation Account directly from any natural resources³²”. By this proviso, the sharing formula from natural resources including crude oil to the littoral states should not be less than 13% from the federation account.

Thus, if the Federal Government of Nigeria allocates revenue from natural resources, it is firmly and constitutionally in control of such resources and no dispute had arisen for determination by Supreme Court on who controls resources in Nigeria but a dispute had stared on the face of the Supreme Court for determination of the seaward boundaries of the littoral states for their entitlement or not for derivable revenue from offshore oil. The agitation of the littoral states in particular was against an attempt to re-introduce the obnoxious classification through the back door using the Supreme Court judgement to rubber-stamp it into the lexicon of crude oil exploration with a view to denying the littoral states of revenue accruing from offshore oil drilled in the territorial waters of Nigeria.

The Federal Government of Nigeria in her opinion had maintained that the territorial waters from which offshore oil is drilled belong to the Federal Republic of

³¹ Constitution 1999, s. 162 (2).

³² *Ibid*; s. 162 (2).

Nigeria and not the littoral states wherein the territorial waters fall. On that framework, the Federal Government of Nigeria had resurrected the onshore and offshore oil dichotomy,³³ which provided that littoral states were not entitled to revenue from oil drilled from Nigeria's territorial waters even though such offshore oil was drilled within the geographical spread of the littoral states. As a result of widespread criticisms against that obnoxious law which did not meet the expectation of the littoral states, the Federal Military Government, under the leadership of General Ibrahim Babangida, a former military President, in 1992 assuaged the strict application of offshore/onshore oil dichotomy.³⁴

That Decree had rekindled in the littoral states a glimmer of hope for survival and it provides thus: "For the purpose of sub-section 2 of this section and for avoidance of doubt, the distinction hitherto made between onshore oil and offshore oil mineral revenue for the purpose of revenue sharing and the administration of the Fund for the development of the mineral producing area is hereby abolished".³⁵ This signals a formidable attempt to abolish the dichotomy.

The above attempt at abolition of the offshore/onshore oil characterisation or classification for the purpose of revenue sharing was a welcome development and a cheering piece of news to the littoral states. They were satisfied that the Nigerian Federation had properly and adequately rewarded them for the natural resource (crude oil) explored in the territorial waters within their geographical confines. Their satisfaction and jubilation were however momentary. That Supreme Court judgement on that matter did not solve the problems of the littoral states but preserved and even worsened them in terms of revenue sharing relating to offshore oil.

Thus, the said suit had strengthened the Federal Government of Nigeria to maintain that littoral States should not lay claims to derivable revenue accruing from crude oil drilled offshore since same was from the country's territorial waters even though within the geographical enclaves of the littoral States. The preceding position of the Federal Government, therefore, informed the much-criticised partial implementation of the constitutionally entrenched thirteen (13) percent derivation principle in matters touching and concerning crude oil exploration in Nigeria. In fact, there were subtle attempts earlier by the Federal Government of Nigeria to re-introduce the obnoxious classification.³⁶ This was followed with the refusal by the Federal Government to allocate revenues to littoral States on the basis of offshore oil, the result being that, the affected states grumbled for their due entitlements by way of adequate and proper revenue allocation.

The foregoing, therefore, explains in some detail why the Federal Government of Nigeria decided through the erstwhile Attorney General of the Federation to issue a

³³ That characterization or classification was brought about by the Oil Revenue Act. No. 9 of 1971. That enactment vested all offshore oil revenue and the ownership of the territorial waters and the continental shelf adjoining littoral States in the Federal Government.

³⁴ See Allocation of Revenue (Federal Account etc.) Amendment Act Cap A 15 LFN 2004. This Act came into effect in 1992.

³⁵ *Ibid* ; s.6 (3).

³⁶ Through the year 1999 Supplementary Appropriation Bill and the year 2000 Appropriation Bill as well as the Niger Delta Development Commission Bill to the National Assembly which through its resilience, vibrancy and potency rejected the various attempts for re-introduction of the obnoxious classification.

Writ of Summons at the Supreme Court of Nigeria against the thirty-six States of Nigeria. On reading, as a whole, the 10 (ten) paragraphed Statement of Claim filed by the Federal Government, one could not be in doubt to arrive at the fact that the suit was targeted at the littoral states like *Akwa Ibom, Bayelsa, Edo, Cross River, Delta, Ogun, Ondo, Rivers*³⁷ and the inclusion of other states, not littoral by location, as parties to the suit was a gimmick and a non-issue after all.

This paper is of the view that in order to fully appreciate the suit and to discover what it sought to determine, one should be guided by the prayer or relief sought by the Federal Government in Statement of Claim thus: “A determination by this Honourable Court, of the seaward boundary of a littoral State within Federal Republic of Nigeria for the purpose of calculating the amount of revenue accruing to the Federal Account directly from any natural resource derived from that state pursuant to the proviso to section 162(2) of the Constitution of the Federal Republic of Nigeria 1999.”³⁸

As a follow up to the above relief, the Supreme court³⁹ by the way of judgement said:” ... that seaward boundary of a littoral State within the Federal Republic of Nigeria for the purpose of calculating revenue accruing to the Federation Account directly from any natural resources derived from the State is the low water mark...”

From the generality of the above submission and with particular reference to the relief and judgement enunciated above, even as the Supreme Court in its judgement decided that the seaward boundary of a littoral State within the Federal Republic of Nigeria does not extend to and does not include or cover territorial waters of Nigeria which disentitles the littoral States to revenue from oil drilled offshore, that does not mean, by extension, that the suit was on resource control having regard to the litany or galaxy of laws⁴⁰ already examined above, on who controls natural resources in Nigeria.

It is illuminating that the above decision of the Supreme Court quoted in part attracted widespread criticisms, which actuated the Federal Government of Nigeria to look for political solution to such national problem. Government therefore, set up a committee and it recommended that the President should send a bill for the abolition of dichotomy in revenue sharing to the National Assembly. The Presidency complied and the National Assembly consequently passed the bill, which abolished the dichotomy, and sent it to the President who readily signed it into an Act. Again, the citation of that Act and the general intendment it carries underline the fact that the said

³⁷ See paragraph 10 of the Statement of Claim cited which states that the States of **Akwa Ibom, Bayelsa, Cross River** ... despite the averment of the Federal Government of Nigeria as pleaded in paragraph 8 thereof claim that natural resources located offshore ought to be treated or located within their respective States, for the purpose of calculating derivable revenue which accrues to them.

³⁸ By virtue of the relief sought as contained in paragraph 10 of the Statement of Claim filed by the Federal Government of Nigeria in **AG of the Federation v. AG. of Abia State & ors.(supra)**.

³⁹ Per Ogundare JSC in the suit already cited.

⁴⁰ See note 27 above.

suit which engendered a political solution (the present Act) was on offshore oil derivation controversy and not on resource control advocacies.⁴¹

Conclusion

In the final analysis, it is the considered opinion of this present writer that the said controversial suit which was decided by the apex Court⁴² was not on resource control but on determination of seaward boundary of a littoral state which bordered on offshore oil derivation and the revenue accruing or not to the littoral states. It is on that premise that this writer observes or suggests that it is safe and proper to refer to that suit always, as having been predicated on offshore oil derivation revenue and not on resource control.

The above position is anchored on the fact that there is a great deal of difference between resource control suit, which is yet to raise its head in any court in Nigeria and a suit which bordered on the controversy whether littoral States were entitled to revenue for oil derived offshore. The Federal Republic of Nigeria had created unnecessary controversy and had also made a great moment and heavy weather where none existed in respect of the suit. In the result, many Nigerians were amused as a result of the judgement of the Supreme Court of Nigeria on the assumed preservation of onshore/offshore dichotomy in the sharing of revenue accruable from oil exploration. This paper recommends that interested stakeholders may approach the Supreme Court by way of a new suit by persuading it to reverse itself in the said case⁴³.

⁴¹ Allocation of Revenue (Abolition of Dichotomy in the Application of principle of Derivation) Act 2004.

⁴² On the 5th of April 2002.

⁴³ *AG of the Federation v. AG of Abia State & ors. (supra)*.

