Joint Venture Contracts (JVCs) among Current Negotiated Petroleum Contracts: A Literature Review of JVCs Development, Concept and Elements

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Abstract: This article is a study of International Joint Venture Contracts (JVC) in the oil and gas industry. It reviews the development, concept and elements of a JVC and examines its legal vehicles. The article establishes that the search for a single definition of a JVC is not important and shows that JVCs assume different legal forms or vehicles, e.g. partnership, limited partnership or limited liability company/corporation. The article also identifies the factors that influence parties when choosing the legal form that their joint venture contract will assume.

I. INTRODUCTION AND STRUCTURE OF THE STUDY

The relationship between national governments and foreign companies in the oil and gas industry is usually determined by individually negotiated contracts. Practice has shown that negotiation in the exploration for and exploitation of petroleum resources has typically resulted in four common types of contracts: Concession Agreements (CA), Joint Venture Contracts (JVC), Service Contracts (SC), and Production Sharing Agreements (PSA). CAs, which give foreign oil companies ownership of oil and gas, and have control over operations and associated risks, were the dominant model in developing countries during the late 1940s and early 1950s. After the disappearance of classical CAs, however, JVCs, SCs, and PSAs came into existence. Before the eventual disappearance of CAs, there

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1. This is especially true for those countries that do not possess petroleum legislation.
2. Exploration is the search for an undiscovered reservoir of oil and gas, while exploitation deals with the production/investment stage. See generally KW Blinn, C Duval, HL Leuch, and A Pertuzio, International Petroleum Exploration and Exploitation Agreements, Legal, Economic and Policy Aspects (Euromoney PLC 1986), hereafter Blinn.
3. For further discussion on the types and extent of the amendments to CAs, see A Suleiman The Oil
was a shift to a new contractual relationship, i.e. JVCs, as well as amendments to CAs, such as Participation Agreements (PA). The shifts and amendments are indications of, or rather rational reactions to, a number of factors in the struggle of host states in their search for a new type of relationship with foreign companies. These factors include: the advancement of technology and knowledge, the state of the economy, and the maturity of the political and legal system of the host states as well as the increased bargaining power of oil-producing states through the establishment of Organization of Petroleum Exporting Countries (OPEC) and the United Nations (UN) resolutions on permanent sovereignty over natural resources. Consequently, petroleum contracts have evolved to cope with these developments. Section B details the evolution from CAs to JVCs and explores how that evolution is intertwined with the changes in the oil and gas industry in the Middle East. The term joint venture was invented to cater to business purposes, and originated when a number of domestic companies combined their resources, skills and operations to run a business efficiently and to penetrate new markets. In other words, the joint venture was developed as a business concept rather than a legal one. As such, researchers were divided over the legal definition of a joint venture and eventually concluded that “joint venture” is an ambiguous term. This ambiguity resulted in books and academic theses which discuss the “legality” of the joint venture by reference to other existing legal vehicles, namely partnership and corporation. Section C questions the importance of having an agreed-upon definition of a joint venture and argues that it is not essential to have a watertight definition. Rather, the focus must be on the different legal forms a joint venture can take to best serve the interests of its parties. This being the case, it would be surprising if there was a comprehensive definition of a joint venture. Finally, JVCs need a legal instrument to establish a framework for joint venture exploration and exploitation operations. Therefore, Section D discusses the legal vehicles available for the joint ventures, focusing on the variables of ownership, control over operations, and risk. The importance of these variables is because, although all petroleum contracts serve the same purpose, they differ with respect to the ownership of oil and gas resources, the degree of control over operations, and the extent

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4. Participation Agreements were influenced by another concept called ‘the profit sharing principle’ introduced by Venezuela in 1948. Y Al-Samaan, Evolution of the Contractual Relationship between Saudi Arabia and Aramco, 12 J. ENERGY NAT. RESOURCES & ENVTL L. 257, 261–63 (1994). Participation Agreements are discussed in great detail in Part B-3 of Section One of this chapter.


7. Or Limited Liability Company, as it is called in the UK; Joint Stock Company, as it is commonly known in the Co-operation Council for the Arab States of the Gulf (GCC).
of the national oil company’s participation and/or the assumption of risk by each party to the contract.

II. Development of Joint Venture Contracts (JVCs)

The development of JVCs relates to the disappearance of classical CAs. The idea of increased participation in the exploration and exploitation of natural resources goes back to the CAs concluded in the 1950s. These agreements were criticized by the host states and, at a later stage, by OPEC as preventing the governments from having an active role in managing their most valuable and critical source of wealth, oil. In addition, the principle of permanent sovereignty advanced by UN resolutions from 1952 to 1966 aided the development of JVCs in general and that of PAs in particular.

A. The Era of Concession Agreements

The classical CAs were popular between the First and Second World Wars and survived until the early 1970s. The first CAs in the Arab world were entered into on March 14, 1925 when the Iraq Petroleum Company signed a concession contract for the exploration and exploitation of oil in Iraq. The CAs spread throughout the surrounding area to Bahrain in 1928, Saudi Arabia in 1933, Kuwait in 1934, and then to the UAE, Qatar, and Oman in sequential manner. The classical CAs, however, did not produce a mutually beneficial relationship. This is because: (1) the host country represented by the National Oil Company (NOC) used to sign a long-term contract that gave the foreign company almost exclusive exploration rights.


9. A discussion of this principle, its development, and its implications is provided in the first part of Chapter Four below.

10. Though the first CAs in the Middle East were granted in 1901 by the Persian government to William Knox D’Arcy, the 1925 concession contract is of considerable significance for it is regarded as a reference model for other CAs in the Middle East. For further discussion on this subject see A. Ely, Changing Concepts of the World’s Mineral Development Laws, 4–46 (1975).

11. Formerly known as the Turkish Petroleum Company.


13. A national oil company is simply known as a company that does not usually have the sufficient technical and commercial skills and expertise, but which still has a knowledge which helps in creating and maintaining a business in the local market area.

14. For example, the government of Saudi Arabia in 1933 granted a concession agreement to the Standard Oil Company of California to explore for and exploit petroleum in the eastern side of the Kingdom for a period of 60 years. See Al-Samaan, supra note 5 at 259.
and exploitation rights over huge areas of land and sometimes the entire country;\(^{15}\) (2) the foreign company had full control over the timetable and the process of the development of the resources with the result that the NOC was not able to acquire the relevant skills and expertise; (3) the host country had no rights except to receive payment, which depended on the level of production, which in turn was under the discretion of the foreign company, and the payment received was often very negligible.\(^{16}\) Given these shortcomings, the increased knowledge and skills of the NOC, the establishment of OPEC, the strengthening of its member states’ bargaining power, and the development of the principle of permanent sovereignty over natural resources through UN resolutions, most developing countries have abandoned this form of oil and gas agreement in favor of other types of agreements, most notably JVCs.\(^{17}\)

\section*{B. OPEC and the Strengthening of its Member States’ Bargaining Power}

The first joint venture in the Middle East took place in 1957 when the Italian National Oil Company, Ente Nazionale Idrocarburi (ENI), via its subsidiary AGIP, signed JVCs with Egypt and Iran.\(^{18}\) ENI, which was wholly owned by the Italian government, inspired the establishment of national oil companies in the region.\(^{19}\) ENI and other independent foreign oil companies such as ERPA-ELF from France and Amoco of the United States were called the “New Entrants” or “New Comers.”\(^{20}\) New Entrants emerged after the conclusion of World War II.\(^{21}\) They sought a share of the oil production and hence became strong competitors of the major foreign concessionaires who were supported by the protectorates or custodian countries. The emergence of these “New Entrants” enhanced the bargaining power of host states and introduced JVCs as a significant aspect of host states’ economic development. This in turn accelerated dissatisfaction with the CAs.\(^{22}\)

The lack of a legal basis to re-negotiate or amend existing CAs retarded the development of a new type of relationship in the Arabian Gulf Area.\(^{23}\) Iran’s unsuccessful nationalization also slowed this process despite the desire to reap more

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16. For example, according to the first CAs in the Arabian Gulf, Bahrain was paid £2,250 pa, Kuwait £38,000 pa and Qatar £30,000 pa. See Suleiman, supra note 12, at 140.
17. From 1967 until 1973, the idea of “participation” in the oil and gas industry had received considerable attention by OPEC and its member states supported by UN Resolution 2158 (XXI) concerning the principle of permanent sovereignty over natural resources.
19. The first national oil company in the Middle East was the National Iranian Oil Company (NIOC) in the aftermath of the nationalization of the oil industry in 1951. Stevens, supra note 18, at 26.
20. Blinn, supra note 2, at 47.
22. Blinn, supra note 2, at 46.
23. The then President of ENI, commenting on the advantages offered by the New Entrants to host states, said, “in obtaining petroleum exploration rights abroad, ENI has not merely offered these countries better contractual terms than usual, but has also given them the chance of sharing on terms of full equality in the exploitation of their resources and hence in the development of their own economies.” Rouhani, supra note 8, at 57.
24. See Rouhani, supra note 8, at 48; Stevens, supra note 18, at 27; and Blinn, supra note 2, at 48.
profit from the oil business. The dominance of the oil market by the major concessionaires resulted in the boycott of Iranian oil in the international market, the departure of skillful foreign personnel, and the inability to import the necessary equipment and materials necessary for the operation and maintenance of the projects.

In addition, a collective effort was essential because individual states had weak positions from which to renegotiate their CAs individually; and it was encountered in the efforts of the Foreign Oil Companies (FOCs) to break any possible coalition between host states in this regard. Therefore, unity among the major oil-producing countries with respect to oil policy issues was imperative in order to have effective bargaining power and greater influence over the FOCs. Accordingly, the first Arab Petroleum Congress was held in Cairo in 1959, and suggested that a common approach to oil policy issues was critical if the Arab states were to have stronger bargaining power.

At the same time, but in another part of the world, Venezuela took steps toward amending its CAs by introducing the 50-50 “Profit Sharing Formula” in 1943-48, which was then increased to between 65-35 and 70-30 in 1958. Middle Eastern states noted this policy shift with enthusiasm because it enhanced their own ability to negotiate.

As this discussion shows, during the 1950s, the general mood of oil-producing countries was in favor of a new type of relationship that would overcome the pitfalls of the CAs, which dominated petroleum arrangements between host states and oil companies.

This mood was further advanced by the establishment of OPEC in 1960. However, OPEC was not the catalyst for a shift in contractual relationships because the willingness for change arose in the 1950s. Nonetheless, OPEC, basing its arguments largely on UN resolutions concerning permanent sovereignty over natural resources and the principle of “changing circumstances,” pressed its member states to re-negotiate their CAs, either individually or collectively. This was reflected in its 1968 Declaratory Statement of Petroleum Policy in Member Coun-

25. For instance, FOCs tried to create a shift between the Arabian Gulf States by making attractive offers to the Kingdom of Saudi Arabia alone in view of their knowledge that the Kingdom led the movement toward the participation agreements. Al-Otaiba, supra note 8, at 165.

26. Seymour, supra note 21, at 24-25.

27. Venezuela, according to its CAs, was allowed to take such unilateral action. H.S. Zakariaya, United Nations Ctr. Natural. Res., Energy & Transp, State Petroleum Enterprises in Developing Countries: Some Aspects of their Rational, Legal Structure, Management, and Jurisdiction 32 (1978); and Seymour note, supra note 21, at 27.

28. For example, Saudi Arabia increased its oil revenues when the Arabian American Oil Company (ARAMCO) on December 31, 1950, based on the principle of 50/50 sharing profit formula, paid a royalty amounting to 50% as a substitute for income tax. Blinn, supra note 2, at 47.

29. The principle of “changing circumstances” as a ground for the revision of the terms of CAs terms is beyond the scope of this thesis. For the discussion of this principle and its counterpart, the principle of “sanctity of contracts,” see generally R.W. BENTHAM, QUESTIONS OF HARDSHIP IN TRANSNATIONAL AGREEMENTS IN FOREIGN INVESTMENT IN THE PRESENT AND A NEW INTERNATIONAL ECONOMIC ORDER (D.C. Dicke ed. 1987); R.W. BENTHAM, OPEC: ITS CONSTITUTION AND RELEVANT LEGISLATION (1986); and I. BROWNIE BASIC DOCUMENTS IN INTERNATIONAL LAW (6th ed. 2003).
tries, in which the state’s undisputed right to participate in the “ownership of the concession-holding company” was recognized. OPEC continued its efforts by emphasizing the issues of ownership, oil prices, level of production, and types of agreement.

Lacking sound legal grounding, skills, relevant knowledge, and rejecting nationalization because of its severe consequences, OPEC member states sought a gradual shift by negotiating a new contractual relationship based on the concept of “participation.” At the same time, the bargaining power of host states received another boost from the introduction of PSAs in the mid-1960s by the government of Indonesia.

The UN reinforced the preceding events, especially with respect to the New Entrants (i.e. the introduction of JVCs) and had its own impact on the development of the JVCs and the increased bargaining power of oil-producing countries.

C. Participation Agreements and UN Resolutions

From 1967 to 1973, the Arabian Gulf States (Saudi Arabia, Kuwait, Abu Dhabi and Qatar), along with Iran and Iraq, started the process of re-negotiating their CAs based on the concept of “participation.” Shortly afterwards, Iran and Iraq pulled out of the negotiation process. Iran declared that it had lost interest in the concept of participation and sought a new deal with a consortium of FOCs, while in June, 1972 Iraq nationalized its oil industry. The four Gulf States continued their negotiation with a delegation headed by the Saudi Arabian Oil Minister representing these States.

The preference for participation over nationalization by oil-producing countries, particularly by the Gulf States, was spiritually and politically supported by UN resolutions on permanent sovereignty over natural resources. The first relevant resolution was issued in 1952 and was then followed by a number of resolutions. The salient resolution was 2158 (XXI) issued in 1966, which called upon oil-producing countries to pursue the maximum possible investment of their oil and gas resources by seeking and exercising full control over operations, productions, management, and marketing. This was regarded by the host states as an indisputable ruling supporting their efforts to amend the existing CAs and seek more involvement.

30. Seymour, supra note 21, at 218–19.
31. According to the OPEC 1975 Declaratory Statement of Sovereigns and Chiefs of States in Algiers, “The Sovereigns and Heads of States reaffirm the solidarity which unites their countries in safeguarding the legitimate rights and interests of their people, reasserting the sovereign and inalienable right of their countries to the ownership, exploitation and pricing of their national resources and rejecting any idea or thought that challenges these fundamental rights and, thereby, the Sovereignty of their countries” Blinn, supra note 2, at 50.
33. Suleiman, supra note 12, at 152.
34. K. HOSSAIN LAW AND POLICY IN PETROLEUM DEVELOPMENT 18–19 (1979); Suleiman, supra note 12, at 156.
JOINT VENTURE CONTRACTS

However, the formula of participation was not clearly defined. Relying on the Tehran and Tripoli Agreements, Saudi Arabia, Abu Dhabi (now the UAE) and Qatar signed the General Agreement on Participation with a group of FOCs in October 1972, entitling the former to an immediate equity of 25% as of January 1973, progressing on a pre-determined time scale to a majority ownership.

PAs were considered a triumph for the host state, especially when compared to CAs, in that they increased government revenue and, to a marginal extent, government control over petroleum resources and over activities of the concession-holders. These agreements also provided the host state with modest access to the international oil market. Nonetheless, PAs still fell short of fulfilling the host states’ desire for full sovereignty over its oil and gas resources; particularly the determination of the crude oil production rates and oil prices; and an increase in the production, operations, management, marketing and technical skills of its NOC and nationals. This shortcoming was attributable to the fact that ownership and management were still in the hands of the FOCs because they held the majority interest in the concession company. In other words, PAs were concessions in a new suit. If we add this fact to the Indonesian experience with Production Sharing Agreements, which provided more favorable terms to the host state, we might understand the reasons which led Iran to withdraw from the negotiation process and accept Kuwait’s reservation on the 1972 General Agreement on Participation. Nevertheless, PAs were considered an achievement at that time given the circumstances, including the fact that host states had no unilateral right to amend their original CAs.

JVCs were built upon the concepts embodied in the PAs. A number of the elements of PAs are found in present-day JVCs, (discussed, infra). First, PAs called for the formation of a Joint Management Committee charged with the responsibility for, inter alia, capital expenditures, operational expenses, and controlling and

35. In the Tehran Agreement signed in February 1971, FOCs agreed to increase oil prices by about 46 cents per barrel, with additional increases of 20 cents scheduled to take place by 1975. In the Tripoli Agreement, which was signed in April 1971, Libya and Algeria were entitled to receive an increase of 80 cents over the same period. A. L. DANIELSEN, THE EVOLUTION OF OPEC 189 (1982).

36. The progressing to a majority share was to start from 1978 until 1982 when the host state ownership was to become 51%. It is worth mentioning that subsequently those countries, except for the UAE, which elected to adhere to the participation agreements, have acquired 100% of the equity. Suleiman, supra note 12, at 152-54.

37. For example, the oil is owned by the host state which brings in a FOC to explore and, in case of commercial discovery, develop the resource. The FOC operates at its sole risk and expense, and receives a specified share of production as a reward. Bindemann, supra note 15, at 10.

38. Though Kuwait signed the first draft of the agreement, it did not endorse it and sought an immediate ownership of majority shares. Suleiman, supra note 12, at 152.

39. Ahmed Zaki Yamani, the then Saudi Arabian Oil Minister who was charged by the Arabian Gulf countries to negotiate on their behalf: “Participation is the only substitute for nationalization and that Saudi Arabia did not aim at obtaining more than 51 per cent as it needed the oil companies to act as intermediaries between producers and consumers and that Saudi Arabia also needed their experience and investments … and that the new relationship between the governments and the companies would, like a Catholic marriage, be indissoluble.” Al-Otaiba, supra note 8, at 164.

40. As a matter of fact, JVCs were utilized alongside PAs. For example, Saudi Arabia entered into JVCs with New Entrants of FOCs. Blinn, supra note 2, at 46-48.
monitoring the activities of exploration and development. This is largely similar to the Executive Management Committee found in JVCs (or to the Operating Committee in JOAs, as we shall see later). Second, PAs also called for the establishment of an Operating Committee charged with the responsibility for conducting and coordinating petroleum operations. The Operating Committee’s responsibility in the PAs is similar to that of the Operator in JVCs and JOAs.

The difference between PAs and JVCs was that PAs were more concerned with overall ownership than with technical expertise and effective control over operations, production, management and marketing skills and the associated risks. The principal concern of host states at that time was limited to receiving more immediate funds to meet their financial requirements. In other words, PAs were concerned with form over substance. Finally, we should emphasize the fact that PAs were the only mechanism, besides nationalization, to amend CAs at the time, while JVCs were initially utilized with the New Entrants.

Therefore, we can conclude that the development of JVCs related to and, possibly, depended on the concept of participation introduced as a mechanism for amending the classical CAs. At the same time, JVCs were utilized with the New Entrants because they were found to be a better instrument for realizing the host states’ desires and demands, namely the sovereignty over their oil and gas resources (or ownership), the control over operations, higher financial returns, transfer of technology and training of nationals, and direct access to the international oil market.

**D. The Role of PSAs and SCs**

The host states—in their struggle for a new type of mutual relationship with foreign companies with respect to the variables of ownership, control over operations and risk—have made use of two other petroleum contracts, namely Production Sharing Agreements (PSAs) and Service Contracts (SCs).

Under PSAs, the FOC is vested with a mandate to provide technical and financial capital and services for the exploration and exploitation of the petroleum deposits in the host state. As a consequence, the FOC is responsible for managing and controlling the petroleum operations despite the fact that the NOC has the option to participate in different aspects of the exploration and development process. The host state, on the other hand, is represented by its NOC and has an outright ownership of the oil and gas subject to the FOC’s entitlement to its share of production. PSAs call for the formation of a joint committee where both participants are represented and which monitors the petroleum operations.

Under PSAs, the oil resources technically remain with the state, but the PSA permits the FOC to manage and operate the development of the oil and gas field. Therefore, the PSC has been used in small developing countries with potential oil and gas reserves. Because these countries lack the technical expertise to efficiently locate oil and gas, the state contracts with the FOC to locate the oil or gas for a

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41. Suleiman, supra note 12, at 198.
42. Al-Samaan, supra note 4, at 257.
43. A number of writers claim that participation is no different from nationalization in that it is just a different reasoning to the same conclusion. Seymour, supra note 21, at 218.
share of the production. If the amount of oil or gas in the ground is unknown, the FOC is assuming enormous financial risk. For example, if little or no oil or gas is found, the FOC can lose its investment. However, if oil or gas is discovered, the FOC is rewarded.

With respect to SCs, the literature on the oil and gas industry refers to two different types of SCs. These are known as “Risk Service Contracts” (RSCs) and “Pure Service Contracts” (PSCs). The distinction between the two is blurred, however. In both the RSCs and PSCs, the FOC agrees to provide services and know-how, and to supply materials. The difference between the two, according to a number of researchers, lies in the type and method of remuneration. Under the RSCs, the FOC will be paid only if there is production, though it has no access to the production itself. The payment to the FOC can be in cash or kind. Therefore, the FOC bears an exploration risk, though indirectly. The indirect assumption of exploration risk is based on the fact that the FOC has no say in the exploration activities, which are in the hands of the host state. So the FOC will not be paid if the exploration activities result in no commercial discovery. The RSCs are similar to Production Sharing Agreements (PSAs) in the sense that the FOC’s remuneration depends on the production. Still, RSCs are different in that the FOC has no control or ownership which it would have had if the contract had been a PSA. RSCs are ‘risk without title of oil.’

The PSCs, on the other hand, guarantee that the FOC will receive its remuneration whether or not there is production. There is no exploration risk on the part of the FOC. The government or NOC bears all the risks. The RSCs and the PSCs are similar to each other with respect to control and ownership. Under the RSCs and the PSCs (collectively, SCs), the FOC has no control over operations and has no equity position (interest) in the venture. In contrast, under PSAs the FOC bears all exploration risks and has control over operations. It also shares the reward in the case of commercial discovery, while the NOC has full ownership of the oil and shares the rewards with no exploration risk.

44. Early examples of SCs were created by Petroleos Mexicanos and Yacimientos Petrolíferos Fiscales in the fifties; and by Iran and Iraq contracts in the sixties, see Bindemann, supra note 15 at 10.
45. With respect to the type of remuneration, the payment can be regarded as profit or fees. The method of the remuneration, on the other hand, is either a percentage of the production (in kind) or fixed amount (cash). D. Johnston ‘Production Sharing Agreement’ Centre for Petroleum Min. L. & Pol’y. 1, 1–68 (1994).
46. Reaching the production stage normally involves the so-called “exploration risk”. Exploration risk means that the foreign oil company will bear (either completely or partially, depending on the contract in question) the risk associated with the exploration activities until a commercial discovery of oil production occurs. If there is no commercial discovery of oil (i.e. no production), an exploration risk is said to occur.
47. Some researchers distinguish between the RSC and the PSC on the basis of the type of received payment (i.e. profit or fees). See generally Johnston, supra note 45 and Blinn, supra note 2. Such distinction is insignificant. A better distinction might be related to the amount of the reward, which is expected to be higher in RSC as on compensation for the extra risk assumed by the contractor. Interview with Danni Kabbani, Legal Advisor to Qatar Petroleum (Aug. 2004).
To sum up, the foregoing contracts and their development can be classified based on the variables of ownership, control over operations, and exploration/exploitation risk. Tables (1) and (2) depict such classification.

**Table (1) Ownership, Control and Risk in the CAs and the PSAs**

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**Table (2) Ownership, Control and Risk in the SCs**

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A number of observations are worth making at this stage. First, if we draw a timeline we observe that the “ownership” variable has been gradually shifting from the hands of the FOC, under the CAs, to that of the “host state” under the PSAs.

50. Even though the host state is the de jure owner of the land, FOC can be regarded as the de facto owner of the oil and gas by virtue of having exclusive development rights over the fields of oil and gas. This contention is substantiated by the fact that the FOC pays fees, royalties and, in some instances, taxes to the Host State. One pays fees and taxes on something one owns. In short, the Host State has no access to (ownership of) the oil even though it owns the land which contains that oil.

51. Similar to some extent to the “Yes,” but different in that the Host State owns both the land and the oil. The FOC’s ownership is both conditional upon the commercial discovery of oil and based on a pre-determined percentage. In other words, the FOC’s ownership of that percentage (oil), though pending, is paid by the Host State.

52. Under PSAs, FOC is responsible for the management and control of the exploration and exploitation operations despite the fact that Host State is provided with an option to participate in some of the development operations. Therefore, the FOC’s ‘Full Control’ is based on the assumption that Host State chooses not to participate. According to Bindemann, *supra* note 15, at 13, this is generally the case. For more on PSAs see generally D.F. Behn, *Sharing Iraq’s Oil: Analyzing Production Sharing Contracts Under the Final Draft Petroleum Law* (Sept. 17, 2007) (unpublishing working paper, on file with the Centre for Energy, Petroleum, and Mineral Law and Policy, Tulane University,) available at http://ssrn.com/abstract=976407.
and the SCs. Second, this shift is accompanied by a similar shift with respect to “control over operations,” the second variable. As we can see from Table (2), the “host state,” under the SCs, has absolute ownership and exclusive control over operations.

While this can be seen as the Host State operating or being capable of operating its oil and gas fields independently, this is not the case. SCs are, in fact, more complementary to other oil and gas contracts than single, standalone, contracts. The exploration for and exploitation of oil and gas usually involves a wider range of inter-related activities (i.e. drilling, maintenance, engendering works, installations of major facilities, etc.). Therefore, it is expected that co-venturers will be unable or unwilling to undertake all these activities. This argument is supported by the lesser popularity of SCs as a leading or governing contract of the relationship between the co-venturers when compared with other types of petroleum contracts. Finally, ownership involves the power of ultimate control. To state that co-venturers are co-owners of the business is to state that they each have the power of ultimate control.

III. THE CONCEPT AND ELEMENTS OF THE JOINT VENTURE

We have seen from the discussion so far how the JVCs in the oil and gas industry developed. We now turn our attention to the term ‘joint venture’. The term joint venture as a form of business enterprise is clearly rooted in the early history of Egypt, Syria, Phoenicia and Babylonia. It originated “as a commercial or maritime enterprise used for trading purposes.” As a legal concept, however, it is still considered a recent development. Historically, joint venture, or adventure as it was often called, was viewed by the law as a branch of partnership. However, the joint venture as a ‘separate concept’ with a similar relationship to partnership was first developed in the United States and Scotland. Some American courts, for in-

53. Bindemann, supra note 15, at 11, ("oil exploration and development can only be conducted by virtue of one of several forms of contracts granted either by the government or its NOC").


56. For example, Crommelin states that “joint venture is not a term of art, in Australia or elsewhere... it follows that the mineral and petroleum joint venture, unlike a corporation, does not enjoy legal personality.” M Crommelin The Mining and Petroleum Joint Venture in Australia 4 J. Energy Nat. Resources & Envtl. L. 65 (1986); Sayer, supra note 6, at 1.

57. For instance it is well documented that the term joint venture has never been recognized by English common law, though it was used by judges in England and the Commonwealth, as an independent concept. See F.L Mechem, The law of Joint Adventure, 15 Minn. LR 644, 644-67 (1931); Bean, supra note 5, at 4.

58. Williston cited a judgment that reads: “the concept of joint venture as a legal relationship or association sui generis is purely of American origin dating from about 1890. Just how or why it originated no one seems precisely to know.” State ex rel. Crane Co. v. Stokke, 272 NW. 811, 817 (S.D. 1937). See Williston, supra note 54, at 544.

59. This is, however, changed later by the application of Partnership Act 1890 which incorporates joint venture into partnership law, see generally J.B. Miller THE LAW OF PARTNERSHIPS IN SCOTLAND (1975).
stance, described the joint venture as “special”\textsuperscript{60} or “limited”\textsuperscript{61} or even “informal”\textsuperscript{62} partnerships.\textsuperscript{63} This is clearly a result of the lack of legislation covering joint ventures as legal concepts. Since then, many attempts have been made to coin an exhaustive definition that can serve to illustrate a legal structure for joint venture. Yet all recognize the difficulties and agree that there is no one legal definition of a joint venture.\textsuperscript{64}

However, there is general agreement that a joint venture is a strategic conglomerate between two or more otherwise unrelated enterprises or organizations engaging in a common undertaking with the hope of achieving a common goal. In other words, there are core elements that constitute a joint venture and distinguish joint ventures from other existing legal vehicles such as the partnership and corporation. Williston, for example, enumerates the following elements, which have been cited by a number of courts and accepted by other researchers:

A contribution by the parties of money, property, effort, knowledge, skill or other asset to a common undertaking; a joint property interest in the subject matter of the venture; a right of mutual control or management of the enterprise; expectation of profit, or the presence of “adventure,” as it is sometimes called; a right to participate in the profits; most usually, limitation of the objective to a single undertaking or ad hoc enterprise.\textsuperscript{65}

The work of Williston does indeed deserve commendation. In fact, it has contributed to the legal literature by providing a list of elements that aim to distinguish joint venture from partnership and recognize joint venture as an independent legal

\begin{itemize}
  \item \textsuperscript{60} The concept of joint venture “is of comparatively modern origin” and has been defined as a “special combination of two or more persons.” \textit{Lesser v. Smith}, 160 A. 302 (1932).
  \item \textsuperscript{61} “However diversified in form and as to subject matter contract of ‘joint adventure’ may be, feature of partnership is a fundamental concept, and rules of law governing partnerships, if relevant, apply to joint adventure, which is termed a limited partnership.” \textit{George W. Haxton & Son v. Rich}, 47 N.Y.S.2d 501 (N.Y. App. Div. 1944).
  \item \textsuperscript{62} “A ‘joint venture’ or enterprise is in essence an informal partnership between two or more persons.” \textit{Wooten v. Marshall}, 153 F. Supp. 759 (S.D.N.Y. 1957); Also in \textit{Lesser v. Smith}, supra note 60, the concept of joint venture “is a creation of the American courts. At common law, and still in England, such an enterprise is treated as an informal partnership.”
  \item \textsuperscript{63} \textit{Jaeger}, supra note 54, at 6.
  \item \textsuperscript{64} The Organization for Economic Co-operation and Development (OECD) has tried to develop an exhaustive definition in their publication \textit{Competition Policy and Joint Venture} (1987) by saying that “the specialist literature gives many definitions...although none provides a truly definitive answer;” see \textit{Nightingale}, supra note 5, at 21. \textit{J. Walsley, \textit{Joint Ventures in the Kingdom of Saudi Arabia} 1-2} (1985); Crommelin, supra note 56, at 79 concluded that “the joint venture has provided the vehicle for huge investments in exploration for and production of natural resources in Australia in spite of the inescapable uncertainty surrounding its legal attributes. It remains for the courts to place their stamp of approval upon this creature of commercial ingenuity”; and \textit{Jaeger}, supra note 54, at 9 (citing a milestone case at the time which recognized such difficulty by stating that “Precise definition of a joint venture is difficult. The cases are of little help since they are generally restricted to their own peculiar facts. Each case in which a coadventure is claimed...depends of course for its results on its own facts, and owing to the multifariousness of facts, no case of coadventure rises higher than a persuasive precedent for another.” \textit{United States v Standard Oil Co. of Cal.}, 153 F. Supp. 121 (S.D.N.Y. 1957)).
  \item \textsuperscript{65} Williston, supra note 54, at 563–65. For detailed discussion and analysis of each of the elements see \textit{Jaeger}, supra note 54, at 9-15 where he adds the element of “sharing of losses.”
\end{itemize}
concept. The process of reaching agreement on these issues had taken considerable time and effort by both courts and scholars. The writer, nonetheless, does not accept the proposition that “expectation of profit” and “limitation of the objective to a single undertaking” are necessary ingredients of a joint venture.

Our reservations on “expectation of profit” stem from the fact that the theme of joint ventures is to spread or reduce the expected risk of the project assumed by co-venturers. No company is prohibited from pursuing a business individually, but in so doing, it assumes 100% of the risk. This is not, however, to rule out the objective of making profit. Rather, it is to emphasize that any expected return requires a corresponding degree of risk. Joint ventures, therefore, are viewed primarily as a mechanism of risk-sharing and hence risk-reduction between the co-venturers.

More importantly, by avoiding the element of “expectation of profit”, or rather the sharing of profit, co-venturers can prevent their business from falling within the definition of partnership, for example, and hence avoid the possible associated adverse effects or implications. The unlimited liability of the partners is one of the disadvantages of the partnership vehicle. Falling within the definition of partnership clearly increases the joint venture’s vulnerability to risk or liability. In addition, the problems associated with the rules of the law of agency, which are inherent in partnership, might cause inconvenience between co-venturers. Therefore, oil and gas joint ventures tend to be structured on a contractual basis rather than incorporate a new joint company or create a partnership. By this, each venturer (FOC and NOC) remains an individual legal entity (though the FOC might be required to incorporate or establish a subsidiary in the host state) without the need for creating a new legal entity.

66. See generally H. Nichols, Joint Ventures, 36 Virginia L Rev 425 (1950) who attempted to prove that joint venture did not differ from partnership; Jaeger, supra note 54, who concluded that joint ventures are no longer a form of partnership.

67. Yet, the writer recognizes the fact that Williston’s work was both concerned with the elements of joint venture in general and not those of joint venture in the oil and gas industry per se, and that he was inspired by the facts, conditions, and problems of his time.

68. Focusing on the element of “expectation of profit” might be artificial or misleading for “it is sufficient for the profit motive to be present in each person as regards his individual activities.” Crommelin, supra note 56, at 68.

69. Needless to say, joint ventures are also an effective collaboration of physical and financial resources, knowledge, skills, and technology. Yet, risk sharing is the prevailing objective, especially in the oil and gas industry where the exploration and exploitation of oil involves great technical risk in dealing with unpredictable and uncontrollable natural forces. In addition, “in the light of the high degree of commercial and non-commercial risks associated with petroleum business, not to mention the huge finance involved, it is vital for petroleum contracts to continuously seek to balance the respective interests of oil companies and oil producing countries.” N.E. Ikenna, International Petroleum Law: Has It Emerged as a Distinct Legal Discipline?, 8 Afr. J. Int’l Comp. L. 428, 445 (1996); see generally J. Wilkinson, Introduction to Oil and Gas Joint Ventures: United Kingdom Continental Shelf (1997).

70. This is based on the assumption that co-venturers elected to undertake their business on a contractual basis (i.e. joint operating agreement) rather than establish a legal entity (i.e. partnership or limited liability company).

71. The agency doctrine is further discussed in Section D(3)—the joint venture partnership.

Furthermore, oil and gas joint ventures are found to differ from business joint ventures in the sense that no joint profit is made. In this regard, however, researchers are divided with respect to the common goal of a joint venture. The common goal can be the pursuit of profit or the carrying out of particular operations together.\textsuperscript{73} The common goal depends on the type of industry in which the joint venture is utilized. Accordingly, for the oil and gas industry the common goal is to generate a product to be shared among the co-venturers.\textsuperscript{74}

With respect to the element of “limitation of the objective to a single undertaking” (hereafter, single undertaking), this is an insignificant factor in the determination of a joint venture though such an element has its merits from philosophical or theoretical points of view.\textsuperscript{75} “Single undertaking” was utilized to distinguish joint venture from partnership on the basis of the duration of the business.\textsuperscript{76} While partnership was considered an association carrying on a general, continuous business until its dissolution, joint venture was viewed as an association carrying on a business over a limited period of time.\textsuperscript{77} This distinction made the single transaction or undertaking a necessary element of the definition of the joint venture. As a result, the definition of “single undertaking” was based on the time-scale of the project rather than on the objectives of the resulting association.\textsuperscript{78}

Today, however, this is not the case. Joint ventures currently may last over 30 to 40 years,\textsuperscript{79} which is a very long period for a single project. Such a period of time...
may resemble, in reality, a continuous transaction. Furthermore, even if we accept the “single undertaking” element as a part of the definition of joint ventures, it is by no means an essential element, because there are a number of legal vehicles available for co-venturers to adopt. These vehicles include partnership or corporation. If co-venturers choose to incorporate their joint venture business the element of a single undertaking becomes irrelevant because the duration of a corporation is infinite. In addition, current joint ventures in the oil and gas industry usually last as long as the oil and gas reservoirs, which might be for a very long period.

The elements of joint ventures have developed over time, as have the definitions of the joint venture. Joint ventures during the period of the late fifties to the late seventies had a number of elements that, to some extent, differ from those of nowadays. For example, the FOC was responsible for carrying out exploration activities, and hence had the burden of final decisions, at its own risk and expense, until the occurrence of commercial discovery. Upon commercial discovery, an operating company, joint venture corporation or partnership, whose legal status depended on both the desire of its parties and the legislation involved, was established to carry out the exploitation and related operational activities. Generally, the governing body (consisting of partners or co-venturers) was evenly distributed between the parties to the joint venture (i.e. most of the joint ventures at the time were shared 50-50) or according to the capital contributed by each party. The chairman’s post was reserved for the representative of the host state, while the FOC was entitled to appoint the executive manager. Finally, the production was divided between the FOC and host state in accordance with the capital contributed and the operating expenses incurred.

1980 when it was acquired by the government of Saudi Arabia. Al-Samaan, supra note 4, at 259-60.

80. This might be true when it is compared with the ‘expected average life’ of the partners of a given partnership, which reflects a general and continuing business. As we know, death terminates a partnership, and hence it is no more a continuing transaction; it loses its distinctive feature. For the sake of argument, if two partners in their forties form a partnership, it is very likely that the partnership will not last for more than 40 years, which is very likely the duration of a joint venture.

81. For example, in Shell Oil Co. v Prestige, 249 F. 2d 413 (9th Cir. 1957) the court considered the “single undertaking” as a part of the definition of the joint venture by saying “a ‘joint adventure’ is an association of two or more persons who combine their property, money, efforts, skill or knowledge to carry out a single business enterprise.” However, the court recognized that such an element is not essential for a joint venture. According to the court, “a contract between parties, a common purpose, a community of interest, mutual control over the subject matter of the enterprise or over the property engaged therein, are elements necessary to the existence of a ‘joint venture.’

82. For example, one of the characteristics of the Limited Liability Company (i.e. corporation) is the continuity of its interest (embodied in its shares) regardless of the number of times these shares exchange hands. Therefore, since the company is a separate entity, in theory, it could go on forever. For example, section 84 of the Insolvency Act 1986 of the UK states that a company may be wound up voluntarily when the period (if any) fixed for the duration of the company by the articles expires. In short, the duration of a company is, in practice, perpetual.

83. For example, the gas reserve in Qatar is expected to last a considerable length of time. According to the Rasgas (a joint venture between QP, Mobile QM Gas Inc., Itochu Corp., and Nissho Iwai) newsletter in 2000, the volume of gas needed to meet the demands of the two-train plant for 25 years is estimated to be less than 2% of the total recoverable reserves in the North Field of Qatar. This is not to say that the existing joint venture should or will last for the same period. Rather it is likely the project will last as long as there is a mutual agreement or until the impossibility of continuation of such agreement becomes inevitable.
The common elements of present-day joint ventures, on the other hand, can be summarized as: (1) the venture must be a particular commercial or business project, (2) there is a common ownership of assets and (3) co-venturers must have the ability to participate in management and control of the joint venture on an equal footing.

As mentioned, joint ventures can be created through a number of legal vehicles, structures or frameworks. The literature provides three different structures under which a joint venture may be formed: Corporation, Partnership and Contractual Joint Ventures. Another possible classification is to categorize these vehicles into “incorporated joint ventures” and “unincorporated joint ventures.” Under the former, we find the corporation vehicle. This group is also called equity joint ventures. General Partnership or Limited Partnership and Contractual Joint Ventures, on the other hand, are referred to as unincorporated joint ventures or non-equity joint ventures. Regardless of the legal vehicle a joint venture might take, the dominant feature is that the joint venture is the creation of a contract:

The law of joint ventures is not being made in the courts or the statute books but in the voluminous documents which order the complex exploration, development and financing activities that modern mining and energy operations involve. The child of convenience is assuming a character of its own.

It is clear so far that the overriding element of a joint venture is that its relationship, and common interest or goals are based on a contract. Therefore, the concept and elements of the joint venture depend on the type of industry in which the joint venture is utilized. In other words, there are core elements but there are also a number of less significant variables for each industry. Accordingly, the elements of an oil and gas joint venture must be unique to reflect the relationship between the co-venturers. Croommelin has provided a practical description for the joint venture in the oil and gas industry as follows:

The mineral and petroleum joint venture is an association of persons (natural or corporate) to engage in a common undertaking to generate a product to be shared

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84. It is interesting to note that during the ‘old’ joint ventures, management and control of the joint venture were in the hands of the FOC; for it had the technical and managerial skills that host states lacked. However, nowadays, most host states have the proper technical and managerial skills that enable them to participate in management and control. For instance, the Vice Chairman and Managing Director of the Qatar Liquefied Gas Company Ltd (Qatargas) is a qualified Qatari citizen, Mr. Faisal M. Al Suwaidi. Qatargas is a joint venture between QP and four FOCs: ExxonMobil, TotalFinaElf, Marubeni, and Mitsui.

85. Bean, supra note 5, at 5; Merralls, supra note 5, at 2, and Wilkinson, supra note 69, at 39–40.

86. See generally Bean, supra note 5; Sayer, supra note 6; Nightingale, supra note 5; Merralls, supra note 5; Lower, supra note 5.

87. Bean, supra note 5, at 5–6; Nightingale, supra note 5, at 7.

88. Schanze, Mining Ventures in Developing Countries: Part II: An Analysis of Project Agreements 23 (1983); Hossain, supra note 34, at 121.

89. Merralls, supra note 5, at 2.

90. Even when co-venturers elect to incorporate their joint ventures (i.e. become a limited liability company), their contract may, too, be incorporated in the shareholders’ agreements, which is likely to constitute (or be reflected in) a part of the articles of association; a required document for incorporation. See Nightingale, supra note 5, at 175; Bean, supra note 5, at 6.
among the participants. Management of the undertaking is divided: specified activities are to be performed by a designated person (the operator or manager) as agent for the participants; the power to determine certain matters is vested in a committee (the operating or management committee) upon which participants are represented and entitled to vote in accordance with their interests in the venture; and other matters are decided at the outset by the participants as terms of the association. The relationship among participants is both contractual and proprietary: the terms of the association are fixed by agreement, and property employed in the undertaking is held by the participants as tenants in common.91

IV. The Legal Vehicles Available to Joint Venture Contracts

We have discussed the variables of ownership, control and risk in the different types of petroleum contracts and documented their evolution. The discussion showed the shift of these variables from the hands of FOCs to the hands of host states. These variables were viewed by the writer as the essential elements of the nature and incidences of the relationship between the host states and FOCs. The participation agreements, for example, focused mainly on increasing the host states’ ownership of oil and gas production, and to a lesser extent on the participation of the host states or the NOC in the management and control of affairs. The Risk variable, on the other hand, can be seen in a sense as an incidental to or by-product of the variable of control. The higher the control gained the higher the risk assumed. Accordingly, we can classify the variables of ownership and control over operations as the primary (independent) variables, while the variable of risk is classified as a secondary (dependent) variable. This is evident by the importance attached to them by both host states and FOCs in their renegotiation of CAs. As pointed out earlier, the Arabian Gulf states had increased their stake in oil projects to 25% and gradually to 51% and ultimately to 100%, without a comparable enhancement of their control over the operations (and hence their assumption of risk), which was in the hands of the foreign companies.

Nevertheless, this is not meant to underestimate other factors or technical issues that may arise between the parties, such as the implication of fiduciary duties and the problems associated with the agency theory that might or should affect the structure of the legal vehicles.92 Rather it is to emphasize that the focus of host states and FOCs when negotiating new contracts or renegotiating existing contracts was, and still is, on those three elements. The main focus is on how the employed legal vehicles accommodate the desire of the host states and FOCs with respect to the variables of ownership, control, and risk. Accordingly, the discussion of the legal vehicles of joint ventures centers on those three elements.

A. Contractual Joint Venture

So far, it has become clear that the most significant document for joint ventures is the contract between the co-venturers. In contractual joint ventures the rela-

92. For a comprehensive discussion of fiduciary obligations in joint ventures, see generally Bean, supra note 5; Shishido, supra note 72; P.D. Finn ‘Fiduciary Obligations of Operators and Co-venturers in Natural Resources Joint Ventures’ 160–76 Australian Mining and Petroleum Law Association Yearbook (1984).
tionship of the parties and the structure of the joint venture are documented and implemented in legal instruments called “Joint Operating Agreements,” (JOAs). Accordingly, there is no separate legal entity created; the legal framework for the operations of exploration, exploitation, and other activities is established by the JOA.

The history of contractual joint ventures goes back to the United States onshore form 610, a model proposed by the American Association of Petroleum Landmen. Nowadays, JOAs or contractual joint ventures are considered the most common form of joint venture in the oil and gas industry.

JOAs are considered a necessary extension of a joint venture agreement. In other words, JOAs are the mechanism by which joint ventures are put into operation. Therefore, it is expected that either JOAs or different arrangements will be necessary to accommodate the various activities and relationships of an oil and gas business. Nonetheless, JOAs in general consist of an operator, charged with the responsibility of the exploration and development operations, supervised by an Operating Committee. The Operating Committee is composed of all co-venturers who have a vote proportionate to the size of their ownership. The Operating Committee protects the rights of the non-operating co-venturers against any possible loss resulting from the work of the Operator. Therefore, the role of both the operator and the Operating Committee is and should be unequivocally defined in the JOAs. In sum, the contractual joint ventures are based purely on a contract, i.e. JOAs. So JOAs create a structure that is similar to a partnership, which is also

93. Typical JOAs cover the scope, purpose and duration of the joint operations, the type of assets contributed by the co-venturers, ownership percentage, management and control of operation, selection and appointment of the operator, the apportionment of liability, the consequences of default, assignment of interest and withdrawal, and the utilisation and disposal of the output of the joint venture. T Daintith, Willoughby and Hill United Kingdom Oil & Gas Law (2000); Merralls, supra note 5, at 2; Blinn, supra note 2, at 192–203; Wilkinson, supra note 69, at 39; Sayer, supra note 6, at 6.
94. This type of structure was introduced in the Middle East by the agreement between the NIOC and AGIP, Philips and the Oil and Natural Gas Commission of India in 1965. See Hossain, supra note 34, at 127.
96. They are well established, for example, in the UK Continental Shelf. See Wilkinson, supra note 69, at 1; Sayer, supra note 6, at 3. See generally Black and Dundas, supra note 95.
97. Bean, supra note 5, at 4; Merralls, supra note 5, at 2, and Blinn, supra note 2, at 193.
98. A typical oil and gas joint venture usually involves the activities of exploration, exploitation, production, management etc. (technically known as downstream and upstream activities). Therefore, it is likely to have different JOAs to reflect the differences in the nature and requirements of such activities. For example, Qatargas (note 84) employs two different arrangements with respect to the percentage of ownership for its downstream and upstream activities: Downstream QP 65%, ExxonMobil 10%, TotalFinaelf 10%, Marubeni 7.5%, and Mitsui 7.5%; and Upstream QP 65%, ExxonMobil 10%, TotalFinaelf 20%, Marubeni 2.5%, and Mitsui 2.5%.
99. The Operator can be one of the co-venturers (usually the one with the largest participating interests), a stranger (a company not associated with the co-venturers) or an Operating Company established by the co-venturers. See Wilkinson note 69 at 40; Merralls note 5 at 8; and Hossain note 34 at 128.
100. Wilkinson, supra note 69, at 41.
101. Sayer, supra note 6, at 6.
based on a contract. However, JOAs differ from partnerships mainly in the sense that co-venturers take the output in kind.¹⁰²

1. Ownership

Under the JOAs, host states and FOCs own both the equipment and facilities of the project, as well as the oil and gas productions. With regard to the latter, it is not uncommon to stipulate that each participant is to take its share in kind.¹⁰³ Therefore, host states and FOCs also have direct ownership of the project and the production. This privilege is considered a fundamental advantage of contractual joint ventures when compared to joint venture corporations where shareholders do not have direct ownership.

2. Control

There are two levels of control¹⁰⁴ between which the mutual interest might be challenged if the JOAs are not precisely drafted. The power to control and manage the activities of a joint venture, except for the exploration and exploitation operations, is vested in the Operating Committee. On the other hand, the Operating Committee is entitled to and does supervise the work of the operator. The exploration and exploitation operations are, on the other hand, under the sole control of the operator.

3. Risk

JOAs usually provide that both parties, host states and FOCs, are jointly and severally liable for the obligations of the venture. Hence, there is an unlimited liability, which would be avoided if the joint venture were a limited liability company, for example. Other possible risks to the co-venturers are associated with the acts of the operator. As pointed out earlier, the operator can enter into binding agreements, usually permissible in advance by the JOAs, and carry out operations without obtaining the non-operating co-venturers’ approval. Hence, unless other co-venturers can prove negligence of the Operator, they will all share the losses and damage caused by the acts of the Operator.¹⁰⁵

¹⁰². This is the most cited reason for distinguishing the contractual joint ventures from partnerships, which are an association of persons carrying on business with a view of profit. Therefore, the common goal of contractual joint ventures and partnerships is carrying out particular operations together as pointed out in footnote 50.

¹⁰³. Blinn, supra note 2, at 194.

¹⁰⁴. Fong classifies the management and control structure of joint ventures as integrated or non-integrated structures. Under the former, the co-venturers jointly participate in the management and control of the joint venture’s affairs. In non-integrated structures, management and control are divided between the co-venturers. See generally C.K. Fong, Construction Joint Ventures in Singapore (1985) Bean, supra note 5, at 13-14.

¹⁰⁵. Wilkinson, supra note 69, at 41.
The second available legal vehicle under which a joint venture may be formed is the corporation. The legal affairs of incorporated joint ventures are governed by the corporation law of the relevant state.

1. Ownership

When co-venturers elect to use this legal vehicle, their ownership will be vested in the shares of the corporation and is in proportion to the capital contributed by each co-venturer. The restriction on the maximum ownership to which FOCs are entitled is conditional on both the relevant legislation and any exemption obtained from the government of the host states. The implication here is that the host states, as well as the FOCs, will be entitled only to receive the proceeds of the oil and gas sales and have no direct access to the crude oil and gas production. The host state and the FOCs are the shareholders of the separate legal entity (i.e. joint venture corporation) that independently owns the oil and gas production. This might not suit the host states that prefer direct access to and ownership of the backbone of their economy.

2. Control

The control and management of joint venture operations and affairs are vested in both the Board of Directors (BOD) and the executive management of the corporation. The BOD is responsible for setting the overall policies and strategies as well as approving major decisions. The management of the corporation is responsible for the day-to-day operations and works under the supervision of the BOD. Hence, there is no direct control by the shareholders (host states and FOCs), though they exercise indirect control through the appointment of the members of the BOD who are, in turn, responsible for appointing the executive management. The voting on the appointment of the BOD, including the chairman and the executive general manager, is usually in accordance with the percentage of ownership of each shareholder. In partnership joint ventures and contractual joint ventures, however, control and management are directly exercised by the partners or co-venturers which might give these two vehicles an advantage over the joint venture corporation.
Also, incorporating the joint venture would necessitate the integration of both the NOC and FOC. This is the major disadvantage of JVCs because the host state or its NOC and the FOC prefer to maintain their original identity. This is why contractual joining ventures and partnerships are preferred.\footnote{This point is also stressed by Shishido, \textit{supra} note 72, at 63 stating “because a joint venture may bring together companies with different interests, management styles and goals, it creates a potential risk that the parent companies will not be able to cooperate on a practical level as business partners.”}

3. Risk

By virtue of incorporating the joint venture, the shareholders, host states and FOCs will have a limited liability up to their paid-in capital or investment. However, the joint venture corporation itself has an unlimited liability with respect to its obligations. The limited liability of the shareholders is an advantage of utilizing such a legal form. In practice, however, this advantage is lost either by the fact that the shareholders act as a guarantor of the loans of the joint venture, and the fact that the joint venture corporation may very well recover contributions from the shareholders in order to pay off its obligations.\footnote{Gower, \textit{supra} note 109, at 89.}

C. Joint Venture Partnership

Unincorporated joint venture partnerships are governed by the partnership laws of the relevant state.\footnote{\textbf{UK Partnership Act 1890}, \textbf{Limited Partnership Act 1907}, and the new \textbf{Limited Liability Partnership (LLP) Act 2000} which came into effect on 6 April 2001; \textbf{D Armour Limited Liability Partnerships: The New Legislation} (2001); and \textbf{U.S. Uniform Partnership Act 1914} (Revised 1994 and 1997), and \textbf{Uniform Limited Partnership Act 1976} with 1985 Amendments.} In theory, a partnership can be created by either a written or an oral contract. However, to avoid any misunderstanding, co-venturers in the oil and gas industry usually put their agreement in writing. As explained earlier, joint venture is an ambiguous term, and courts and writers tend to classify it as a form of partnership.\footnote{Others, however, maintain that joint ventures have a more limited scope. Shishido, \textit{supra} note 72, at 66.}

A partnership can take one of two forms. In a general partnership, all parties are personally liable for the debts of the partnership. In a limited partnership, at least one general partner has unlimited liability while dormant partners have limited liability but no rights to control or manage the business. The oil and gas industry prefers general partnerships.

1. Ownership

The ownership is divided into interest according to the contributed capital (either cash or property) by each partner. However, such ownership is not traced directly to individual assets; it is a qualified ownership.\footnote{The ownership of property is qualified when it is shared with one or more persons as opposed to absolute ownership where a single person has the absolute dominion over the property. \textit{Black’s Law Dictionary} (West Publishing Co. 6th ed. 1991).} In contrast to the joint venture corporation, there is a direct ownership of (and access to) the oil and gas production in addition to the equipment and facilities.
2. Control

Generally, the management structure of a partnership is more flexible when compared to a corporation. However, given the special nature and sensitive operations of the oil and gas venture, the management structure and formalities need to be tailored with care so that they reflect and accommodate the essence of the relationship between the partners, host states and FOCs. In theory, all partners have an equal right to participate in managing and controlling the affairs of a joint venture partnership.

In practice, a management committee consisting of representatives of the co-venturers is responsible for running the business. The management and voting rights are allocated in accordance with the weighted size of either the capital contributed or the profit shares of the co-venturers. However, unless otherwise agreed to, a minority of partners has the right to participate in the management and control of the joint venture on an equal footing with the majority partners. This right of direct control should be structured well in advance. Finally, the principle of “reserved matters” is necessary to protect the interest of minority partners. Reserved matters are any acts that require the consent of other partners. So, the control and management of a joint partnership is a sensitive and delicate issue that requires tremendous attention and care.

3. Risk

The unlimited liability of each partner creates a great deal of risk, which has caused general partnerships to become unpopular. Partners are personally, jointly, and severally liable for the debts of the ventures. Although a limited partnership can resolve these difficulties, such an arrangement results in another disadvantage: the loss of the right to control and manage the business—the essence of a joint venture. For example, sleeping (or limited) partners cannot get involved in the management of the business for they would become general partners with unlimited liability.

Finally, according to the principles of the agency theory, each partner is considered an agent of the partnership. In other words, the act of each partner is

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115. Sayer, supra note 6, at 9.
116. Id.
117. The determination of what constitutes “becoming involved in the management” is not easy. Herzfeld, supra note 6, at 33-47. Consequently, the adherence to the requirements of limited partnership is a time-consuming and expensive process. Lower, supra note 5, at 53.
118. This supposed relationship is debatable. In essence, it is related to the question whether the implied agency relationship found in partnerships can be or should be applied or extended to joint ventures. Miller comments on such a question by saying: “...it is commonly said that absent an agreement to the contrary the acts of a partner in carrying out partnership business bind the firm, while the acts of a joint venturer in similar circumstances do not.” He refutes such a contention based on the fact that in the absence of an expressed agreement, the limited scope of a joint venture’s commercial operation should nullify the authority of one party to represent the others. Miller argues that the existence of the implied agency relationship in the context of joint venture depends on the nature of the business association (i.e. trading vs. non-trading venture) and not the scope of such a business. So, in his opinion, the agency relationship is not infinite and has its own sensible limits: “From the mere formation of a non-trading venture, without other agreement, it can hardly be implied that the parties contemplate a mutual principal-agent relationship,
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binding on all of the partners. Therefore, host states and FOCs must agree on and carefully draft the management structure and formalities to prevent any possible dispute.

V. Conclusion

By demonstrating that JVCs, SCs, and PSAs came into existence after the disappearance of the classical CAs, our review of the meaning and development of such contracts revealed not only that there was a clear shift to a new stage of contractual relationship (i.e. JVCs), but also the occurrence of certain amendments (i.e. Participation Agreements) to the concessionary contracts well before their disappearance.

Discussing the “legality” of the joint venture with reference to other existing legal vehicles demonstrates that it is not essential to have a water-tight definition of a joint venture. Although all petroleum contracts serve the same purpose, they differ with respect to the ownership of oil and gas resources, the degree of control over operations, and the extent of the national oil company’s participation and/or the assumption of risk by each party to the contract. The joint venture is an association of persons engaging in a common undertaking to generate a product to be shared among the participants. Any joint venture will involve the variables of ownership, control over operations, and risk. In addition, joint ventures are undertaken through a number of legal vehicles, each of which will accommodate these variables differently. The advantages offered by each vehicle are relative and therefore a trade-off is not uncommon.

for there is in no sense a manifestation of consent that any of the parties may act on behalf of the organization.” In short, except for the non-trading ‘restrictions’, according to Miller, the principles of agency apply equally to both partnerships and joint ventures. G. Miller, The Joint Venture: Problem Child of Partnership, 38 Cal. L. Rev. 860, 861 (1950).