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CROSS-BORDER UNITISATION OF PETROLEUM PRODUCTION SHARING AGREEMENTS: THE NEED FOR ADEQUATE SOCIAL STABILITY CLAUSES

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ABSTRACT

This paper argues that there is a missing ingredient in contemporary international law with regards to the protection of inter-governmental agreements concerning the joint development of straddle reservoirs of crude oil and gas. In many oil and gas producing countries, the mineral reservoirs straddle the boundaries of multiple countries especially within the maritime borders. This segment of the paper affirms that, the cross-border straddles are "… potential source[s] of international dispute[s] as to the nature and extent of rights as may be asserted by the several sovereigns under whose territory the pool lies … the potential for conflict is even stronger where the petroleum deposits straddle the common boundary of two or more countries, particularly where the shared boundary has not been delimited."[3] The nature of the spread of the mineral necessitates international co-operations of those countries to facilitate peaceful and lucrative extraction without waste and conflict. The paper concludes that International Unitisation Treaties and Joint Development Agreements (hereinafter referred to as JDA) are prevalent legal mechanisms by which nations form partnership in the development of oil and gas reservoirs that straddle the boundaries of the countries which are parties to the Treaty or JDA.

Keywords: Petroleum, International law, Treaties, International cooperation, Marine resources, Comparative law,Government, Jurisdiction, Hydrocarbons.

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[3]W. T Onorato, 'Apportionment of an International Common Petroleum Deposit' 26 ICLQ, 324-337, p.1 (1977). Also cited in Bulama, Bitrus Joseph "cross-border unitisation & joint development of straddling petroleum resources along shared international boundary: what options are there for states if no agreement is reached?" Online at: https://www.academia.edu/7946510/Cross-Border_Unitisation-_What_Options_are_there_for_States_if_No_Agreement_can_be_Reached_New accessed on 14 Feb 2017

adequate social stability clauses in the partnership agreements.

1. INTRODUCTION

Liquid minerals such as crude oil and natural gas often pool in a large geologic form beneath the Earth's surface. Unitisation is therefore a process by which the pool of the reservoir is divided into tracts or units over the geographical area to provide adequate gap between the drill-wells for proper extraction. Unitisation conglomerates all the ownership rights of the mineral resources, bringing them under common control. It sometimes, merges manifold drilling units into a bigger unit to cover the entire pool of the oil and gas reservoir. Prior to merging the units under central control, each unit is allotted to an owner or the units are all collectively operated under a joint venture (partnership) for the joint development of the mineral resources.

The first part of the paper examines the development, usefulness and constraints of cross-border unitisation. It acknowledges that cross-border unitization, though an effective partnership model for the joint development of crude oil and gas between neighbouring countries[4] faces some social and legal challenges such as the effects of states' internal conflicts on cross-border unitisation[5] treaties and joint development agreements. The second part of this paper draws inferences from the Treaty between the Federal Republic of Nigeria and the Democratic Republic of Sao Tome and Principe on the Joint Development of petroleum and other resources, in respect of the Areas of the Exclusive Economic Zone of the Two States.[6] It argues that the challenges faced by unitisation treaties can be significantly reduced by the inclusion of adequate social stability clauses in the partnership agreements.

Joint venture agreement is a partnership legally binding on two or more parties for specified mutual benefits with each party's duties, obligations and benefits clearly defined. In the field of oil and gas law, joint ventures includes but not limit itself to the joint development of oil prospecting licences and oil mining leases and facilities. Typically, a country with oil and gas reservoirs can enter into a joint venture agreement with a multinational corporation, permitting the corporate entity to explore, produce and export crude oil and gas for the mutual financial benefits of the parties. The Shell Petroleum Development Company of Nigeria Limited (SPDC) which according to official Nigerian government sources, is a joint venture composed of NNPC (55 per cent), Shell (30 per cent), Elf (10 per cent) and Agip (5 per cent) and operates largely onshore on dry land or in the mangrove swamp,[7] provides such example. Unitisation is thus a form of joint venture agreement.

It is very common in the minerals exploration and extraction industries, where minerals have the capability of migrating across common borders, for example, crude oil reservoirs that resides on the boundary of lands owned by separate countries or separate private land owners. In such circumstances, the various land owners may wish to enter into a joint production agreement to circumvent the complications of individualised chaotic production and to eliminate possible "capture"[8] of migrated crude oil. Unitisation

[4] See: N Macleod Unitization in G Gordon, J Paterson and E Usenmez Oil and Gas Law – Current Practice and Emerging Trends, 2nd Ed Dundee University Press, 2011.

[5] In this paper, the expression International Unitisation is used interchangeably with Cross border unitisation

[6] The Treaty or the N/STP-JDZ Treaty

[7] Kingston, Kato Gogo. Pollution and Environmental Responsibility in Petroleum Extraction In The Niger Delta Of Nigeria: Modelling The Coase Theorem. Germany: Lambert Academic Publishing (2017) at p. 23

[8] In the field of oil and gas law, the *rule of capture* states that crude oil is like wild animal hence, no one owns it. Hpowever, the first person to capture it is the owner of the quantity captured. The doctrine (rule) was first developed in England and has become a very crucial aspect of oil and gas law. In *Kelly v. Ohio Oil* (49 N.E. 399, Ohio

agreements legitimises slant and directional drilling across national frontiers within and across the borders of the contracting parties. Unitisation is less complex where the parties are private mineral land owners especially, in the United States where the laws permit private ownership of mineral lands. In countries where mineral bearing lands are owned by the State, unitisation agreements occur in the form of Treaties between nations such as the Cross border or international unitisation of Nigeria and Sao Tome.[9] According to Asmus and Weaver:[10]

> Without unitized operation of the [crude oil and gas] reservoir, the common law "rule of capture" results in competitive drilling and production with consequent economic and physical waste, as each separate owner attempts to secure his or her fair share of the underground resource by drilling more and pumping faster than his neighbour. To conserve its petroleum resources, the United States became the unitization capital of the world as measured by the enactment and use of domestic unitization laws."[11]

Cross-border unitization and joint development of petroleum assume the form of bilateral Investment Treaties (BITS). Cross-border unitization and joint development of petroleum reservoirs that straddles across common international boundaries are the two major types of bilateral joint venture agreements among countries of a 'common pool'.[12] In the last few decades, the two models of co-operation have provided many countries with the essential outlines for joint exploitation, extraction and mutual sharing of mineral resources where unilateral development would have possibly lead to inter-states skirmishes. To avoid disputes and conflicts the joint development partners, the parties prefer to develop co–operative plans to foster the extraction of mineral deposits "collectively."[13]

In *Eritrea v. Yemen (Arbitration, Phase II Maritime Delimitation),*[14] the arbitral panel acknowledged that *"there has grown up a significant body of cooperative state practice in the exploitation of resources that straddle maritime boundaries."*[15] Onorato[16] observed that joint development and cross-border unitization are obliging practices intended to preserve the unity of mineral "*deposits while respecting the inherent, sovereign rights of the interested states*." Bulama[17] thus, explains:

> … whereas, cross-border unitisation applies in respect of reservoir underlying two or more countries that have delimited boundary between them, joint development on the other hand,

1897), it was held that: (a) Oil does not automatically become property until it is extracted from the land, before it can be claimed as the personal property of the person that extracted it; (b) It is irrelevant where the oil came from originally so long as it was naturally drained into the owners well.

[9] Another example is the cross-border unitisation of Ikanga - Zafiro Treaty crude oil fields signed by Nigeria and Equatorial Guinea

[10] David Asmus and Jacqueline Weaver. Unitizing Oil and Gas Fields Around the World: A Comparative Analysis of National Laws and Private Contracts. *Houston Journal Of International Law*, Vol. 28 (2006)

[11] *Id*, p. 7

[12] Common pool in this context refers to the reservoir of crude oil and natural gas that situates across neigbouring national boundaries.

[13] O T. Oduntan. Modalities for Post Boundary Dispute, Cross Border JPZs/Unitisational Upstream Hydrocarbon Exploration in the Gulf of Guinea? OGEL (2009)

[14] Arbitral Tribunal Award, 17 December, 1999. Accessible at http://www.pca-cpa.org. accessed 15/2/2017

[15] *Id*.

[16] W.T Onorato. 'Apportionment of an International Common Petroleum Deposit'26, ICLQ, 324-337, at 332-33 (1977)

[17] Bitrus Joseph Bulama, "cross-border unitisation & joint development of straddling petroleum resources along shared international boundary: what options are there for states if no agreement is reached?" Online at: https://www.academia.edu/7946510/Cross-Border_Unitisation-_What_Options_are_there_for_States_if_No_Agreement_can_be_Reached_New accessed on 14 Feb 2017

refers to an arrangement between two or more countries to jointly develop and share petroleum resources found within a geographic area that has disputed sovereignty, and usually designated and developed as joint development zone (JDZ).

A Joint Development Agreement (JDA) however, differs from cross-border unitisation treaties. JDAs occur when two or more states are 'legitimately' laying claim to mineral reservoirs within an overlying continental shelf or in an exclusive economic zone; The contending parties may wish to co-operate to develop and exploit the minerals found in the disputed area pending the determination of issues under contention such as the demarcation of the maritime area.[18] The legal backing of such an arrangement is contained in Article 74(3) of the United Nations Convention on the Law of Seas (UNCLOS).[19]

It provides that states which are unable to resolve disagreement over the boundaries of their continental shelves and exclusive economic zones should endeavour to jointly make practical interim arrangements for development of mineral deposits situated on the *"overlapping geographical area under dispute without foregoing their territorial sovereignty."*[20] On the other hand, cross border unitsation is an agreement by two or more countries to co-operate in the development of minerals resources straddling across the boundaries of the contracting parties. In unitisation agreement, there are usually no dispute over the boundary where the reservoir situates.

Contemporary public international law approves the joint development of gaseous and liquid mineral resources that straddle across nation states however, it stipulates strict procedural conditions on state parties. In the event that, the countries hosting the pool of minerals are not able to reach an agreement on joint development, the law permits each country to exploit the resources within its own national frontier.[21]

As stated earlier, where each country sharing the same straddle of crude oil and gas opt for unilateral drilling and exploration, there is a possibility of unhealthy competition in the drilling and use of seismic explosives that are likely to have extensive ecological negative externalities. An increase in the cost of

[18] D M Ong. Joint Development of International Common Offshore Oil and Gas Deposits: Mere State Practice or Customary International Law? (Vol. 93 American Journal of International Law) 771 – 804 (1999); P D Cameron, The Rules of Engagement: Developing Cross- Border Petroleum Deposits in the North Sea and the Caribbean, (Vol. 55 International & Comparative Law Quartely 559 – 585 (2006); D M Ong, Implications of Recent Southeast Asian State Practice for the International Law on Offshore Joint Development (Essex University Law School) available at <http://cil.nus.edu.sg/wp/wp-content/uploads/2011/06/Session-5-David-Ong-JD-SEAsianStatePractice-Jun111-pdf.pdf> accessed on 14 Feb 2017

[19] UNCLOS *op cit*

[20] The United Nations Law of the Sea Convention 1982 (UNCLOS) obliges "States which have not been able to agree boundaries of their continental shelves and exclusive economic zones to make efforts to enter into provisional arrangements of a practical nature to develop the Petroleum deposit located in the overlapping geographical area under dispute whilst not forgoing their sovereignty or sovereign rights to the deposits in place in its territory or continental shelf"; Article 83 (3) and 142 of the 1982 UN Convention on the Law of the Sea (UNCLOS);Churchill quoted in Hazel Fox, Joint Development of offshore Oil and Gas, vol II, The British Institute of International and Comparative Law, 1990, p. 55 (adapted from Awe Akinwale, Oil & Gas Law, Robert Gordon University, Scotland, UK (2014). Available online at: https://www.academia.edu/7415180/OIL_and_GAS_LAW_TRANSBOUNDARY_OFFSHORE_RESOURCES?auto=download Accessed 15/2/2017)

[21] Peter D. Cameron, The Rules of Engagement: Developing Cross-Border Petroleum Deposits in the North Sea and the Caribbean, *The International and Comparative Law Quarterly,* Vol. 55, No. 3, pp. 559-585 (2006)

production and environmental remediation is also likely. The authors argue that a preferable option is the joint production partnership. However, we acknowledge that, it is very difficult to ascertain absolute *correlative rights*[22] of the contracting parties in such joint production partnership. This is because the principle of correlative rights requires that every party to a JDA should be given a fair share in the *profit oil*.[23]

2. THE RULE OF CAPTURE AND THE NEED FOR STATES' CO-OPERATION

The UNCLOS controls the demarcation of maritime boundaries, and contains provisions on techniques of managing the overlying prerogatives of countries sharing common shorelines, and for compliance with the inherent rights and interests of third-party States. Specifically, Articles 74 and 83 of UNCLOS provided for maritime demarcation of the Exclusive Economic Zone and Continental Shelf, with precise emphasis on States' obligations *vis-à-vis* maritime areas that are not demarcated to which no short-term arrangements apply. Articles 74(3) and 83(3) UNCLOS warns states to abstain from actions that possibly will endanger or hinder the accomplishment of final agreements on demarcation.

The UNCLOS bequeaths upon states the rights over mineral reservoirs found in their maritime territories and the Exclusive Economic Zones. Consequently, states have the rights to extract and develop mineral resources within their own side of a clearly demarcated maritime borderline irrespective of whether the pool of the mineral straddles into another country. In essence, the UNCLOS backs the rule of capture.[24]

The rule of capture originates from English common law and has since been adopted across the world. The rule excludes liabilities of the extractor of captured mineral resources, including groundwater, crude oil and natural gas. It implies that the first to capture such resources retains the ownership. The rule of capture therefore, permits a landowner to extract and capture crude oil and natural gas from the reservoir that is beneath his own property, even where the minerals escapes from the adjoining land owned by another. In the classic case of *Acton v. Blundell,*[25] the defendant was a miner who drilled pits on his own land and extracted the water, which flowed under the property of the claimant. Thereafter, the well on the plaintiff's land which was about a mile away dried up. The plaintiff sued for an action in the tort of trespass. It was held *inter alia*:

> ... that principle, which gives to the owner of the soil all that lies beneath his surface; that the land immediately below is his property, whether it is solid rock, or porous ground, or venous earth, or part soil, part water; that the person who owns the surface may dig therein, and apply all that is there found to his own purposes at his free will and

[22] The doctrine of correlative rights is a legal concept which restricts the rights of the owners of land that falls within the area of common pool of water or crude oil or gas to the proportion of the size of land owned by each on the surface above the pool. Also, the doctrine states that, "each owner of a common reservoir should be afforded his or her fair share of the recoverable oil or gas beneath his or her land. One mineral owner's right to produce oil and gas (Rule of Capture) is limited by the obligation to do so without waste or negligence,"
Adapted from http://www.landmanblog.com/rule-of-capture-correlative-rights/ accessed 15/2/2017

[23] Profit oil is the total quantity of oil that the JDA parties could share in the proportion of their agreed sharing principle. When crude oil is extracted or captured by the operating partner, the cost of production is deducted and the remainder is the profit. However, in JDAs, the cost of production is not awarded to the operating partner in cash but in crude oil value. The crude oil given to the operating partner to cover the cost of production is called "cost oil" and the remaining crude oil after deduction of cost oil is known as profit oil.

[24] V. Prescott and C. Schofiled, The Maritime Political Boundaries of the World, (2nd Ed, Boston, Martinus Nijhoff Publishers (2005).

[25] 12 Mees. & W. 324, 354, 152 Eng. Rep. 1223, 1235 (Ex. Ch. 1843)

> pleasure; and that if, in the exercise of such right, he intercepts or drains off the water collected from underground springs in his neighbour's well, this inconvenience to his neighbour falls within the description of damnum absque injuria, which cannot become the ground of an action.

Some scholars have portrayed the rule of capture beyond ownership of land context, for example, Kuntz[26] argued that in the 'exclusive-right-to-take theory' the legal interest owner of land only own the surface of the land but, he however, may retain the exclusive rights of capture. In essence, *"the owner of a tract of land acquires title to the oil and gas which he produces ...though it may be proved that part of such oil and gas migrated from adjoining lands."*[27]

The case of *Acton v. Blundell* illustrates that every land owner has an absolute right to appropriate crude oil, groundwater, and gases that he captures on his land or that flows into it without being liable for breach of duty of care to other landowners. This principle was emphasised in *Ballard v. Tomlinson*,[28] where it was held that: "*Percolating water below the surface of the earth is ... a common reservoir or source in which nobody has any property, but of which everybody has, as far as he can, the right of appropriating the whole."* The rule of capture becomes more problematic where it involves two or more national boundaries. The prevailing scheme of international law tends to lean towards boundary delineation to determine the point of ownership of captured minerals. For example, Article 6 of the Geneva Convention[29] provides *inter alia*:

> 1. *Where the same continental shelf is adjacent to the territories of two or more States whose coasts are opposite each other, the boundary of the continental shelf appertaining to such States shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary is the median line, every point of which is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.*
>
> 2. *Where the same continental shelf is adjacent to the territories of two adjacent States, the boundary of the continental shelf shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary shall be determined by application of the principle of equidistance from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.*
>
> 3. *In delimiting the boundaries of the continental shelf, any lines which are drawn in accordance with the principles set out in paragraphs 1 and 2 of this article should be defined with reference to charts and geographical features as they exist at a particular date, and reference should be made to fixed permanent identifiable points on the land.*

In the *North Sea Continental Shelf Cases*[30] the disputes concerned large international

[26] Robert E. Kuntz, 'The Rule of Capture and its Implications as Applied to Oil and Gas', 13, Texas Law Review, 391 (1935)

[27] *Id*, p. 393.

[28] 29 Ch.D. 115 (1885). Also see: *Sipriano v. Great Spring Waters of America*, Inc., 1 S.W.3d 75 (Tex. 1999) and; *Barshop v. Medina County Underground Water Conservation Dist.*, 925 S.W.2d 618 (Tex. 1996) *Barshop v. Medina County Underground Water Conservation Dist.*, 925 S.W.2d 618 (Tex. 1996) *Barshop v. Medina County Underground Water Conservation Dist.*, 925 S.W.2d 618 (Tex. 1996)

[29] Convention on the Continental Shelf, Geneva, 29 April 1958, Entry into Force: 10 June 1964

maritime boundaries rich in mineral resources. The issues were thus, based on the strict interpretation and application of Article 6 of the Geneva Convention. The International Court of Justice approves the concept of joint development and cross-border unitisation of minerals reservoirs. The *North Sea Continental Shelf Cases* reinforces the relevance of cross border unitisation. However, there is currently a lack of a binding generic international regime to regulate joint co-operation in the development of crude oil and gas that straddles national frontiers.[31] This vacuum in the international law necessitates the mutual co-operation of neighbouring states in the form of partnership either by cross-border unitisation Treaties or through joint development agreements. This need for co-operation was reinforced by *Resolution 3129* of the United Nations General Assembly which provides as follows:

> It is necessary to ensure effective cooperation between countries through the establishment of adequate international standards for the conservation and harmonious exploitation of natural resources common to two or more states in the context of normal relations between them."[32]

Articles 2 and 6 of the UN Convention on the Continental Shelf[33] authorize coastal states to exploit mineral deposits that are within their continental shelves. The convention regards such rights as "*sovereign rights*."[34] The sovereign rights of nations over continental shelf extends up to two hundred nautical miles from the reference point, in accordance with the provision of the *UNCLOS.*[35]

3. LEGAL FRAMEWORK OF CROSS-BORDER UNITISATION

The legal framework for cross-border unitisation is based on three basic sources of enabling instruments, namely: (a) national laws and regulations; [36] (b) international law;[37] and, operating agreements of the relevant parties.[38] For example, Articles 74 and 83 of the UNCLOS forbids unilateral exploitation of minerals that straddles across border that are in maritime areas in dispute except where the disputing parties decide to cooperate in the exploration and development of minerals. In *Guyana v. Suriname*[39] the Tribunal stated that, irrespective of any existing disagreement over the maritime boundaries, states are obliged under Article 74 and 83 of the UNCLOS, to co-operate with regards to the exploitation of the straddle[40] minerals reservoir. Further, states could co-operate to exploit minerals that straddle without demarcation of maritime boundary for instance, in 1965, the United Kingdom signed a bilateral Treaty with Norway for cooperation in the joint exploitation of straddling mineral reservoirs in the North Sea without geographically

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[30] The cases involved the *Federal Republic of Germany v. Denmark* and the *Federal Republic of Germany v. Netherlands* with a combined citation, I.C.J. 1969 I.C.J. 3

[31] Francis N. Botchway. "The Context of Trans-Boundary Energy Resource Exploitation: The Environment, the State and the Methods," Vol.14:2 Colo. J International Environmental Law L. & Pol, pp. 190- 240 at p. 228 (2003)

[32] UN General Assembly. "Cooperation in the field of environment concerning natural resources shared by two or more states" UN General Assembly Res. 3129; I.L.M. XIII, 232 (1973)

[33] The UN Convention on the Continental Shelf, 1958; Website: http:www.oceanlaw.net/texts/genevacs.htm accessed on 14th Feb, 2017.

[34] Nicola MacLeod, "Unitisation" in Greg Gordon, John Paterson and Emre Usemez (Eds) Oil and Gas Law: Current Practice and Emerging Trends, (2nd Ed. Dundee University Press,) pp. 433-434 (2011)

[35] *Id*, op cit

[36] Asmus, D and J Weaver, *supra*

[37] These are International conventions, bilateral treaties, and international customary laws

[38] See: R Lagoni, "Oil and Gas Deposits Across National Frontiers", Vol.73 American Journal of International Law 215 at 216 (1979)

[39] ICGJ 370 (PCA 2007)

[40] Straddle reservoir in oil and gas law describes reservoirs that stretches across a national boundary into the legal boundary of another country.

demarcating specific fields.[41] Another example is the joint development Treaty between Saudi Arabia and Bahrain.[42]

Due to a possible divergent legal regime[43] of the parties to cross-border unitisation in addition to the existence and the importance of respecting nation's territorial sovereignty and, the recognition of the exclusive sovereign rights of states over their natural resources. The mineral deposits are thus, subject to dissimilar legal rules, diverse terms and conditions for exploitation and transportation of minerals.[44] Asmus and Weaver;[45] and Akinwale[46] conclude that cross-border unitisation treaties could be used to exploit a reservoir or multiple crude oil and gas reservoirs.

> …the cooperation of the two states through a treaty or international agreement on issues related to optimum field whilst maintaining their sovereign rights and the licensee's single development plan and a unit operating agreement, and developed subject to the approval of both countries. Each license group's share of production and costs is based on the proportionate share of the field's oil and gas and each licensee pays its taxes and royalties in accordance with the terms of its own contract. The legal framework maintains two separate sets of regulations and fiscal terms."[47]

4. THE NEED FOR STABILIZATION CLAUSES

Katja and Brillo[48] observed that the reason for the inclusion of stabilization clauses in a bilateral agreement is to enable parties to manage investment risks. Consequently:

> Stabilization clauses are mostly included in contracts that relate to capital-intensive projects, such as extractive industry, infrastructure or public services' projects (e.g. mining, oil, electricity, water and sewage, telecommunications, transport) and involve concession agreements (CA), production sharing agreements (PSA), and build-operate and transfer agreements (BOT).[49]

Stabilisation clause in this context refers to such clauses inserted in contracts signed by national governments and the oil corporations. This is because, the projects naturally necessitate huge preliminary capital investments and develop into lucrative ventures as the investments grow. The need for assurance that the huge investment by the corporations will be safe necessitate the inclusion of the stabilisation clauses in the contracts. This is the approved standard of the

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41 Cecilia Low, "Marine Environmental Protection in Joint Development Agreements" Vol.30: 1 JERL (2012)

42 Lagoni, R (1988) Report on Joint Development of Non – Living Resources in the Exclusive Economic Zone (Warsaw Conference of the International Committee on the Exclusive Economic Zone, (International Law Association 2)

43 Each country has its unique legal system that would influence the nature of agreement it enters with another.

44 Awe Akinwale, Oil & Gas Law, Robert Gordon University, Scotland, UK (2014). Available online at: https://www.academia.edu/7415180/oil_and_gas_law_transboundary_offshore_resources?auto=download Accessed 15/2/2017

45 D Asmus and J. Weaver, *Supra*

46 Awe Akinwale, *supra*

47 *Id*

48 Katja Gehne and Romulo Brillo. Stabilization Clauses in International Investment Law: Beyond Balancing and Fair and Equitable Treatment; Working Paper No 2013/46 Working Paper No 2013/46 Working Paper No 2013/46 (2014).

49 Cotula, Lorenzo, *Briefing 4: Foreign Investment Contracts,* International Institute for Environmental and Development, Sustainable Markets Investment Briefings, August 2007, p. 1. (2007), Cited in Katja and Brillo, *op. cit*

International Energy Charter,[50] For example, in *Kuwait v Aminoil*[51] the tribunal decided that the stabilization clause in the agreement which prohibited the nationalisation of the foreign-owned assets established legitimate expectations in the minds of the private corporation which implied that the corporation's assets would not be subject to seizure. The implication of *Kuwait v Aminoil* is that:

> Large projects with longer periods to recover the costs and generate profits, such as infrastructure investments, seek guarantees that changing investment conditions do not harm the cost-benefit equilibrium of the investment. Pre-investment cost-benefit calculations may be significantly distorted by later environmental and social legislation, e.g. related to new technology standards or retirement, employment and health care regulation.[52] Host states grant stabilization clauses to accommodate the investors' interests and attract future investment by providing a high level of warranty. Their use is fostered by their inclusion in model agreements that set a certain standard of protection for specific sectors or industries, such as, for example, the Energy Charter Model Host Government Agreement (HGA) on Cross-Border Pipelines.[53]

5. CONFLICTS, POLITICAL AND SOCIAL RISKS OF JDA PARTNER COUNTRIES

Crude oil and natural gas often lie at the heart of the regions of the world that are relatively prone to civil conflicts and political unrest that create uncertainty for economic activities. Although the profits from crude oil and gas resources are huge, so also are the associated risks. It is often challenging to regulate and tackle the activities of sinister resource traders, crude oil smugglers, crooked local officials, weapons dealers, transport operators and avaricious companies. Political instability in some countries often exacerbates internal conflicts that often involve the use of the state apparatus to suppress the violence and resistance thereby leading to an increase in volatile insurgency.

Entering into JDA or cross-border unitisation with a neighbouring country whose risk profile is very high requires careful planning. There is the need for nations engaging in bilateral investment agreements to expressly agree on whose obligation it is to bear the burden of attacks by both government and non-government agents, which inflict damages and causes disruption of production and supply activities with regards to cross-border unitisation of crude oil. In many of the oil producing countries in Africa, there is a high-risk of civil unrest which often affect the social efficiency of JDA. For example, the Nigeria-Soa Tome JDA[54] has suffered from Nigeria's high political risk which consistently forces the oil corporations to discontinue, suspend or scale-down their operations.

There is also some degree of doubt around the monetary rules in Nigeria with high impact on the legal framework governing the operations of the JDA.[55] Since the commencement of the

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[50] International Energy Security: Common Concept for Energy Producing, Consuming and Transit Countries (2015) at: http://www.encharter.org/index.php?id=182 accessed 17/2/2017

[51] *The Government of the State of Kuwait v The American Independent Oil Company*, tribunal award 1982

[52] Also in T.W. Wälde, *Stabilising International Investment Commitments: International Law versus Contract Interpretation*, CPMLP Professional Paper No. PP13, pp. 1-89, p. 5. (1994)

[53] Katja and Brillo, *supra*.

[54] The development of the straddling crude oil reservoir is the JDZ, an area of overlapping maritime boundary which is defined by internationally recognised coordinates of the Gulf of Guinea. It covers an area of 34,450 sq. km.

[55] "Security experts say pirates have emerged from militant groups in Nigeria's oil-producing Niger Delta, such as the Movement for the Emancipation of the Niger Delta (MEND)" adapted from: http://www.marinelink.com/news/equatorial-agreement406752 accessed 21/2/2017

JDA, there have been instances of attack of the facilities by maritime criminal including piracy, abduction of project personnel, crude oil theft, and sabotage of oil rigs. These occurrences necessitate effective measures by Nigeria and Soa Tome.

Most cross-border unitisation contracts contain clauses on: Unit operating committee procedures and voting; The factors that should determine the creation of the unit; Determining Unit Interests*;* Redetermination; Determination of Tract Participations; Redetermination of Tract Participations; and, non-unit operations.[56]

A great proportion of the cross-border unitisation treaties adopt the model formulated by the Association of International Petroleum Negotiators (AIPN) in 2006. Whilst the model template of the AIPN is helpful, the parties may have to redesign or customise the content to suit their required standards. The major defect with the template is that it fails to provide for the insertion of social stability clauses. It seems to recommend one format to every JDA and cross-border unitisation without taking into account the features and divergence of the straddling mineral reservoirs; the peculiar nature of the countries where the straddling reservoirs are located; and the frameworks by which the straddling reservoirs are being developed.

Bilateral contracts which involve two neighbouring countries for the purpose of joint exploration of crude oil and gas are akin to what Coase[57] described as an "*arms-length contract*" and hence, involve some degree of costs. Thus, where there is a likelihood of instability in the project area, corporations would be willing to enter into a long-term contract with the project managers. Subsequently, the parties to cross-border unitisation need to guarantee each other some degree of stability to encourage the sub-contracting oil corporations to invest in the ventures. This is because socio-political stability ensures equity of investments. In national unitisation where a country unitizes its reservoir of crude oil and gas and contract with corporations, stabilisation clauses are tailored towards assuring the corporations that their investments will be safe in the event of any changes in national regulatory laws.[58] According to the United Nations, [59] stabilisation clauses are "*contractual clauses in private contracts between investors and host states that address the issue of changes in law in the host state during the life of the project.*"[60]

There is very limited literature on the subject of stabilisation clauses in cross-border unitisation. It appears however, that one of the possible reason for the gap in this area is because, in many cross-border bilateral agreement for joint development and production of crude oil, the *force majeure clause* is believed to be sufficient to cover all events which may be caused by acts of God and other forces beyond the parties' control.

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[56] Howell, Nina and Weems, Philip (2016) Oil and Gas Unitization: Specific Considerations for Cross-Border Unitization. Online at: http://www.energylawexchange.com/oil-gas-unitization-specific-considerations-cross-border-unitization/ accessed 14/2/2017

[57] R. H Coase, The Nature of the Firm. Economica, New Series, Vol. 4, No. 16. pp 386-405 (1937)

[58] "By a stabilization clause, the state accepts that the existing and future laws would not affect the contractual terms agreed upon with the investor and retaining the sanity of contracts by protecting the investor from unaccepted actions by the HS, stabilization and adaptation clauses major aims is to maintain the initial contractual terms and condition as previously signed by both parties" Adapted from: UK Essays. November 2013. Impact Of Stabilization Clause On Petroluem Agreements Commercial Law Essay. [online]. Available from:www.lawteacher.net/free-law-essays/commercial-law/impact-of-stabilization-clause-on-petroluem-agreements-commercial-law-essay.php?cref=1 [Accessed 17 February 2017].

[59] In the following: SRSG study.

60 Andrea Shemberg, *Stabilization Clauses and Human Rights*, IFC/SRSG Research Paper. 11 March 2008. Available at: http://www.ifc.org/ifcext/sustainability.nsf/Content/Publications_LOE_Stabilization, Accessed 13/2/2017)

This paper argues that social stabilization clauses must be inserted in all cross-border unitization agreements. In this context, social stabilization clause is described as a clause or a group of clauses that should clearly apportion liabilities to any party whose failure to effectively protect the project geographical area from invasion, sabotage, and any acts resulting from the territorial zone of the party which obstructs or interfere with the normal course of the exploration and production activities. There also exists the possibility of the eruption of inter-state war or intra-state civil unrest which may affect parties' ability to perform their obligations under the JDA or cross-border unitisation treaty. For example, Dudley[61] observed:

> Armed conflict is raging all around the world right now … A number of scenarios can complicate legal obligations when an armed conflict erupts between state parties to a treaty. For example, imagine you are the leader of a State that has just declared war on another State. After fighting commences, you come to the realization that your country previously entered into a number of treaties with the same State with which you are now at war. Are those treaties still in effect? What would happen if neither State formally declared war? Imagine yet another scenario where there is no international conflict, but violent clashes have erupted between the State's military and armed groups within the territory. Is the State still bound to fulfil all of its treaty obligations with other states? What if the State's military is not involved in the clashes, but instead the violence is carried out by at least two groups of non-state actors?

In the past, when and where there was an outbreak of war between contracting states, all treaties were deemed annulled.[62] However, in contemporary international law, this is no longer the situation. The trend shifted slightly following the United Nations International Law Commission (UNILC) documented model which was formulated as the Draft Articles on the Effect of Armed Conflict on Treaties and adopted by the United Nations General Assembly in 2011.[63]

The 'Draft Articles' proffer guidance on the necessity for earmarking steps to protect treaties and their provisions in the event of the occurrence of unforeseen circumstances that could require such treaties to be suspended or terminated. It outlined the possible effects armed conflicts on treaties thus and sought to provide guidelines on the best ways of protecting treaty related projects, properties and investments that fall within the territories of armed conflict.

Even though, the UN Draft Articles made significant inroad towards the protection of treaty provisions caught-out by wars or armed conflicts, it is yet to be accepted as an authoritative international law machinery requiring states to be bound by it. Secondly, there is no specific provision that guarantees stability of treaties and fails to speculate on fragility of states. Further, there is a lack of consensus on the meaning of 'armed conflict'. Several organisations and scholars have given different interpretations to the concept.

The most likely acceptable description was provided in 1995 by the International

[61] Lauren Dudley. "Until We Achieve Universal Peace: Implications of the International Law Commission's Draft Articles on the "Effects of Armed Conflict on Treaties"," American University National Security Law Brief, Vol. 6, No. 1, at p. 1 (2016) Available at: http://digitalcommons.wcl.american.edu/nslb/vol6/iss1/2 accessed on 4 March 2017

[62] Silja Vöneky. *Armed Conflict, Effect on Treaties* 1, *In* Max Planck Encyclopedia Of Public International Law, Online Edition (Rüdiger Wolfrum ed., (2011). At http://opil.ouplaw.com/home/epil. retrieved 20 October 2017

[63] *Effects of armed conflicts on treaties*; 9th Dec 2011., UN Doc. A/RES/66/99

Criminal Tribunal for the Former Yugoslavia ("ICTY") as follows: "[Armed conflict occur] whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State."[64] Also in *Prosecutor v. Musema,*[65] the court said:

> The expression '*armed conflicts'* introduces a material criterion: the existence of open hostilities between armed forces which are organized to a greater or lesser degree. Internal disturbances and tensions, characterized by isolated or sporadic acts of violence, do not therefore constitute armed conflicts in a legal sense, even if the government is forced to resort to police forces or even armed units for the purpose of restoring law and order. Within these limits, non-international armed conflicts are situations in which hostilities break out between armed forces or organized armed groups within the territory of a single state."[66]

The Draft Articles presume the continuity of treaties in the event of outbreak of armed conflict. Conflict thus, does not itself terminate or suspend the operation of any existing treaty. It goes on to provide the index of the nature of treaties which implies continued operation during armed conflicts. Accordingly, the examples of such treaties that are not affected by armed conflicts are treaties of friendship and commerce; navigation and analogous agreements concerning private rights; and, treaties relating to commercial arbitration. However, "termination or suspension of a treaty in times of armed conflict would be subject to certain formalities. An intention by a State Party to terminate or suspend requires notification. A State Party thus affected may object. This procedure would lead to the obligation to resort to dispute settlement."[67]

Most bilateral investment treaties for example, Article 1105(1) of the North American Free Trade Agreement and Article 10(1) of the Energy Charter Treaty, do contain numerous types of express clauses covering eventualities such as armed insurgency and criminality. The essence of the inclusion of such clauses, is to protect the equity and the rights of the contracting parties. It is important to note that, the express provisions that guarantees unmistakable protection and security of the parties' investment is not good enough without a separate clause providing for the avoidance of the act and/or the provision for indemnity where stability of the investment environment is violated to such extent that losses accrued.

However, it is difficult to hold a state party liable for the act or omission committed by non-state actors, but easier to hold a state party liable for failure to guarantee protection and security of investment where the vicious act is from state organs, for example, the enforcement of a treaty provision where there is a straight attack on a party's property by an institutional actor of a contracting party is easy to prove.

In certain circumstances, the nefarious activities of non-state actors which causes loss to a contracting party of a bilateral agreement may be apportioned to a party where there is strong evidence of failure of that party to curb the activities. For example,

[64] *Prosecutor v. Tadic*, Case No. IT-94-1-A72, p. 70 (2 October 1995).

[65] Case No. ICTR-96-13-T. In this case, the International Criminal Tribunal for Rwanda re-defined armed conflict in an attempt to fill the vacuum of Article 3 of the Geneva Conventions which fails to provide a precise definition of non-international armed conflicts

[66] Id at pp. 247–48

[67] Christoph Schreuer, The Protection of Investments in Armed Conflicts, of Counsel, Wolf Theiss
Vienna; former Professor of Law, University of Vienna (2017). Online at: http://www.univie.ac.at/intlaw/wordpress/pdf/Armed%20Conflict.pdf accessed 7 March 2017

In *Biwater Gauff* v. *Tanzania,*[68] the tribunal stated that, the term "*full security standard" is not restricted to a State's party's "failure to prevent actions by third parties, but also extends to actions by organs and representatives of the State itself."*[69]

It suffices to saying that, actions of non-state actors such as rebels and insurgent gangs whose activities affects the investment of a party or parties of bilateral agreement(s) cannot be ignored by the party that suffer the loses. Despite the existence of various types of clauses, there is still room for the inclusion of special stabilisation clauses designed purposefully to cover all manners of instability which may arise within the operational zones of the bilateral investment treaties.

6. CONCLUSION

The current regime in JDA and cross-border unitisation treaties appears to depend largely on the existing concept of *force majeure* and the provisions of the UN Draft Articles which are both not emphatic enough to cover the events of local insurgencies occurring within the territory of a contracting state party that often affect the profits of the joint development projects to the detriment of a conforming state party.

Many bilateral agreements provide that, each state party should ensure adequate security of the joint projects, but often, the parties have failed to curb illegal and sometimes violent activities to such extent that economic losses arise. For example, the frequent insurgency and attacks against oil and gas facilities in Nigerian maritime zones had grave consequences on the Nigeria – Soa Tome joint development agreement to the detriment of Soa Tome.

The introduction of new social stability clauses into crude oil joint development agreements and cross-border unitisation agreements will offer much more than temporary solutions for socially efficient decisions involving inter-state bilateral investment cases. It will also aid treaty interpretation and serves as a point of reference for bilateral investment agreement jurisprudence.

[68] *Biwater Gauff* v. *Tanzania*, Award, 24 July 2008, para. 730. Adapted from Schreuer, Christoph, *Id*., p.5
[69] *Id*