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OFFSHORE OIL AND GAS DRILLING REGULATORY REGIMES IN NIGERIA: UNFOLDING THE SETBACKS

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ABSTRACT

There is a growing concern on the complicated nature of the enforcement of regulatory instruments with regards to the accountability of crude oil companies' offshore production activities in Nigeria. Elsewhere in the world, adequate steps are well structured to monitor compliance and enforce the laws to create the balance between crude oil production and socially efficient accountability with regards to safety, environmental responsibilities, economic equilibrium, fiscal stability of oil production and customary international laws. Consequently, this article seeks to identify the fundamental defects with the relevant laws and regulations governing offshore oil drilling in Nigeria and to device the best possible ways to improve the omisions and lapses in the laws, regulations, and the institutional management of the offshore facilities.

Keywords: Offshore facilities, Crude Oil, Gas, Laws, Nigeria.

1. INTRODUCTION

Offshore drilling for oil and gas within the shallow and deep waters of Nigeria account for about 49% of the total national production. As of September 2018, the Egina Floating, Production, Storage and Offloading (FPSO) vessel commenced drilling in deeper horizon. This signals the possibility of more drilling into deeper Atlantic zone of Nigeria's maritime waters. The shifting of drilling activities further into deeper zones of the sea brings growing risks to the marine environment and further complicates the already weak regulatory regimes. The

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danger associated with the inability of government to effectively and efficiently regulate offshore drilling activities of the oil corporations was succinctly expressed by Hults[3] as follows:

> The April 2010 explosion and sinking of the *Deepwater Horizon* oil drilling rig in the Gulf of Mexico, which claimed eleven lives and led to the United States' largest ever offshore oil spill, sparked reflection on the future of offshore oil drilling. Among the critiques were that regulatory agencies failed to take account of an infrequent, catastrophic "fat-tail" risk like the *Deepwater Horizon* disaster; that regulators did not understand oil drilling technologies well enough to properly regulate them; that the liability regime did not incentivize oil companies to take proper care; and that the Department of Interior's former Mineral Management Service (MMS)—the government entity primarily regulating offshore drilling—was corrupted by the industry it oversaw.

An offshore oil platform[4] is usually a huge edifice with amenities for crude oil well drilling which serve the purposes of facilitating the exploration, extraction, storing, processing of hydrocarbon products including natural gas which lies from underneath the the seabed. Most offshore oil platforms are equipped with facilities to accommodate the personnel and equipment.

The first recorded offshore drilling platform was an underwater oil well constructed 10 metres deep to the seabed of the pacific ocean and about 400 metres off the coast of Summerfield in California, United States in 1896. In 1947, the first crude oil well was drilled from a fixed oil platform off the coast of Louisiana in the United States. The platform had a depth of 5 metres.[5] The world first deepest offshore oil well on a fixed platform was constructed in 2013 off the coast of India at a depth of 3,165 metres.[6]

There are two major form of offshore oil platforms namely; fixed and floating. The fixed platforms are erected firmly to the seabed with the working spaces high above sea level. Some fixed platforms are constructed in the form of artificial islands where sand has been dredged

[3] D Hults. *Environmental Regulation at the Frontier: Government Oversight of Offshore Oil Drilling North of Alaska*. Environmental Law Review, Volume 44, Issue 3, 2018
[4] Also known as offshore drilling rig
[5] National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling, 2010)
[6] Julien Rochette; Matthieu Wemaëre; Lucien Chabason; and, Sarah Callet. Seeing beyond the horizon for deepwater oil and gas: Strengthening the international regulation of offshore exploration and exploitation. IDDRI Number 01/14 February 2014

and pumped to create such an island. On the other hand, the floating platforms are not permanently fastened to the seabeds but anchored to such extent that, they are easily dismantled and moved off the site of crude oil extraction. The most common form of the floating platform is the *Floating Production Storage and Offloading* (FPSO) facility. The FPSO is largely made from adapted ship hull which was originally manufactured for conveying crude oil in the form of oil tanker. It is particularly arranged and fitted with crude oil processing equipment capable of separating water from crude oil and gases. It is also fitted with flexible pipes capable of directly extracting oil from beneath the seabed onto the hull from sub-sea oil wells.

As of April 2018, there are an estimated 276 FPSOs in the World. However, the first FPSO (the ship) is reported to have been manufactured in 1977 in Spain; ever since, the floating technology of the FPSO has revolutionised the oil companies by aiding the capture crude oil from the most remote offshore and deeper water, which otherwise would have been very complicated to achieve with the fixed platform method. With the rapid developing technologies in offshore crude oil exploration and extraction, there is the challenge of regulating the activities thereof, bearing in mind that some of the offshore platforms are situated several kilometres offshore. It is this regulatory challenge in Nigeria that is called into question by this article.

The issues of parmount concern regarding the potential project-specific risks and negative impacts of the offshore platforms are: Wastewater discharges; Air emissions (including flaring); waste management; oil spillages; Noise generation (surface and underwater); Energy conservation;[7] abandonment; personnel safety and, decommissioning plans.

Globally, there are several laws attempting to regulate, standardise and safeguard the delicate marine environment, there is no generic international enforcement mechanism. However, the offshore oil platform accidents that occurred in Montara in Australia and the Deepwater Horizon in the United States of America triggered a global debate and there are efforts being made to tackle the problem internationally. On individual national perspectives, the regulatory regimes comprise of laws and regulations that govern the offshore drilling undertakings. However,

> Drilling more and deeper means increased threats to the environment, depletion of natural resources, and potential negative consequences for the human activities dependent upon these ecosystems. Recent accidents on offshore platforms have demonstrated that the environmental risks of offshore

[7] Environmental, Health, And Safety Guidelines Offshore Oil And Gas Development, world Bank Group, June 5, 2015. Online at: /www.ifc.org/ retrieved 6th June 2018.

> drilling activities concern all regions of the world and all types of companies. These transboundary nature of the impacts from these accidents have reinvigorated discussions regarding the suitability of the current international regulatory framework for offshore oil and gas activities. In this regard, it is clear that there are regulatory gaps, both in terms of safety of offshore drilling activities and liability and compensation in case of accidents.[8]

2. THE INTERNATIONAL REGULATORY SYSTEMS

An effective and comprehensive regulatory regimes of offshore oil and gas drilling should routinely include "environmental protection, safety, employment standards, work environment, health protection, emergency planning, oil spill response, and liability for accidents."[9] Each of the stated variables can be controlled both predominantly through a single all-inclusive statute and connected regulations. Also through isolated statutes that tackles individual varible. Nonetheless, there is prospect of intersection among many of these variables, a single legislation directed at offshore drilling could simplify a unified method to regulation that safeguards coordination and delivers effeciency to the regulatory system.

The yardsticks for evaluating responsibility in international law are: The objective and the subjective models. The objective model stipulates that responsibility can only be apportioned in circumstances where there is a causal link between the conduct of a State and the consequential outcome. Hence, accountability can be attributed to the State instead of showing any established fault. On the other hand, the subjective models apportions responsibility simply where and when there is a proof of intention resuting in negligent consequences, where the State is the offending party. It is import to point out that, in the circumstance where the objective model of assessing liability is adopted, the responsibility and liability is attributed to the State where it is clearly found that it has violated her international obligations though, the State has a defence where such violations occur after reasonable steps were taken to prevent the violation.[10]

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[8] See: J. Rochette, Wemaëre M., Chabason L., Callet S., Seeing beyond the horizon for deepwater oil and gas: strengthening the international regulation of offshore exploration and exploitation, IDDRI, Study N°01/14, 36p (2014). Also see: P. Cameron, "Liability for catastrophic risk in the oil and gas industry", International Energy Law Review, Volume 6, pp.207-219 (2012).

[9] J Dagg; P Holroy; N Lemphers; R Lucas; B Thibault; C Severson-Baker; S Kennett; J Leaton and B Wheeler. Comparing the Offshore Drilling Regulatory Regimes of the Canadian Arctic, the U.S., the U.K., Greenland and Norway, The Pembina Institute, 2011. Online at: www.pembina.org retrieved 12 October 2018

[10] The defence of reasonable caution is also known as due diligence. Where the State can show that it conducted due diligence to prevent a breach, even where the breach occur with consequential effects, the State may not be wholly liable.

There are several international laws on the protection of the marine environment in general such as the 1972 London Convention for the Prevention of Marine Pollution by Dumping of Wastes and other Matter;[11] Kuwait Convention and Offshore Protocol;[12] and the Helsinki Convention[13] "there is a regulatory gap at the international level. Despite the United Nations Convention on the Law of the Sea's (UNCLOS) relevant provisions, to date no international convention on the safety of offshore drilling activities has been adopted, and there is at present no ongoing process intended to fill this gap."[14]

Furthermore, the lack of a globally accepted rules for the regulation, adjudication and enforcement of liability and compensation for contamination damages consequential from offshore crude oil platforms calls for concern. Despite the absence of international regulatory frameworks, there is no single international consensus and agreement for the purpose of compensating the victims of offshore crude oil environmental damages.[15] The existing Brussels Civil Liability Convention For Oil Pollution Damage 1992 is silent on safety, environmental responsibilities, economic equilibrium and fiscal stability of oil production risks caused by offshore pollution and the resultant environmental damages. The only relatively global scheme that deals with problem is the Offshore Pollution Liability Agreement (OPOL),[16] however, this initiative is private in nature hence, its membership is voluntary and the geographical coverage of the members is the European areas. The compensation mechanism of the OPOL is pecked at a very marginal level.[17]

Rochette, *et. al*[18] have observed that the reliable ways by which offshore drilling can be efficiently regulated is by adopting some level of uniform regional approach. This is because it enables states to adopt international conventions with regards to safety, liability and compensations. Another reason why the adoption of regional approach may prove successful is

[11] Backed by the 1996 Protocol

[12] Protocol to the Kuwait Regional Convention for the Protection of the Marine Environment Against Pollution from Land-Based Sources, 21 February 1990

[13] Prohibits the dumping of things at sea unless such dumping is preferable for human and marine lives

[14] L. Chabason; Offshore oil exploitation: A new frontier for international environmental law, Working Paper N°11/11, IDDRI (2011) cited in Julien Rochette and Glen Wright, Strengthening the international regulation of offshore oil and gas activities. Online at: www.iddri.org/ retrieved 6 June 2018

[15] P. Cameron, "Liability for catastrophic risk in the oil and gas industry", International Energy Law Review, Volume 6, pp.207-219 (2012)

[16] According to the official Bulletin of the OPOL, "Under the Offshore Pollution Liability Agreement dated 4th September 1974 as amended from time to time, (referred to as OPOL), operating companies agree to accept liability for pollution damage and the cost of remedial measures with only certain exceptions, up to a maximum of US $250,000,000 per incident" online at: www.opol.org.uk retrieved 19 July 2018

[17] J. Dragani and M. Kotenev, "Deepwater Development: What Past Performance Says About the Future", The way ahead, Volume 9-1, pp.8-9 (2013)

[18] Julien Rochette; Matthieu Wemaëre; Lucien Chabason; and, Sarah Callet, op cit

that "the International Law Commission's Draft Articles on State Responsibility provide that every internationally wrongful act of a State entails the international responsibility of that State[19] and there is an internationally wrongful act of a State when conduct consisting of an act or omission: (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State.[20]"

(a) The United Nations Convention On The Law Of The Sea 1982 (UNCLOS)

This is one of the most relevant international laws with regards to the protection of the marine environment. UNCLOS permits coastal States to create offshore facilities on their continental shelves and in their own exclusive economic zones (EEZ), and to maintain jurisdiction thereof.

In accordance with the provisions of UNCLOS, countries are obligated to take reasonable care and steps to abate all activities that are likely to pollute the marine environment including pollution from the offshore installations including static and movable crude oil facilities. In essence, individual countries are required to enact and effectively enforce laws and regulations that protect all relevant seabed undertakings and liaise with regional nations in tandem with global best practices in the formulation of internationally approved rules and standards for the protection of the marine environment.

UNCLOS further require States to implement operational international standards, and to inaugurate suitable reparation for damages caused by pollution to the marine environment. Unfortunately, there is a major weakness with UNCLOS, in that, it failed to specific the required pragmatic standards by which States should adhere to with regards to the prevention of marine pollution, nonetheless, it inspires States to develop national laws.

(b) International Convention On Oil Pollution Preparedness, Response And Cooperation,1990 (OPRC 1990)

According to the provisions of the OPRC, each State party shall inaugurate a national arrangement to punctually and efficiently respond to all incidents of crude oil pollution. The convention also require that State parties should establish a proficient national framework and a national exigency plan for the purpose of responding to the possible accidents and disasters that may arise as direct consequences of crude oil production (offshore and onshore). Additionally, States are to set out the necessities for pollution emergency strategies by which

[19] Ian Brownlie, *Principles of International Law* (Oxford University Press, 7th ed, 2008) 436-37

[20] International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1, art 2, in Crawford, above n 11, 81 adapted from Julien Rochette; Matthieu Wemaëre; Lucien Chabason; and, Sarah Callet, op. cit p. 5

the operators and authorities in control of vessels, offshore platforms,[21] and onshore sites must be put in place.

3. POLLUTION AND CUSTOMARY INTERNATIONAL LAW

The starting point of this segment shall flow from the international *locus classicus* of the case of *United States v. Canada*[22] where the United States sought damages from Canada by suing them and sought for an injunction for air pollution in the state of Washington, by the Trail Smelter, a Canadian corporation which is based in Canada. One of the main issues for determination was whether, it is the responsibility of a country to protect other countries against harmful acts by individuals from within its jurisdiction. It was held that:

> It is the responsibility of the State to protect other states against harmful act by individuals from within its jurisdiction at all times. No state has the right to use or permit the use of the territory in a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein as stipulated under the United States laws and the principles of international law.

The implication of the decision in this case is that, Canada was answerable in international law for the demeanour of the Trail Smelter Company. Therefore, the burden lies on the Canadian government to ensure that Trail Smelter's behaviour ought to be in compliance with the obligations of Canada in accordance with International law. For example, Principle 21 of the 1972 *UN Stockholm Declaration on the Human Environment* accentuates this duty of care. It obligate States "to ensure that activities within their jurisdiction or control do not cause damage to areas beyond the limits of national jurisdiction". The internationally recognised legal maxim of *sic utere tuo ut alienum non laedas*[23] also stipulates that, it is the right of a country to use its territory in such a way that is constrained by the obligation not to cause injury to, or within, another country. This maxim has significant effect with regards to crude oil activities that are often disposed to air, sea and land pollution. Where damages accrue to another country, it is regarded as extra-territorial harm which violates the rights and interests of a third State hence, it is actionable under the customary international law.

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[21] These include the floating and fixed rigs involved in exploration, production, loading and unloading of crude oil and natural gases

[22] This case was initiated on the international rule of law which imposes the duty of care on nations to act reasonably in such manner that protects other countries against harmful acts by individuals from within its jurisdiction at all times. The matter was decided at the *Trail Smelter Arbitration.* Citation: Arbitral Trib., 3 U.N. Rep. Int'l Arb. Awards 1905 (1941)

[23] It translates as follows: "Use your own property in such a manner as not to injure that of another."

4. THE REGULATORY REGIMES OF OFFSHORE OIL AND GAS DRILLING IN NIGERIA

Before engaging in the discussion on the regulatory structure of the offshore oil and gas drilling in Nigeria, it is imperative to observe that the management systems to which the country's regulatory machineries propel take the form of weak mandatory programmes which solely relies on the crude oil firm to design and implement policies and actions, in essence, the greater segment of the regulatory regime appear to encourage industrial compliance as opposed to compelling industries to comply. Therefore, Nigeria's offshore regulatory regimes permit flexibility than conventional regulatory style. This approach has so far failed to develop a culture of effective safety in the oil industry.

Critics of the model of Nigeria's regulatory approach have attributed the limited ability of government agencies to validate the compliance of oil firms on the desperate needs of the government to retain the services of the oil firms to which the bulk of the national revenue accrues through crude oil production. This policy of disregarding the non-compliance of the oil firms is consistent with Porter's paradigm of the *race to the bottom.*[24]

a. An Overview of the offshore petroleum regulatory structure

In Nigeria, the regulation, licensing and control of the oil and gas undertakings (onshore and offshore) are directly propelled by the Federal Ministry of Petroleum Resources. However, the duties of administering all the technical aspects of the offshore and onshore activities are vested in the Department of Petroleum Resources, which is one of the arms of the Federal Ministry of Petroleum Resources.

The offshore sectors of the oil and gas business are usually carried out through production sharing contracts (PSCs) where the contracting parties are the federal government on the one part and the oil firms on the other part. The Nigerian National Petroleum Corporation (NNPC) represents the government in the contract and the applicable operator (the multinational oil company or/and indigenous firm). There are multiple deep offshore oil platforms in Nigeria including the Bonga (operated by Shell); Erha (operated by ExxonMobil); Agbami (operated by Texaco). There are 34 pieces of legislation, excluding regulations and directives, regulating various aspects of the oil and gas industry in Nigeria. To regulate the nature and method of

[24] Gareth Porter. Trade Competition and Pollution Standards: Race to the Bottom or Stuck at the Bottom; Journal of environment and Development, 8:2, 133 (1999).

PSCs within the offshore oil and gas sector, Nigeria enacted the *Deep*[25] *Offshore and Inland Basin Production Sharing Contracts Act.*[26] The preamble of the Act states:

> An Act to, among other things, give effect to certain fiscal incentives given to the oil and gas companies operating in the Deep Offshore and Inland Basin areas under production sharing contracts between the Nigerian National Petroleum Corporation or other companies holding oil prospecting licenses or oil mining leases and various petroleum exploration and production companies.

The Act provides guidance for the fiscal aspects of the deep offshore development including but not limited to taxation;[27] royalties;[28] allocation of profit oil[29] and cost oil;[30] duration of oil prospecting licences,[31] etc. Unfortunately, the Act conspiscously left out provisions on insurance and decommissioning requirements. Hence, Nigeria depends on the policies and procedures laid out in several international frameworks for dealing with consequential liabilities resulting from the deep offshore oil and gas undertakings.

4.2 Key gaps in Planning

There has not been a single and huge disaster in the deep offshore platforms since the commencement of oil production in Nigeria. However, it is foreseeable that accident may occur at some point in time. Currently, the National Oil Spill Contingency Plan (NOSCP) is supposed to be the central all-inclusive action plan for liabilities and response action in terms of crude oil spill situations. The NOSCP is the demosticated version of the International Convention on Oil Pollution Preparedness, Response and Co-operation, 1990.

Nigeria's government regulation of deepwater offshore oil and gas explorations is very difficult to evaluate with regards to the environmental impact of the production activities. This because the available legal and institutional frameworks rely on corporate self-regulation without actual government monitoring. The reporting processes by which the government depend is under the control of the corporations. The regulated is in firm control of the regulating processes. Hence, there is inadequate plans and procedures for the management and avoidance of the risk of accidents within the offshore oil exploration industry.

[25] The Act defines "Deep Offshore" as any water depth beyond 200 metres
[26] No. 9 1999.
[27] Section 12
[28] Section 5 and Section 7
[29] Section 10
[30] Section 8
[31] Section 2

5. CONCLUSIONS

In Nigeria, the current domestic guidelines lack real, uninterrupted monitoring of intricate offshore oil and gas operations. The governance of offshore oil and gas production wholly relies on self-regulation by the operators. One supporting argument for the sel-regulation is that, the oil firms constantly use sophisticated technology that are difficult for the government to comprehend, this means that operators should monitor the consequential damages and risks. In essence, the relevant government institutuions lack the required skills and knowledge to execute thorough inspections. Besides, conflicts of interest are widespread in the oil and gas industry in Nigeria. For example, currently, the President is also the Minister of Petroleum, this creates incongruous twofold commands - to inspire the oil firms and to supervise regulatory processes.

> It follows, therefore, that a coastal state's regulatory authority declines with distance from the shore. This makes it difficult for a state regulator to evaluate a cost of harming fish species, birds, or water quality, where people never go. It is also hard to justify research of deep-sea aquatic ecosystems, as this kind of research requires sophisticated technologies, which are very expensive. As offshore oil and gas explorations are technologically possible in greater depths and distances with growing technological development, the domestic regulatory authority is less operative.[32]

It is obvious from the foregoing discourse that there is no clearly defined regulatory and liability regime and no dependable fiscal source in Nigeria's offshore oil and gas operations to recompense for the negative externalities arising from offshore oil and gas production. It is thus, recommended that, policy makers in Nigeria should embark on training of highly skilled personnel and equip them with the necessary resources to effect the monitoring of the activities of the operators of the offshore oil and gas platforms. By the same token, the existing laws should be revised and re-enacted to be fit for purpose.

[32] N Hasson, Deep Water Offshore Oil Exploration Regulation: The Need For a Global Environmental Regulation Regime, online at: http://law2.wlu.edu/deptimages/Journal%20of%20Energy,%20Climate,%20and%20the%20Environment/Hasson.pdf retrieved 12 October 2018