



THE VACUUM IN NIGERIA'S CRUDE OIL LAWS: AN INQUIRY INTO THE
DECOMMISSIONING OF ONSHORE AND OFFSHORE FACILITIES

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ABSTRACT

Conventional wisdom requires that at the completion of crude oil production, the oil wells should be permanently plugged to protect the environment. Although, crude oil production has been undertaken for decades in Nigeria, there is no evidence to show that any facility has been properly decommissioned. In the United States, about three-quarter of the 50 states have plugging rules governing the procedures for plugging and abandonment of oil and gas wells. There is currently no official legal and institutional arrangement for proper decommissioning of oil and gas facilities in Nigeria. It is this loophole that this article seeks to investigate with regards to the effectiveness of Nigeria's legal and institutional policies on abandonment and decommissioning of oil and gas facilities. It suggests that, there is currently a vacuum in the laws and that, the enactment of adequate legislation is urgently required.

Keywords: Abandonment, Decommissioning Oil Facilities, Regulations, Nigeria.

1. INTRODUCTION

As oil and gas production infrastructure stretch to the last stage of their productive life, it becomes imperative that they should be closed down in a harmless and environmentally accountable manner.³ Decommissioning is the last phase in the lifespan of any oil and gas project. Oil and gas wells are supposed to be plugged and legally abandoned at the end of its expedient lifecycle when it becomes a dry well.⁴ The plug and abandon processes are usually regulated by law.⁵ Hence, there are specified rules for the preparation of the well sites for abandonment accomplishments.⁶ Safeguards are often put in place to guarantee that the wells are safe.⁷ The sites are evaluated to certify the following: Safe access and way-out; stability of the soil conditions; no possibly hazardous substances are left near the well; no obstruction to traffic and the

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³ S. C. Zyglidopoulos. The social and environmental responsibilities of multinationals: Evidence from the Brent Spar case. *Journal of Business Ethics*, 36 (1-2): 141-151 (2002).

⁴ A dry well is an oil well that cannot produce crude oil in commercial quantity. A commercial quantity is considered to be 10,000 barrels per day.

⁵ C. D. Whitney. Topped platform in-place creates reef in US Gulf. *Oil & Gas Journal*, 98 (45):53-59 (2000).

⁶ B. A. Hamzah. International rules on decommissioning of offshore installations: some observations. *Marine Policy*, 27(4):339-348 (2003).

⁷ D.G. Gorman and June Neilson. *Decommissioning Offshore Structures* (Environmental Science and Engineering). London: Springer (2011)

movement of humans and animals; and, there is no risk of fire and equipment staging at the sites.

Studies have shown that, total decommissioning may be disastrous to the environment. For example, Chandler *et. al*⁸ observed that, artificial reefs do mold around many of the offshore platforms, providing homes for marine lives, therefore, the total elimination may adversely affect the environment. The decommissioning procedures are of several phases depending on whether the facility is onshore or offshore.⁹ Generally, decommissioning includes the safe plugging of the well on the surface of the earth or in the deep/shallow offshore and the discarding of the equipment used in the oil production.¹⁰ Decommissioning though very expensive, is a fast emerging market sector in the oil and gas industry, with foremost probable risks. The decommissioning process therefore requires that the well-bore casing, tubulars, and other equipment are surgically removed. Skills and care are required to remove tubulars involving the method of freepoint, stretching, cutting at a safe depth with chemical cuttings. It may also require the use of explosives or hydraulic cutting tools. However, it is cheaper to apply the pulling technique. Abbagnara¹¹ summed up the entire process as follows:

“In the oil & gas industry and particularly in the offshore industry, wells securing operations are firstly started and afterwards the structures and pipes connecting the platform to the treatment ground centers

are removed. Such operations must be performed with extreme care and require both specialized personnel and sophisticated techniques with the aim at avoiding environmental impacts. The removal stage is followed by the identification of adequate sites for the storage of non-usable materials and the final processing of potentially polluting product, such as metallic and plastic wrecks, combustible oils ... the decommissioning costs are very difficult to establish as they depend on a number of variable factors such as the installation typology, the site geomorphology, the choice whether to remove partially or entirely the installation, the market conditions, the presence of key personnel and so on ...”

Decommissioning is not the same thing as abandonment. Decommissioning is generally an approved manner of closing down, dismantling and clearing up all equipment and possible hazards at the sites of crude oil operation at the end the life cycle of the site. On the other hand, abandonment occurs when an oil firm locks up the site and simply discontinue operations and vacate removing only the items they consider as essential. Abandonment of oil installations is generally unacceptable in many countries.

2. THE COMMON LAW RULES OF ABANDONMENT

An abandoned crude oil facility may not be a subject of trespass action. Therefore, it is very important for an approved system of decommissioning to be in place, otherwise the rule of abandonment may be applicable to crude oil facilities that may fit into the legal meaning of abandonment. It is a general principle in common law, that items found on the land are the properties of the owner of the items, except that there is a credible evidence that the owner had abandoned the items. This rule also applies to items found in waste bins and waste dumping sites. The rule was tested in *Parker v. British*

⁸ John Chandler, David White, Erika J. Techera, Susan Gourvenec, Scott Draper. Engineering and legal considerations for decommissioning of offshore oil and gas infrastructure in Australia. *Ocean Engineering* Volume 131, 338–347 (2017)

⁹ B. A. Hamzah. International rules on decommissioning of offshore installations: Some observations. *Marine Policy*, 27(4):339-348 (2003).

¹⁰ A. G Pulsipher et al. Onshore disposition of offshore oil and gas platforms: Western politics and international standards. *Ocean and Coastal Management* 43(2):973-995 (2000).

¹¹ Francesco Valerio Abbagnara, An overview on the decommissioning process in the oil & gas sector. Salini Impregilo SpA and OECD Paper, United Kingdom, December 2016. Online at: <https://www.lexology.com/library/detail.aspx?g=06ad2b58-2646-4cbf-9c5f-f5de60145a41> retrieved 29 May 2018.

*Airways*¹² where, the claimant, a traveler picked a gold bracelet on the floor at the departure lounge of Heathrow airport and could not find the owner. He gave it over to the staff of British Airways, and left his telephone numbers and contact address. The claimant also left instructions that, he should be informed when the actual owner has received the bracelet. The claimant later discovered that British Airways sold the bracelet at the sum £850. He challenged for the right of ownership of the £850, being the value of the bracelet. It was held that, the claimant automatically gained the rights of possession of the bracelet as against the defendants.. Donaldson LJ set out the rights and obligations of a finder *inter alia*:

- (1) “The finder of a chattel acquires no rights over it unless:
 - (a) it has been abandoned or lost and
 - (b) he takes it into his care and control.
- (2) The finder of a chattel acquires very limited rights over it if he takes it into his care and control with dishonest intent or in the course of trespassing.
- (3) Subject to the foregoing and to point 4 below, a finder of a 330 chattel, whilst not acquiring any absolute property or ownership in the chattel, acquires a right to keep it against all but the true owner or those in a position to claim through the true owner or one who can assert a prior right to keep the chattel which was subsisting at the time when the finder took the chattel into his care and control.
- (4) Unless otherwise agreed, any servant or agent who finds a chattel in the course of his employment or agency and not wholly incidental or collaterally thereto, and he takes it into his care and control does so on behalf of his employer or principal who acquires a finder’s rights to the exclusion of those of the actual finder.
- (5) A person having a finder’s rights has an obligation to take such measures as in all the circumstances are reasonable

¹² [1982] 1 All ER 834.

to acquaint the true owner of the finding and present whereabouts of the chattel and to care for it meanwhile.”

In respect of the application of the rule of abandonment to crude oil infrastructure, in *Chaplin Exploration v. Western Bridge*,¹³ Champlin attempted to extract crude oil from a refined pool of petroleum that drifted from the neighbouring refinery. The court agreed that, the refined petroleum “escaped” into the soil are not subject to the law of capture unless it could be shown by proficient evidence that the refiner has abandoned it. The court also considered that, when petroleum that have been extracted and taken as personal property subsequently “escape,” the owner may lose possession but he retains title unless he abandons it. In *Pearson v. Black*,¹⁴ “abandoned” was defined as the abdication of possession with the intention of axing one’s ownership or interest. Likewise, in *Morgan v. Fox*,¹⁵ it was held that where the license owner of an oil well ceases to use it by way of non-production for some considerable timeframe, it does not mean that he has abandoned it. However, the court did not specify the duration of the non-use or the maximum passage of time that can constitute abandonment in Texas. In view of the nature of abandonment and how the courts tend to approach it, is crucial that a careful approach is required whereby international laws should set the standards¹⁶ on how oil infrastructure should be dismantled without the needs for abandonment.¹⁷

3. THE REGIONAL AND INTERNATIONAL REGULATORY FRAMEWORK

The key legal international instruments for the regulation of offshore pollution, including the pollution from crude oil (offshore platforms) are contained in the followings:

¹³ 108 597 P.2d 1215.

¹⁴ 120 S.W.2d 1075 (Tex.Civ.App. 1938)

¹⁵ 536 S.W.2d 644 (Tex.Civ.App. 1976)

¹⁶ Marc Hammerson. Oil and Gas Decommissioning: Law, Policy and Comparative Practice. Globe Law And Business; 2 edition (July 31, 2016)

¹⁷ J. Clifford Jones. Offshore Oil and Gas Decommissioning. Sydney: BookBoon (2017)

- (a) The Geneva Convention on the Continental Shelf, 1958;
- (b) The United Nations Convention on the Law of the Sea (UNCLOS), 1982;
- (c) The International Maritime Organization Guidelines and Standards of the Removal of Offshore Installations and Structures on the Continental Shelf and in the Exclusive Economic Zone, 1989;
- (d) The Convention for the Protection of the Marine Environment of the North-East Atlantic (The OSPAR Convention) 1992; and,
- (e) Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircraft, done 1972.

However, it is only three of the international conventions that specifically address decommissioning of offshore installations.¹⁸ It must also be noted that conventions have no direct effect on every country except they have been ratified.¹⁹ This principle is subject to the exception that a treaty or convention may become binding on a non-state party where it passes into customary law.²⁰ The conventions are:

- (a) The Geneva Convention on the Continental Shelf (“The Geneva Convention”) 1958;

Article 5(5) of the Geneva Convention states that:

“Any installations which are abandoned or disused must be entirely removed.” However, it is silent on specific installation materials such as pipelines. It also fails to provide the definition of the word “any” as part of the infrastructure to be detached. It is, thus possible to infer that the convention fails to oblige oil firms to remove pipelines and flexible cables which

¹⁸ D. M Schroeder and M. S Love. Ecological and political issues surrounding decommissioning of offshore oil facilities in the Southern California Bight. *Ocean and Coastal Management*, 47.1/2:21-48 (2004).

¹⁹ J. Rowan-Robinson. The environmental implications of decommissioning in the North Sea. *Offshore magazine*, 65 (8):144 (2005).

²⁰ See: Malcom M. Shaw. *International Law* (5th Edition), Cambridge University Press, p. 90 (2003)

may be dumped in the sea. One other key defect with the convention is that It does not specifically place obligations on the oil firms regarding the protection of the offshore environment.

- (b) London Dumping Convention (“the London Dumping Convention”) 1972

The London Dumping Convention attempted to curb the defect of the Geneva Convention. It specifically deals with all aspects of dumping in the seas, though its provisions does not cover the dumping of materials within national inland waterways. Despite the initial failure to provide a comprehensive definition of what constitutes dumping,²¹ the Protocol to the Convention adopted in 1996, defines dumping as: “Any abandonment or toppling at site of platforms or other man-made structures at sea, for the purpose of deliberate disposal.” By the provisions of the London Convention, it is illegal to abandon the crude oil offshore platform or any aspect of it at sea. Such abandonment could be construed as dumping in contravention of the London Dumping Convention.²²

- (c) UN Convention on the Law of the Sea (UNCLOS) 1982

Of the three international conventions, UNCLOS is slightly better framed. For example, Article 208 require States parties to adopt laws and regulations including several other desirable measures to “prevent, reduce and control pollution of the marine environment arising from or in connection with seabed activities subject to their jurisdiction.” In the same direction, Article 60(3) provides as follows: “Due notice must be given of the construction of such artificial

²¹ M. V. McGinnis. Analysis of the role of ecological science in offshore continental shelf decommissioning policy. *Proceedings of the Conference on California and the World Ocean*, March 24-27, 1997, 1384-1392 (1998).

²² Søren Knudsen. Decommissioning concrete structures – Environmental and safety challenges. *Society of Petroleum Engineers - SPE International Conference on Health, Safety and Environment in Oil and Gas Exploration and Production 2011*, Vienna, Austria, 451-464 (2011).

islands, installations or structures, and permanent means for giving warning of their presence must be maintained. Any installations or structures which are abandoned or disused shall be removed to ensure safety of navigation, taking into account any generally accepted international standards established in this regard by the competent international organization. Such removal shall also have due regard to fishing, the protection of the marine environment and the rights and duties of other States. Appropriate publicity shall be given to the depth, position and dimensions of any installations or structures not entirely removed.” This implies that the dismantling of offshore oil facilities should be conducted with care and skills as not to harm the habitats of fishes and other marine lives. It further requires that, the crude oil firms should publish all the relevant information about the size, depth, location, and measurements of the installation that are not completely removed. Furthermore, Article 80 clearly re-emphasise that Article 60 also “applies *mutatis mutandis* to artificial islands, installations and structures on the continental shelf.”²³

Aside from the global conventions, in the West African region, there has been an attempt for the harmonisation and execution of desirable policies for the protection of the marine environment which culminated in the inception of the Convention for the Co-operation in the Protection and Development of the Marine and Coastal Environment of the West and Central African Region (“the Abidjan Convention”).²⁴

(d) The Abidjan Convention

In 1974, the United Nations Environment Program (UNEP) hosted the Regional Seas Programme (RSP) with the sole intent to encourage regional co-operative accomplishment

²³ Joy Asanga, Prospects of decommissioning oil & gas installations in Nigeria, Online at: <http://www.financialnigeria.com/prospects-of-decommissioning-oil-gas-installations-in-nigeria-blog-322.html> Retrieved on 01 June 2018.

²⁴ The Convention for the Co-operation in the Protection and Development of the Marine and Coastal Environment of the West and Central African Region, 23 March 1981, 20 ILM 746 (was entered into force on 5 August 1984).

in the direction of the protection of the marine and coastal environment, and the preservation of natural resources. This ushered into existence, the Convention for the Co-operation in the Protection and Development of the Marine and Coastal Environment of the West and Central African Region (Abidjan Convention).²⁵ Nigeria, assented to the Convention. This means that, Nigeria is obliged to take obligatory actions to stop environmental pollution and mitigate all forms of pollution consequential to the seabed and subsoil occasioned by crude oil exploration and production activities. The Abidjan Convention did not specifically use the word “decommission” and “offshore” however, it is clear that Nigeria’s failure to adopt measures and design a framework for the decommissioning of offshore oil platforms could constitute a breach of the Abidjan Convention.

4. DECOMMISSIONING AND ABANDONMENT OF OIL FACILITIES IN NIGERIA

In Nigeria, the Petroleum Amendment Act 1996, introduced paragraph 16A into the First Schedule to the Petroleum Act 1969. Paragraph 16A of the amended Petroleum Act states:

- (1) The holder of an oil mining lease may, with the consent of and on such terms and conditions as may be approved by the President, farm-out any marginal field which lies within the leased area;
- (2) The President may cause the farm-out of a marginal field if the marginal field has been left unattended for a period of not less than 10 years from the date of the first discovery of the marginal field;
- (3) The President shall not give his consent to a farm out or cause the farm – out of a marginal field unless he is satisfied – (a) that it is in the public interest so to do, and in addition, in the case of a non producing field, that the marginal field has been left unattended for an unreasonable time, not being less than 10 years; and, (b) that the parties to the farm-out are in all respect acceptable to the Federal Government.

²⁵ Id

It therefore follows that, no crude company is allowed to abandon an oil facility in any part of Nigeria including offshore. There are an estimated 200 offshore oil structures located in Nigeria's maritime zone. Under international law, it is Nigeria's sovereign rights and responsibility to safeguard and preserve the marine environment. That being so, International law obliges nations to enact and enforce laws and regulations that are effective and not those that are lower than the universal rules that protects and safeguards the seas from pollution caused by dumping.

As earlier stated, there is no evidence to substantiate that the decommissioning of the crude oil facility has ever taken place in Nigeria. One argument to support the absence of decommissioning in Nigeria is that Nigeria's oil wells and rigs have not got to the end of their operational lives.²⁶ It is therefore pertinent to question, whether the government of Nigeria wait for the end of the useful lives of the crude oil installations before designing a framework for decommissioning?

Amongst the various legislation and rules governing crude oil business in Nigeria, there is no national law that imposes the obligation of decommissioning on the oil companies. Oil and gas infrastructure decommissioning is only mentioned in the oil production, licensing instruments which can only be enforced through international arbitration. Also, there is scarcely any comprehensive provision that addresses decommissioning of crude oil facilities except for section 36(1) of the Petroleum (Drilling And Production) Regulations²⁷ which provides *inter alia*:

No borehole or existing well shall be re-drilled, plugged or abandoned, and no cemented casing or other permanent form of casing shall be withdrawn from any borehole or existing well, which it is proposed to abandon, without the

written permission of the Director of Petroleum Resources.

In the same vein, section 36(2) Petroleum (Drilling and Production) Regulations further states that:

Every borehole or existing well, which the licensee or lessee intends to abandon shall, unless the Director of Petroleum Resources otherwise permits in writing, be securely plugged by the licensee or lessee so as to prevent ingress and egress of water into and from any portion or portions of the strata bored through and shall be dealt with in strict accordance with an abandonment programme approved or agreed to by the Director of Petroleum Resources.

It is contended that neither section 36(1) nor 36(2) outlined herein, fully considers the effects and consequences of abandonment. Decommissioning is conspicuously missing in the entire regulation. Arguably, section 46(3) of the regulation vaguely appears to address decommissioning but treated it under the general heading of 'termination' of oil and gas operation. It states that:

"On the termination of his licence or lease the licensee or lessee shall, subject to the rights of the owners of the surface or other persons having a legal interest in the relevant area or any part of it, remove all buildings, installations, works, chattels and effects erected or brought by the licensee or lessee upon the relevant area for or in connection with his operations: Provided that, subject as aforesaid, the Minister may specify any such buildings, installations, works, chattels or effects, and shall then be entitled to take the same at a price bearing a reasonable relationship to the written down value thereof."

Even if and when Nigeria designs an appropriate decommissioning legal structure, one issue worth considering is how to apportion liability for

²⁶ Id

²⁷ L.N. 69 of 1969

commissioning of the crude oil facility where the oil mining lease (OML) holder transfers its title in the property (wholly or partly) to a third party oil firm. In certain instances, the instrument of transfer of oil facility may expressly allot liability to a party in the transaction.

In other instances where the decommissioning liability clause is not inserted, the courts tend to place the burden on the assignor or the lessor. For example, in *Railroad Commission v. Olin Corp.*,²⁸ it was held that, where the lessor of an oil well retains its reversionary interest in the leasehold property, the obligation for plugging was retained hence the liability for decommissioning goes to the lessor. By this decision, any decommissioning law to be enacted in Nigeria should be structured to expressly apportion the liability for decommissioning to the oil firms. This is because, the current laws that govern oil and gas ownership in Nigeria firmly creates two major types of interests – Mineral ownership being the federal government and, mineral leases being held by the oil firms. Going by the legal ownership structures, the liability for decommissioning lies with the Nigerian government except the oil mining lease instruments specifically state otherwise. However, in *Sheridan Oil Co. v. Wall*,²⁹ the Supreme Court (United States) decided that, “where the lessee had abandoned the property he is in a position analogous to a tenant who has capitulated possession of the premises without making necessary repairs.”

In *Railroad Commission v. American Petrofina Company of Texas*,³⁰ it was held that a fresh assignee of an interest in a lease, where an oil well has stopped producing crude oil and has been abandoned by another oil company (the previous operator), was not liable for decommissioning costs since the new assignee qualify to be regarded as the "operator" of the well. In the State of Oklahoma (USA), a successor in title of an oil facility can be liable for the tort of negligence where it fails to halt a

persistent public nuisance, whether the nuisance was generated by the former owner or not.³¹

5. CONCLUSION AND RECOMMENDATIONS

From the treaties herein, it is summarised that in Nigeria, almost all the oil installations have no plans for decommissioning; there are no futuristic budgets for decommissioning liabilities; No legal and institutional framework for re-utilisation, innocuous disposal of dismantled equipment and no legally approved model for remediation of the polluted environment; the timing and decision for decommissioning is solely, the voluntary decision of the oil companies thus, there is no obligation for post-decommissioning monitoring and evaluation, that is, if it takes place at all.

The direct gains of abandonment of oil platforms accrue to the oil firms to the detriment of the environment in the sense that, “the relative order of a number of impacts can be given with reasonable certainty. When an installation is left in place, a number of potential benefits can be expected in terms of reduced costs, reduced risks to personnel health and safety, and reduced impacts from waste handling.”³²

It is not too late for the Nigerian authorities to device efficient structures and enact specific legislation to properly obligate the oil companies to adequately decommission, dismantle, and remove all installations at end of the useful lives of the oil facilities onshore and offshore. It would be necessary to adopt the health and safety procedures which the United States established for decommissioning in the Gulf of Mexico and other offshore managements. Nigeria should also

³¹ *Fischer v. Atlantic Richfield Co.*, 774 Fed. Supp. 616 (W.D. Okla. 1989).

³² IMSA Bulletin, *Decommissioning of North Sea oil and gas facilities: An introductory assessment of potential impacts, costs and opportunities*. Background Report Phase 1, Living North Sea Initiative, Amsterdam (April, 2011) Online at: www.imsa.nl retrieved 2 June 2018. Also see: S. Nesse, E. Lind and B. Jarandsen. New handbook for guidance in assessing impacts of decommissioning and disposal of redundant offshore installations. International conference on health, safety and environment in oil and gas exploration and production, Kuala Lumpur, Malaysia, 1501-1507 (2002).

²⁸ 690 S.W.2d 628 (Ct.Civ.App. 1985)

²⁹ 103 P.2d 507 (Okla. 1940).

³⁰ 576 S.W.2d 658 (Tex.Civ.App. 1978)

create a technology system for the oil industries for tumbling of jacket erections with adequate risk control mechanism. There must be an approved technical standards for regulating the risk in the refloating of concrete gravity oil platforms. Furthermore, there should be specific legislation or regulation for the management of emergency response measures of decommissioning and dismantling of platforms.