AN APPRAISAL OF THE LEGAL FRAMEWORK OF DECOMMISSIONING OF OFFSHORE OIL AND GAS INSTALLATIONS IN NIGERIA

By

Emeka Henry Odum*

1.0. INTRODUCTION:

In Nigeria, oil and gas prospecting and exploration in the deep offshores and continental shelf have increased since the first offshore discovery in Okan (presently known as Akwa-Ibom State in 1964.[1]There are over 175 offshore installations [2]and more are anticipated. There are no specific laws governing the decommissioning of offshore oil and gas installations. However, pertinent regulations exist in miscellaneous legislations regulating petroleum activity and general environmental protection.

Once the presence of oil is sufficient quantity has been discovered, there are a number of onshore and off shores activities that need to be undertaken to allow exploitation and supply of that reserve.[3]as soon as the field is declared commercially viable, the provision of concrete and steel production platforms , storage facilities for the oil, terminal facilities for landing and primary processing of oil and gas and onward transmission have to be considered and implemented.[4]The legal treatment of decommissioning process whether in terms of environmental protection, taxation or ongoing liabilities is now understood not simply as part of tidying up exercise, but rather as a crucial component in continued success of what is a mature province.[5]

The term decommissioning is interchangeably used with "abandonment" to mean the process of removing redundant off shores installations. However, due to sensitive nature of this issue since Brent Spar[6], the oil and gas industry has somehow jettisoned the term "abandonment", which was formally used to

* **LLB Delta State University, LLM University of Aberdeen, United Kingdom, Research Fellow Nigerian Institute of Advanced Legal Studies. Email: emehen13@yahoo.com.**

[1] M. A. Ayoade 'Disused Offshore Installations and Pipelines: Towards "Sustainable Decommissioning"' in Z.Gao (ed) *International Law on offshore abandonment: Recent Developments, Current Issues and Future Direction in Environmental Regulation of Oil and Gas* (London Kluwer Law International 2002) 9

[2] Y.Omorogbe , "The Legal Framework for the production of oil and gas in Nigeria". 5 J.E.N.R.L (1989) P.274.

[3] P Owen, T Rice: Decommissioning the Brent Spar (London Spon Press 1999) 16.

[4] Ibid.

[5] J.Paterson.,"*Decommissioning of Offshore Installations*" in Paterson, Gordon (ed) Oil and Gas -Current Practice and Emerging Trends (Dundee University Press 2007) 149.

[6] In the early summer of 1995, one of the largest oil company in the world (Shell International) tried to get rid of the redundant 14,500 tonne Brent Spar (an oil storage tank) by sinking it in the North sea off the coast of Scotland in the United Kingdom. The environmental Non-Governmental Organization, Green Peace led a public protest against this move which resulted in global protest against this attempt to dump the facility. For detailed analysis of this incident see S. C. Zyglidopoulos "The Social and Environmental Responsibility of Multinationals: Evidence from the Brent Spar Case," (2002) 36 (1) Journal of Business Ethics 141.

describe the process, in favour of decommissioning for fear that the former conveys the wrong image of what is involved.[7] For the purpose of this work, I wish to adopt the term decommissioning. The aim of this paper is to examine the legal framework of decommissioning of offshore installations in Nigeria whilst making reference to international instruments and the United kingdom Continental Shelf.(UKCS) as it relates to Nigeria and to make some recommendations to this effect.

1.1 The Meaning of Decommissioning

Decommissioning, as it relates to off shores oil and gas installations can broadly be described as the process by which possibilities for the physical removal , disposal or re-use of an installations /structures after their productive life span are assessed, a plan of actions is prepared by the operators and approval is gained from government and then implemented. Initially, decommissioning was an obligation owed only to the host state. In recent times decommissioning has become an issue of global environmental concern.

1.2 Decommissioning process

There are four separate stages for the decommissioning of oil and gas installations: options are developed and evaluated and chosen and put through a comprehensive planning process which includes engineering and safety preparation; then the operator has to stop producing oil or gas, plug the wells deep below the surface and make then safe; the removal from site of all or part of the installations and finally, the disposal or recycling of these parts which have been removed. However, the truth is that as simple this procedure may look in the description, it is a complex and time consuming; no wonder the process is fraught with a lot of controversy and problematic and there are huge health and safety issues involve. It took 8 (eight) years for Maureen platform in UK to be finally decommissioned.[8] The Brent Spar platform took almost 10 years to be decommissioned.

It is imperative to mention that most of the oil and gas offshore installations fall outside Nigeria's territorial waters and stretch into waters that are governed by international decommissioning instruments and decommissioning duties and obligations on Nigeria therefore, there is need to look at international instruments as it relates to decommissioning of offshore installations in Nigeria and this is also the reason why the legal framework of decommissioning in Nigeria is nebulous.

2.0. INTERNATIONAL LAWS

[7] A.D. Forte, "Legal Aspects of decommissioning offshore structures" in Gorman, Neilson (ed) *Decommissioning Offshore Structures* (Springer, London 1998) 39

[8] Philips petroleum UK (now ConocoPhillips) decommissioning of platform from 1993-2001;

There was no international or regional law on decommissioning of offshore installations in existence until 1958.[9] Consequently, due to the proliferation of offshore installations and its concomitant risk, health and safety as well as some environmental issues which necessitated the first international legislation. It is pertinent to mention that in practice, national laws constitute the important piece of legislations in decommissioning regulation, but there is need to have an understanding of these international and regional laws as Nigeria is a signatory to a good number of these conventions and are bound by them.

2.1. The United Nations Convention on the Continental Shelf 1958(Geneva)

This is primary the first international law on offshore decommissioning. It was ratified by Nigeria on 28th April 1971. The foundation document on offshore decommissioning is the 1958 United Nations Geneva Convention on the Continental Shelf (GC).[10] The GC granted countries exclusive rights for the purpose of exploring the continental shelf and the rights to exploit its natural resources.[11] To this end, it further entitled states to construct and maintain or operate offshore installations.[12] It however, noted that the exploration of the continental shelf and the exploitation of its natural resources must not result in unjustifiable interference with navigation, fishing or the conservation of the living resources of the sea.[13] It went on to explicitly provide that apart from giving notice of the existence of any such installations by providing and maintaining a permanent means of warning, installations which are abandoned or disused must be entirely removed.[14] Thus, by this article 5(5) any redundant offshore installation or structure must be totally removed. This provision is very instructive as it also applies to Nigeria in offshore decommissioning.

2.2 The 1982 United Nation Convention on the Law of the Sea: Nigeria on 14th August, 1986 acceded to the 1982 United Nation Convention on the Law of the Sea (UNCLOS).[15] This convention was prompted by the difficult – if not indeed impossible – requirement of the GC, for complete/total removal. Instructively, the preamble explicitly stated that developments since 1958 have heightened the need for a new and generally acceptable Convention and it thus gave a less draconian requirement:

> *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 organisation. Such removal shall also have due regard to fishing, the protection*

[9] I.L. Worika "Towards a Sustainable Offshore Abandonment /Rehabilitation Policy in African, part 1, I.E.L.T.R. No. 10(2000) p.235-240.
[10] Convention on Continental Shelf, April 29, 1959, 52AJIL 858(1958) (Entered into force in 1964)
[11] Ibid Art.2(1)
[12] Ibid, Art. 5(2)
[13] Ibid Art. 5(1)
[14] Ibid Art.5 (5).
[15] U.N. Convention on the Law of the Sea, 10 December 1982, 21 I.L.M. 1261 (1982) (entered into force on 16 November, 1994).

> *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.*[16]

This convention does not stipulate that structures must be removed entirely but that structures shall be removed taking into consideration the marine environment and accepted international standards. Nigeria ratified this convention on the 10th of December 1982.

2.3 International Maritime Organisation Guidelines 1989

The wording of Article 60(3) UNCLOS which requested States to take into cognisance international standards Organisation (IMO) and in particular its Maritime Safety Committee, the impetus to affirm its competence in this regard.[17] Relying on the provisions of Article 60(3) UNCLOS, the body produced Standards and Guidelines on the removal of disused or abandoned offshore installations.[18] These Standards and Guidelines are not legally binding; they are just recommendations to be taken into account by member governments when making regulations regarding the removal of abandoned or disused installations or structures.[19] The Guidelines are meant to be minimum standards, thus member states can adopt stringent decommissioning requirements.

2.4.1 London Dumping Conventions

While the GC, UNCLOS and IMO clearly provided for the removal of offshore installations, whether wholly or partly, they all failed to provide for what should happen to them afterward. This lacuna was, however, filled by the Convention on the Prevention of Marine Pollution by the Dumping of Waste and other Matter at Sea (London Convention).[20] The Convention spells out specific processes and conditions that must be fulfilled from the removal of platforms and rigs on the sea to their final destinations. The disposal of offshore installations is specifically covered by the convention, by defining 'dumping' to include any deliberate disposal at sea of vessels, aircraft, platforms or other man-made structures.[21] Nigeria is a party to this convention.

2.5 Abidjan Convention

The uniqueness of this convention is the fact that it is a regional convention for Africa. The United Nations Environment Program (UNEP) introduced a Regional Seas Programme in 1974, basically to promote regional collaborative action

[16] Ibid Art. 60(3).
[17] P.D. Cameron, Decommissioning of Oil & Gas Installations: A Comprehensive Approach to the Legal & Contractual Issues (New York, USA: Barrows Company INC, 1998)5.
[18] 1989 Guidelines and Standards for the Removal of Offshore Installations and Structures on the Continental Shelf and in the Exclusive Economic Zone (IMO Resolution A.672 (16), adopted on 19 October 1989) [hereinafter, IMO Resolution].
[19] *Ibid*., Resolution A.672 (16).
[20] Convention on the Prevention of Marine Pollution by Dumping of Wastes and other matters (London Convention), 13 November 1972, 11 I.L.M. 1302 (Entered into force 30th August 1975.
[21] Ibid, Art. 111(1) (a) (ii)

towards the protection of the marine and coastal environment, and the conservation of their resources. One of such programmes is 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).[22] This instrument does not mention decommissioning of offshore installations, but it borders on international environmental issues and decommissioning cannot be divorced from other environmental imperatives. Nigeria, having acceded to this Convention, is compelled to take necessary actions, to stop and control pollution resulting from seabed and subsoil exploration and exploitation activities. Even though decommissioning of offshore oil and gas is not specifically mentioned, Nigeria would be in clear breach of this Convention if internationally recognised standards and rules are not adhered to during decommissioning.[23]

3 NATIONAL LAWS ON DECOMMISSIONING IN NIGERIA.

Having looked at the international and regional instruments that govern decommissioning of offshore oil and gas installations, there seems to be one inescapable fact that the responsibility will reside squarely on the Nigeria government by the implications of the international instruments. It is based on this realisation that there is need for the appraisal of the national laws on decommissioning of oil and gas offshore installations.

3.1. Petroleum Act of 1969: it is important to point out here that the principal petroleum legislation in Nigeria is the Petroleum Act of 1969.[24]However, it does not contain any specific provision for the decommissioning of offshore installations. However, the Act empowered the Minister to make regulations on a number of issues including "regulating the construction, maintenance and operation of installations used in pursuance" of the Act.[25] The Petroleum (Drilling and Production) Regulations of 1969, which was made in furtherance of the Act imposed a general obligation on International Oil Companies to, upon the termination of their licenses, "remove all buildings, installations, works, chattels or effects erected or brought by the licensee upon the relevant area for or in connection with the petroleum operations", subject however, to the Minister's right to take over the installations.[26] A critical look at this provisions in the regulation, one may be at illusion or delusion of making a conclusion that the international oil companies (IOCs) are solely responsible for the decommissioning of offshore oil and gas installations, this is however far from the legal positions as this provisions only specifically mention onshore oil and gas installations and

[22]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 (entered into force on 5 August 1984).
[23] S.W.West., *The Decommissioning of Offshore Oil and Gas Installations and Structures in Nigeria and South Africa in the Context of International Best Practices* (Unpublished LLM thesis submitted to the Institute of Marine and Environmental Law, University of Cape Town 2005)
[24] Petroleum Act 1969, Cap. P10 Vol. 13 of the Laws of the Federal Republic of Nigeria, 2004.
[25] Ibid. Sec.9.
[26] Regulation 45(3).

nothing more. So, it does not cover the offshore oil and gas installations and this is our focal point.

3.2. Harmful Waste (Special Criminal Provisions, etc) Act, 1988

The dumping of decommissioning material is governed by the Harmful Waste (Special Criminal Provisions, etc) Act, 1988.[27] The Act makes it a criminal offence to deposit or dump harmful waste into the marine environment.[28] The Act defines "Harmful Waste" to include injurious, poisonous, toxic or noxious substances that may subject any person to the risk of death, fatal injury or incurable impairment of physical and mental health.[29] The provisions did mention offshore oil and gas installations, but it is apposite to state even though the definition did to extend to offshore installations, it can be inferred that these offshore installations could be injurious and poisonous to marine life and this was the basis of the environmentalist involvement in the decommissioning of Brent Spar in the UK jurisdiction which subsequently led to the improvement and robust decommissioning law in the United Kingdom Continental Shelf (UKCS) and the Nigeria legislation need to incorporate or borrow a leaf from. Therefore, it can be safely inferred that the insertion of toxic or noxious substances in the definition of harmful wastes (substances which may be found in deactivated offshore installations) could make the dumping of such installations a crime.[30]

3.3. The Environmental Guidelines and Standards for the Petroleum Industry in Nigeria, 2002 ("EGASPIN 2002"). [31]This guideline is almost similar to the International Maritime Organisation Guidelines 1989.[32] For example, it demands the complete removal of any offshore installation sited in water depth of less than 100 metres and weighing less than 4,000 tons. It also provided that any installation placed on the Nigerian continental shelf or Exclusive Economic Zone from January 1st 2003, must be designed in such a way that it can be completely removed. Furthermore, the Guidelines require decommissioning programmes for offshore installations to be planned at the initial or design stages of projects.[33]

Upon satisfactory completion of the decommissioning activity, a Decommissioning Certificate will be issued by the Director of Petroleum

[27] Harmful Waste (Special Criminal Provisions, etc) Act, 1988, Chapter H1, Vol.7, LFN, 2004.
[28]Ibid. Section 1(3).
[29] Ibid. Section 5.
[30] E.U.Azaino.,"*International Decommissioning Obligations": Are There Lessons Nigeria Can Acquire from the UK's Legal and Regulatory Framework*. CEPML (University of Dundee) Annual Review –CAR. Vol.16.(2013) p.215.
[31] First produced in 1981, the Guidelines were revised in 2002
[32] Ibid at note 17
[33] EGASPIN 2002 – Part VIII-G, Clause 1.0 (Note that all clauses of the EGASPIN referred to hereafter are those in PART VIII-G).

Resources.[34] The EGASPIN 2002 Guideline made provisions for offshore oil and gas installations decommissioning, but it is not certain who is liable for the removal, it is just a general provisions on offshore decommissioning which is unlike what is contained in the UKCS offshore decommissioning regulation. [35] The regime addresses issues such as identifying the party or parties on whom decommissioning obligations vests and also provides a mechanism for ensuring compliance with this obligation.[36]The author is of the opinion that the Nigeria law should be tailored toward the UKCS decommissioning regime and also the IOCs should be made clearly liable for offshore decommissioning just as we have it in the UKCS regime. It is also pertinent to mention that under the oil and gas contractual arrangements, [37]liability is not on the IOCs, but the Nigeria government.

4.0. CONCLUSION

The necessity of effective decommissioning of oil and gas facilities in Nigeria transcends national interest. It is of global interest that oil and gas facilities particularly those that are used for offshore oil and gas exploration be properly decommissioned. This would guarantee the sanctity of the global environment and prevent the unnecessary harming of marine life.

There is no doubt that the national laws on offshore oil and gas installations decommissioning is inadequate as it stands today in Nigeria oil and gas industry and this is not surprising because there has not been any particular case study of offshore decommissioning, but in the nearest future the vacuum in the legislation on decommissioning would be seriously felt. The "polluter pay principle" (which requires the person or organization that is responsible for pollution must bear the cost of addressing the pollution) is operational under the UKCS and it is now the international best practice on decommissioning of oil and gas offshore installations. It is now a strict liability to neglect offshore oil and gas installations. It regrettable that the controversial Petroleum Industry Bill (PIB) did not cover anything much on offshore oil and gas decommissioning. So, there is need for us to be proactive in other to forestall the occurrence of an incident similar to the Brent Spar incident in Nigeria. This event can be avoided by taking the best action to overhaul our law national laws in this aspect as well as our model contracts, especially the Production Sharing Contracts which are the commonest and most viable in the oil and gas contractual arrangements. It should be inserted that the

[34] Ibid. clause 3.2

[35] The Guidance Notes for Industry Decommissioning of Offshore Installations and Pipelines under the Petroleum Act, 1998. Issued by the Department of Business, Enterprise and Regulatory Reforms (DBERR) (formerly DTI), the Guidance Notes were first produced in August 2000 have been regularly updated since then. The most recent version was issued in March 2011 and can be accessed online at http://og.decc.gov.uk/en/olgs/cms/explorationpro/decommissionin/decommissionin.aspx (hereinafter "DBERR Guidance Notes").

[36] Ibid.

[37] Nigeria currently operates three contractual regimes to wit: Production Sharing Contract (PSC), Joint Venture (JV), and Risk Service Contracts (RSC), the writer will only focus on the PSCs. This is because virtually all the fields located offshore are governed by PSCs

IOCs should be liable and responsible for removing or decommission in the offshore oil and gas installations since there were the one that put them there. The government would supervise and inspect such process through DPR.

In addition, Nigerian laws must be expanded in conformity with international conventions and standards to define specifically what happens to these facilities when they are decommissioned and how best to dispose of them permanently. This article recommends that an agency with staff specially trained on monitoring decommissioning should be established to specifically monitor and ensure that IOCs comply with national regulations and international and regional standards.