THE OFFSHORE/ONSHORE OIL DICHOTOMY ABOLITION ACT - MATTERS ARISING

By

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There have been mixed reactions to the Offshore/Onshore Oil Dichotomy Abolition Bill, which was signed into law by President Obasanjo in mid February 2004, after the approval by the National Assembly. While many political leaders in the South-South zone have been showering praises on President Obasanjo for his "magnanimity", some activists and professionals have called for caution. On the optimistic side, the Senate President has called on the governors of littoral states to use the additional funds accruing from the abolition of the onshore/offshore dichotomy in the best interest of the Niger Delta people. The former Speaker of the Akwa Ibom State House of Assembly, Chief Bassey Ekanem, has said that the new law will check youth restiveness in the Niger Delta and put a stop to the kidnapping of oil workers by irate youths. Some state governors have started building castles in the air in anticipation of the "offshore oil windfall". For instance, the Akwa Ibom State governor, Obong Victor Attah, has said "We have to put this money into creating industries, environment that will bring back industrial development so that our internally generated revenue will grow… I am looking at things like the Independent Power Plant… and our refinery, IT, and our new university. I am also ready to build an airport in the state once we get the allocation… I am looking at creating an environment for an industrial take off; finish our industrial park, and attract industries".

Amidst this euphoria, some activists and professionals are insisting that there is nothing to celebrate yet. For instance, the Executive Director of the Environmental Rights Action (ERA) Mr. Douglas Oronto has called for a clarification of the "200 meters depth isobaths". According to him "The governors should have sat down to educate their people on what 200 meters depth isobaths means…. But those of us who understand what 200 meters depth isobaths means, we are saying that the communities and the people of the Niger Delta… are the losers and are losing". According to him, the new law is simply a temporary measure aimed at satisfying shortsighted politicians from the Niger Delta region. In the same vein, the former President of the Nigeria Bar Association (NBA) Mr. O. C. J. Okocha (SAN) has expressed concern over the application of the law to 200 meters water depth isobaths. According to him, "So when the depth of water is above 200 meters what happens? How do you know the boundary? I think this is difficult to measure in terms of the physical geography of this area. It is a very ambiguous provision. 200 meters isobaths! Do you know what that means. By the time they begin to calculate the thing out there in Abuja do not be surprised that we might be getting less than what we are getting now". He also stated that the bill signed by President Obasanjo was not the original one the last National Assembly had recommended as a way of assuaging the injustices inflicted on the people of the oil mineral producing states. Furthermore, the President of the Movement for the Survival of Ogoni People (MOSOP), Mr. Ledum Mitee, has stated that the law does not deal with the core issues like environmental degradation, marginalization, and the right to self determination and control of natural resources raised over the years by the people of the Niger Delta. According to him, "the law is no more than scratching the problems of the Niger Delta on the surface…We have been told that the President has signed the bill abolishing the onshore/offshore dichotomy into law; but are we certain that it has totally done away with the onshore/offshore dichotomy? It may have added a little more money to the state governments but that is not the best thing for the people of the Niger Delta who want resource control". Also, one of Nigeria's leading authority in constitutional law, Professor Ben Nwabueze, has faulted the new law saying that what is required is a constitutional amendment, not an act of parliament. Thus some unscrupulous individuals and/or the non-benefiting states opposed to the law may soon decide to go to court to restrain the Federal Government from implementing the new law.

As if to pour cold water on the fire of optimism by the state governors and politicians, the Chairman of the Revenue Mobilization, Allocation and Fiscal Commission (RMAFC), Engr Tukur, has also stated that his Commission needs some time to ascertain the quantum of oil produced by each of the littoral states in order to determine the amount of revenue accruable to them individually. He has stated categorically that the implementation of the on-shore/off-shore dichotomy
abrogation law could not be immediate because "anybody getting derivation money, by the constitution, must be in proportion to the quantum of oil that state is producing." He explained further that the Commission would need to work with several agencies of government including the National Boundary Commission, NNPC, Department of Petroleum Resources (DPR), the office of the Surveyor-General of the Federation, the Nigerian Institute of Oceanography and Marine Research and those of the states concerned, so that "the data we obtain will be factual and then the indices can then be generated to determine what quantum of money each state should get in fairness with its own production quantity." He noted that this will ensure justice and avoid a situation of conflict in the sharing of the derivation revenue between neighboring beneficiary states, because once "there is no justice in it if you start hearing a lot of complaints, you have taken my oil and given it to another state". The implication of this is that the state Governors will have to wait for some time for expected "oil windfall" to materialize. But how long will they have to wait? Your guess is as good as mine! One can also conclude from this that the Presidency, the Governors and the National Assembly did not have the contour map of Nigeria’s offshore and the oilfields/wells during the consideration, approval and signing of the bill. So it was almost like running through the forest in the dark without torchlight! One would have expected that during the "negotiations", they would have juxtaposed the map of the offshore oilfield/oil-wells on the offshore contour map showing the 200m depth isobaths, the continental shelf (200 nautical mile) and the contiguous zone (24 nautical mile). Apparently, this was not the case. What then was the basis of the mythical "200 meters water depth isobaths" and what is the basis of the optimism of the Governors? Perhaps they have privileged information which the RFAMC and the rest of us do not have.

It is clear from the above that some of the key questions/issues arising from the new law are as follows:

Is it true that the law abolished the offshore/onshore dichotomy in oil revenue allocation?

How much will the littoral states benefit from the law and when will they begin to reap the benefits?

What does the "200meter water depth isobaths" mean and how does it relate to the original concepts of "continental shelf" and "contiguous zone"

Will the law stop the demand for resource control?

We now discuss these questions in turn.

1. On the first question, it appears that the new law is actually a misnomer. The law has not abolished the dichotomy completely. In fact, it has established a "trichotomy": (a) onshore oil; (b) offshore oil at less than 200m depth isobaths; and (c) offshore oil at more than 200m depth isobaths. What the new law states is that the 13% derivation principle will be applied only to (a) and (b) above. In other words, 13% of the revenue from oil produced onshore and offshore at less than 200m depth isobaths will be shared among the oil producing littoral states but the revenue from the oil produced at more than 200m depth isobaths will not be subject to the derivation principle. In essence, the dichotomy remains. What the new law has done is to move the dividing line from the "low-water mark of the land surface" (or "seaward limits of inland waters) to "200m water depth isobaths". Thus, it is technically wrong to add the word "abolition or abrogation" to the law. It should simply read the "Offshore Revenue Allocation Act".

It will be recalled that the dispute between the Federal Government and the eight littoral States in 2001/2002 was the application of the derivation formula to offshore revenue. The Federal Government contended the seaward boundary of each of the littoral states was the low-water mark of the land surface of such state and that natural resources located within the continental shelf of Nigeria are not derivable from any of the littoral states and thus revenue from such resources should not be subject to the derivation formula. According to the Supreme Court, "The eight littoral states did not agree with the Federal Government contentions and each claimed that its territory extends beyond the low-water mark onto the territorial water and onto the continental shelf and the exclusive economic zone. They maintained that natural resources derived form both onshore and offshore are derivable from their respective territory and in respect thereof each is entitled to the "not less than 13 per cent" allocation as provided in the proviso to subsection (2) of section 162 of the Constitution". The Federation Government took the littoral states to the Supreme Court praying for "a determination of
the seaward boundary of a littoral State within the Federal Republic of Nigeria for the purpose of calculating the amount of revenue accruing to the Federation Account directly from any natural resources derived from that State pursuant to section 162(2) of the constitution of the Federal Republic of Nigeria 1999. In its judgement delivered in April 2002, the Supreme Court maintained that the "Plaintiff's case succeeds and I hereby determine and declare that the seaward boundary of a littoral State within the Federal Republic of Nigeria for the purpose of calculating the amount of revenue accruing to the Federation Account directly from any natural resources derived from that State pursuant to Section 162(2) of the Constitution of the Federal Republic of Nigeria 1999, is the low-water mark of the land surface thereof or (if the case so requires as in the Cross River State with an archipelago of islands) the seaward limits of inland waters within the State".

Thus, so long as the "200m water depth isobaths" is interpreted as the "low-water mark of the land surface" (or the "seaward limits of inland waters" if the case so requires), the new law does not violate the April 2002 Supreme Court judgement which in effect re-established the offshore/onshore dichotomy. But is such an interpretation acceptable?

2. On the second question, given the confession of the RFAMC chairman, it is too early to speculate on the amount of additional revenue that will accrue to the littoral states arising from the new law and when they will start reaping the benefits. We have to wait until the Commission is able to produce the offshore contour map showing the 200m depth isobaths as well as the offshore oil-wells/fields, their production levels and the "offshore boundaries" of the littoral states. For the purpose of this paper, let us assume that the offshore area between the coast and less than 200m depth isobaths is the "shallow offshore" while the offshore area after 200m depth isobaths is "deep offshore". If a substantial part of the oil currently produced in Nigeria’s offshore is from the "shallow offshore" (at less than 200m depth isobaths), then littoral states can expect to get substantial amount of new money. For instance, if we assume that that 60% of Nigeria’s oil is currently produced onshore, 30% at less than 200m depth isobaths and only 10% at more than 200m depth isobaths, then if total projected oil revenue in 2004 is N1,000 billion, the derivation money from onshore oil will be N78b (i.e. 13% of 60% of N1,000b), while the derivation money from "shallow offshore" oil will be N39billion (13% of 30% of N1,000b). Thus the littoral states will be N39m richer. The revenue from deep offshore oil (N100billion, i.e. 10% of N1,000b) will not be subject to derivation. Thus the total derivation fund will be N117b while the balance N883billion oil revenue will be shared among the three tiers of government in accordance with the current revenue allocation formula. On the other hand, if only 10% of the total oil revenue is from shallow offshore while 30% is from deep offshore, the derivation money from the shallow offshore oil will be N13billion. Thus the amount of "new money" that the littoral states will receive (at the expense of what will be available for sharing among the three tiers of government) will depend on the amount of oil produced at less than 200m depth isobaths. But this remains unknown! And so long as this remains unknown, littoral states cannot expect to reap the benefits of the new law. Even after mapping the 200m depth isobaths, the "seaward boundaries" of the littoral states will still have to determined and agreed. How are they going to draw the boundary line between two littoral states from the coast to the "200m depth isobath"? Will it be a straight line that is perpendicular to a point at the coast? Will the point on the "200m depth isobaths" have the same longitude as the boundary point on the coast? How are they going to manage a situation where an oil field straddles the "boundaries" of two littoral states? Let us pray that the likely "offshore boundary" disputes between neighboring littoral states will be resolved expeditiously and amicably.

3. On the contentious issue of "200m depth isobaths", it will be recalled that President Obasanjo and the Governors of the littoral reported reached an agreement on it over a year ago. President Obasanjo had earlier proposed the term "contiguous zone" (24 nautical miles from the coast) but the Governors and National Assembly had insisted on "continental shelf" (200 nautical miles from the coast). In a curious compromise, Obasanjo and the Governor reportedly agreed to substitute "200 m depth isobaths". Following that agreement, President Obasanjo sent a letter dated February 5, 2003 to the National Assembly, proposing that the phrase "continental shelf and exclusive economic zone" be changed with "200 meter water depth isobaths", and assuring that "all existing producing oil fields are located within the 200 meter water depth isobaths. Except for AGIP Abo Field, virtually all deep off shore commercial oil discoveries are located in less than 1000 meter of water depth beyond which the quest for derivation cannot be justified… impact of environmental pollution to coastline is at this distance considerably reduced because of sudden steepness of water depth. Equally, this contour also marks the limit of routine of fishing activities… with the agreement, the controversy on the bill will be brought to an end as the governors are in agreement with the amendment to the bill". Following this, the Thursday, 15th February 2003, reported that the Federal Government has agreed to pay "derivation revenue on oil found up to 200
meters water depth isobaths into the high sea to the littoral states… the affected littoral states can only derive revenue from the coast up to 200 meter depth into the high sea, while the demarcation into ultra deep exploration will be left for the federal government for the purposes of calculating the federal revenue". It appears that in arriving at the "agreement", the Federal Government did not present the Governors with the alternative scenarios of the expected derivation revenue corresponding to the three cases - contiguous zone, continental shelf and the "200 meters water depth". My guess is that the Governors may have been given the assurance that their derivation revenue under the "200 meters water depth" case will approximate the continental shelf case. But is this going to be the case? In the absence of the relevant information, let us look at what the textbooks say.

In "Modern Earth Science", by Robert J. Sager, et al, (1998, pp. 393-395), we are told that, "The ocean floor can be divided into two major areas - the continental margins and the deep ocean basin. The continental margins are shallower portions of the ocean floor made up of the continental crust. The deep ocean basin is the portion made up of the ocean crust. The line that divides the continental crust from the ocean crust is not always obvious. Shorelines are not the true boundaries between the ocean floor and the continents. The real boundary lies some distance offshore, beneath the ocean itself. Every continent is bounded in most places by a zone of shallow water, where the ocean covers the edge of the continent. This part of the continent that is covered by ocean water is called the continental shelf. The shelf usually slopes gently from the shoreline, dropping only about 1.2m every 100m. Although it is under water, a continental shelf is part of the continental margin, not the deep ocean basin. The width of a continental shelf varies. On the west coast of South America, the continental shelf is only a few kilometers wide. On the west coast of Florida, however, the shelf extends 760km into the Gulf of Mexico. The continental shelves are affected by changes in sea level. At the seaward edge of a continental shelf is a steeper slope called a continental slope… Along the continental slope, the ocean depth increases to several thousand meters within a distance of a few kilometers." It is clear from the above that the depth of the continental shelf varies considerably from place to place. Even within the continental shelf, there are deep valleys (submarine canyons). Thus, it is possible to find a valley of 400m surrounded by "200 meter water depth". Imagine the complication of computing the derivation revenue from an oil reservoir in such vicinity? If we assume that on average the depth of the ocean increases by about 1.2m over 100m distance from the shoreline (as indicated above), it follows that on the average, a depth of 200m will be reached at about 16,667m (or 16.67km which is about 10.4 nautical miles) from the shoreline (coast). This is less than the 24 nautical miles (contiguous zone) originally proposed by President Obasanjo and a far cry from the 200 nautical miles proposed by the National Assembly. I must however warn that this calculation may be wrong since it is not based on Nigeria’s contour data. Even if most of the offshore oil is currently produced at less than 200m depth isobaths, what will happen in the near future if most of the oil is produced at more than 200m depth isobaths and what is the guarantee that an oil spill from oil production activities at such depths will not affect the coastline of littoral states?

4. Finally, on the issue of resource control, there is no doubt that the Federal Government hopes that the new law will remove the sail from the agitators of resource control. However, although the struggle for the abolition of the offshore/onshore oil dichotomy may have brought the issue of resource control to the fore, resource control seems to have assumed a wider meaning than the mere abolition of the dichotomy. In fact, to many activists, the abolition of the dichotomy is only a small part of the struggle. While some activists are advocating for a return to the provisions of the 1963 constitution (50% derivation and total abolition of the dichotomy) others are going further to call for a 100% control of natural resources by the federating state governments (who will them make some contribution to the central government). Given this increasing wider perspective of the "resource control" issue, it is doubtful if the new law can kill or neutralize the struggle. The extent to which the new law is able dampen the struggle will depend on the benefits the littoral states are able to derive from the new law. If the new law results in significant increase in revenue and improvement in living conditions in the affected states in the short to medium term terms, then the politicians will have a case to dissociate themselves from the struggle even if the activists decide to continue. However, if there is undue procrastination in the implementation of the new law or if it does not result in any significant improvement in the revenues of the affected states, the politicians are likely to return to their tents and continue the struggle with the activists.

In conclusion, although the new law marks a significant victory for the littoral states and the apostles of resource control, there are still many unresolved issues that will complicate and delay its implementation. The sooner these issues are resolved, the better. Let us hope the new law will not turn out to be a "Pandora’s box" or a "Greek gift" or a "Trojan horse" or all of these.