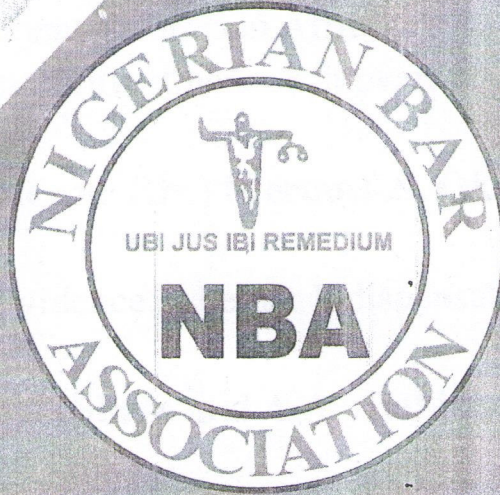


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ONSHORE/OFFSHORE DICHOTOMY IN THE APPLICATION OF THE PRINCIPLE OF DERIVATION IN NIGERA

INTRODUCTION

The question of equitable formula for revenue allocation from the Federation Account based on the principle of derivation from resources of the federating units called states has always been and remains a vital point of controversy on the agenda of the Nigerian state to be determined. This question arose as a result of constitutional provision that all revenues collected in Nigeria be paid to the Federation Account from where all the federating units shall receive their allocation based on certain principles and especially that of derivation from natural resources yielding revenue to the Federation Account.

1

The 1999 constitution of Nigeria which sought to settle the problem arising from revenue allocation provides

“The federation shall maintain a special account to be called the Federation Account into which shall be paid all revenues collected by the government of the federation...”²

The constitution further provides

“The president, upon the receipt of advice from the Revenue Mobilization Allocation and fiscal commission, shall table before the National Assembly Proposals for revenue allocation from the Federation Account, and in determining the formula, the National

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¹ See S. 162 (1)) & (2) Constitution Federal Republic of Nigeria 1999

² S. 162 (1) CFRN 1999

Assembly shall take into account, the allocation principles especially those of population, equality of states, internal revenue generation, land mass, terrain as well as population density; provided that the principle of derivation shall be constantly reflected in any approved formula as being not less than thirteen percent of the revenue accruing to the federation account directly from any natural resources”³

The mainstay of the Nigerian economy are crude oil (petroleum) and gas which account for more than 80% of the revenue accruing to the Federation Account. These essential mineral resources are found in about 9 coastal states of Nigeria called the litoral states. These include all the Niger Delta states. These essential mineral resources are not only found in the land territory of these states but also in the adjoining and adjacent prolongation of the land territory of the coastal states submerged into the sea beyond the territorial sea to the outer edge of the continental margin and touching the sea bed popularly known as the continental shelf⁴.

The mineral resources found in the land territory of the litoral states are on the shore. Hence the right of litoral states to derivation on activities of the federal government on petroleum and other natural resources on their territories is not in dispute. But the mineral resources found in the continental shelf are found off the shore of the litoral states and hence the term offshore.

The Federal Government of Nigeria is of the opinion that the mineral resources found in the continental shelf are found outside the territory of litoral states and that the litoral states cannot legally seek to control the natural resources located beyond their seaward boundaries⁵ or seek to have undue advantage over other states of the

³ S. 162 (1) CFRN 1999

⁴ Art 76 1982 UN Convention on the Law of the Sea

⁵ The Guardian Newspaper, April 6, 2002. p. 1

federation based on the principle of derivation of revenue from the Federation Account. This opinion of the federal government was vehemently rejected by the litoral states and that is the crux of the onshore/offshore dichotomy between the federal government and the litoral states.

When the two sides to this all-important dichotomy could not reach amicable negotiation, the federal government headed for the Supreme Court and the Apex Court of the land being the only legally recognized arbiter in this situation. The court delivered its judgement on April 5, 2002. The Supreme Court ruled in the case of **Attorney-General of the Federation v. Abia State & Ors**⁶ that the litoral states have no legal right to revenue accruing from oil derived off the shore of their states.

This judgement of the Supreme Court of Nigeria has generally been acclaimed by legal experts and practitioners as a landmark judgement. The judgement contains a lot of material on the application and interpretation of municipal law, international law, maritime law and constitutional law among others. According to Chief Richard Akinjide⁷, the Supreme Court could not have done otherwise in the judgement it gave. If it did otherwise, it would have gone contrary not only to the international law but also to the interpretation and application of the conventions which are international treaties and therefore, binding on Nigeria.

Despite the hardwork, plethora of analysis of international and municipal legal materials and cases leading to the landmark and resounding judgement of the Supreme Court, the dichotomy continue to rear its strong head in the Nigerian polity. This is because the implication and consequences of the Supreme Court judgement if implemented to its letter, are that it will have adverse effects on the socio-economic relation and the general developments of oil producing states and their people.

⁶ Sc 28/2001 or (2001) 7 Sc (Pt. 1) particularly at P. 32

⁷ Former Minister of Justice and A.G. Federation who signed the 1982 UNCLOS for Nigeria. See The Guardian Newspaper April 13, 2002, p. 16

From the time oil exploration started in 1956 till 1993, almost all exploration and production activities were concentrated on the land and in the swamps. The only exception being that of Mobil Producing which operated mainly offshore. Its activities are however in areas not farther than 200 metres of water depth. But now the Federal Government is deriving larger part of its revenue from natural resources offshore.

If the principle of law established by the Supreme Court that littoral states have no right to revenue accruing from oil derived off their shore, states such as Akwa Ibom and Ondo will lose their right to 15 percent or more oil revenue derivation from oil concessions offshore⁸.

In the entire Niger Delta region, the judgement has fuelled revulsion against the federal government which initiated the suit. Some of the projects which some of the States embarked upon in the wake of the new-found prosperity brought about by the operation of the 13 percent principle of derivation, were abandoned. The States could also not meet their obligations to their workers and pensioners. Consequently, workers in the six south-south states of Akwa Ibom, Bayelsa, Cross River, Rivers, Delta and Edo States most of whom could not be paid their monthly salaries regularly, organized series of rallies to protest against the Supreme Court's judgement⁹.

The above situation in a democracy got the polity heated beyond comfortable levels, and as a result, the federal government decided to have a rethink on a matter that was supposedly finally determined by the apex court in the land. Neither the Executive nor the Legislative arm of the government can amend or tamper in anyway whatsoever with the decision of the court. The only legally acceptable way of addressing a matter differently having been pronounced upon by the court is to pass a new legislation which will be binding on both the executive and the judiciary without offending the constitutional powers of authority of the judiciary. In order to

⁸ The Court Newspaper Vol 4, No. 1249, Dec 16 2002 .

⁹ The NEWS Magazine, Vol 19, No. 26, 30 Dec. 2002, p. 59

alleviate the fears and the sufferings of both the government and the people of the litoral states, the President of the Federal Republic of Nigeria sent a bill for

“An act to abolish the dichotomy in the application of the principle of derivation for the purpose of allocation of revenue accruing to the federation account and for matters connected therewith to the National Assembly to be enacted”¹⁰.

The whole bill is a very short one containing only two clauses in a space of less than a page of paper. Clause 1(1) provides as follows:

“As from the commencement of this Act, the contiguous zone of a state of the federation shall be deemed to be part of that state for the purposes of computing the revenue accruing to the Federation Account from the state pursuant to the provisions of subsection 2 of Section 162 of the constitution of the Federal Republic of Nigeria 1999”¹¹

Clause 1(2) provides

“Accordingly, for the purposes of the application of the principle of derivation, it shall be immaterial whether the revenue accruing to the Federation Account from a state is derived from natural resources located onshore or offshore”¹²

¹⁰ This bill was sent to the National Assembly on the 28th August 2002

¹¹ Draft bill on the Allocation of Revenue (Abolition of Dichotomy in the Application of the Principle of Derivation) Act 2000 clause 1

¹² Draft bill on the Allocation of Revenue (Abolition of Dichotomy in the Application of the Principle of Derivation) Act 2000

The remaining one clause is on the short title and commencement of the Act which says that this Act may be cited as the Allocation of Revenue (Abolition of Dichotomy in the Application of the Principle of Derivation) Act 2002 and shall be deemed to have come into force on 1st April, 2002. The explanatory memorandum to this bill says that the Bill seeks to specify the extent of the application of the principle of derivation to resources derived offshore. The National Assembly deliberated on the bill and passed it with the speed of light compared to other bills ever sent to the National Assembly by the Executive. In passing the bill, the National Assembly in its wisdom amended clause 1(1) to read:

“As from the commencement of this Act, the continental shelf and the Exclusive Economic zone contiguous to a state of the federation shall be deemed to be part of that state for the purposes of computing the revenue accruing to the Federation Account from that state pursuant to the provisions of the constitution of the Federal Republic of Nigeria 1999 or any other enactment”¹³

On receipt of the bill passed but with above amendment for his assent, the president withheld his assent and wrote back to the National Assembly saying that it is inadvisable and indeed, dangerous to extend the application of the Bill to the continental shelf and the Exclusive Economic Zone contiguous to a state of the federation to be part of that state for the purpose of computing the revenue accruing to the Federation Account from that state.

As it stands now, it appears that there are two different dichotomies on the application of the principle of derivation for the purposes of Allocation of Revenue accruing to the Federation Account. The first one is between the federal government and the litoral states on

¹³ This President's letter rejecting or withholding Assent to the Dichotomy Bill was dated November, 26, 2002

whether the litoral states have right to revenue accruing from oil/natural resources derived off their shores. This is a disengagement that exposes the weakness of the sandy soil on which the Nigerian federation was built. A federation is a central government formed by other independent governments. This is to say that all the federating units must have deliberated and agreed to form the central government. As it were the Nigeria federation came into being by the fact of colonialism. Hence the component units now called states are still trying to find their feet in an arrangement of government that they supposed to have brought into being.

It is the union of independent national states that usually gives birth to federations¹⁴. The above being the case, the constitution of a federal state devolutes powers to both the federal and state governments showing the areas where they can validly operate¹⁵. The Supreme Court judgement of the 5th of April has decided that the litoral states cannot operate beyond their land borders, meaning that all the natural resources in the territorial sea, contiguous zone, exclusive economic zone, the high seas and that of the continental shelf are exclusively put under the jurisdiction of the federal government whether for the purposes of derivation of revenue or for other purposes.

The other dichotomy is between two federal arms of government i.e. The executive and the National Assembly on what part of the sea territory is to be ceded to litoral states to mitigate the harshness of the Supreme Court judgement on the litoral states and for the purposes of computing the revenue accruing to the Federation Account from those states pursuant to Section 162 (2) CFRN 1999.

Before we go further to analyze this second dichotomy, it is apposite to explain some terms that will be relevant to our further discussion. The first term is a "state". A state in international law or arena is a

¹⁴ V.I. Lenin. *The Right of Nations to Self-Determination/Selected Works* in three volumes Vol 1 Progress Publishers Moscow 1977, p. 568-569

¹⁵ See Rufus O. Oluwa: Introduction to international Law, Published by Silk Commuunications Ltd, Ikeja, 2000 pp. 36-3 and WADE AND Godfrey Philips Constitutional and Administrative Law. Ninth Edition, Longman 1977 p. 372

country. The state as a person in international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other states¹⁶ or countries¹⁷. The federal state shall constitute a sole person in the eyes of international law¹⁸, Section 2 of the Nigerian constitution provides that "Nigeria is one indivisible and indissoluble sovereign state to be known by the name of the Federal Republic of Nigeria"¹⁹. The same section goes further to provide that Nigeria shall be a federation consisting states and a federal capital territory. It thus follows that when the term "state" is mentioned concerning any subject-matter beyond the land borders of Nigeria and concerning it, we mean Nigeria as a state.

The second term is the "territorial sea" which is the breadth of the sea up to a limit not exceeding 12 nautical miles, measured from the baseline with the UN convention on the law of the sea²⁰. The baseline is the low-water line along the coast (shore)²¹. The baseline is a line joining all the points where the sea water touches the coast land. This is the point from where all the different territorial breadth into the sea are measured. The sovereignty of a coastal state extends beyond its land territory and internal waters and in the case of an archipelagic state, its archipelagic waters, to an adjacent belt of sea described as the territorial sea. This sovereignty extends to the airspace over territorial sea as well as to its bed and subsoil²². This sovereignty is only subject to the rights of innocent passage to foreign ships²³.

¹⁶ Convention on Rights and Duties of States Art 1 (Louis Henkin & Ors Basic Document Supplement to international Law, Cases and Materials. American Casebook Series 1980 p. 42

¹⁷ Emphasis mine

¹⁸ Convention on Rights and Duties of States Art 2

¹⁹ CFRN 1999 Section 2(1) and (2) Also see IUNCLOS 1982 Art 1 on States Parties to the Convention

²⁰ UNCLOS 1982 Art 3

²¹ Ibid Art 5

²² Ibid Art 2 (1) and (2)

²³ Ibid art 17, 18, 29, 20 and 21

The next term is “contiguous zone”. The contiguous zone is a body of sea water which may not extend beyond nautical miles from the baseline from which the breadth of the territorial sea is measured. This zone may be used by the coastal state to exercise control necessary to prevent infringement of its custom, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea. It may also be to punish infringement of the above laws and regulations committed within its territory or territorial sea.²⁴

The “Exclusive Economic Zone” (EEZ) is also a body of sea water beyond and adjacent to the territorial sea but shall not extend beyond 200 nautical miles from the same baseline from which the breadth of the territorial sea is measured²⁵. The EEZ is an area of the high seas subject to a regime based on the freedom of the High seas where the coastal state is granted a scope of rights and jurisdictions²⁶. In this zone, the coastal state enjoys exclusive right to harvest the living and the non-living resources of the EEZ²⁷.

“Continental shelf” is the prolongation of the land territory of the coastal state into the sea beyond the territorial sea.

- i. To the outer edge of the continental margin or to a distance of 200 nautical miles from the baseline from which the breadth of the territorial sea is measured; or
- ii. To a distance beyond the 200 nautical miles but not exceeding 350 nautical miles (i.e. if the prolongation of the shelf still continues beyond the 200 nautical miles before the end of the continental margins); or
- iii. To a distance but not exceeding 100 nautical miles from the 2,500 metre isobaths, which is a line connecting the depth of

²⁴ UNCLOS 1982 Art 33

²⁵ Ibid Art 55, 57

²⁶ E.P Adreyev, I.P Blishchenko (General Edition) *The International Law of the Sea*, Progress Publishers, Moscow, 1988, p.5

²⁷ See UNCLOS 1982 Art 56; U.O Umozurike *Introduction to International Law*, Spectrum Books Ltd, Ibadan 2001, p. 111-112

2,400 metres provided that it does not apply to submarine elevations such as plateau rises, caps, banks and spurs²⁸.

According to the UN convention on the law of the sea 1982, a coastal state shall adopt one of the above three variants of continental shelf and deposit with the Secretary-General of the UN charts and relevant information, including geodetic data, permanently describing the outer limits of its continental shelf²⁹. The continental shelf is very important to Nigeria because it is in this subsoil under the sea called "continental shelf" that our oil and gas are found. The coastal states (country) exercise exclusive sovereign right over the area for the purposes of exploration of natural resources.

The "high seas" covers areas beyond the limits of the territorial sea and not subject to the sovereignty of any state. The UNCLOS 1982 provides that this part of the sea apply to all parts of the sea that are not included in the Exclusive Economic Zone, in the territorial sea or in internal waters of a state³⁰

The last but not the least term is the nautical mile. Nautical is a term used by sailors for measuring time, distance, tides etc. Nautical mile is a distance equivalent to 1,852 metres³¹. A nautical mile is equivalent to 1.8 kilometers on land³².

Looking carefully at the text of the bill presented by the Executive to the National assembly and the Bill adopted by the National Assembly, one can vividly see that both bills created different problems. The executive bill ceded contiguous zone to the states knowing fully well that the litoral states cannot exercise jurisdiction in this zone and the fact that the contiguous zone is only a body of water where oil and gas, the subject matter of the dichotomy, do not exist. The only natural resources that can be found here is the fish

²⁸ UNCLOS 1982 Art 76 (9)

²⁹ UNCLOS 1982 Art 76 (9)

³⁰ Ibid Art 86

³¹ Oxford Advanced Learners Dictionary of Current English

³² The President's Case Against the Bill/The Comet Newspaper, 16th Dec, 2002, p. 5

and other living resources. What is more, even fishing and fisheries, maritime shipping and navigation are vividly placed in the exclusive legislative list where only the federal government can legislate³³.

The contiguous zone is established as stated earlier on, for purposes of preventing information of the coastal state's custom, fiscal, immigration or sanitary laws and regulations. All these are items listed in the executive legislative list for the federal government to the total exclusion of the jurisdiction of the litoral states³⁴. Finally, the bill presented by the executive did not recognize the fact that the litoral states are neither subjects of international law nor parties to the 1982 UN convention on the law of the sea and as such have no obligation under that law.

On the other hand, the bill amended and passed by the National Assembly ceded two other sea areas comprising the continental shelf and the exclusive economic zone to the litoral states for purposes of enjoying derivation from revenue allocation. These two sea areas belong to the whole of human kind but by international customary and treaty law ceded to the coastal states for the only purpose of exercising control on the explanation, exploitation and management of living and non-living natural resources and taking all the economic benefits therefrom. The sovereign coastal state has only exclusive economic rights in these two regions. These are the two sea areas especially the continental shelf where the government of the federation is getting all its oil and gas offshore.

There are lots of questions that beg for answers. Can the federal government have sea areas without the litoral state shaving any interest whatsoever? Can the federal government carry out oil and gas exploration in the sea areas without concrete adverse effects on the livelihood of the people in the litoral states? What is the quantum of rights and benefits that should accrue to the litoral states whether these sea areas are deemed to be part of their territory for the

³³ CFRN 1999, 2nd Schedule Part 1.

³⁴ Ibid

purpose of computing revenue accruable to them from the Federation Account or not?

There are a lot more questions. But what is clear in Nigeria today is that most of the problems have neither been addressed nor fully addressed. The current Nigerian constitution³⁵ puts such items as mines and minerals, including oil fields, oil mining, geological surveys and natural gas; water from such sources as may be declared by the National Assembly to be sources affecting more than one state; fishing and fisheries other than fishing and fisheries in rivers, lakes, waterways; ponds and other inland waters within Nigeria, maritime shipping and navigation and implementation of treaties in the exclusive legislative list. Meaning that whatever the federal government decrease concerning any of the items remains valid without any query from other levels of government.

The Constitution, the Petroleum Act and many international legal instruments are in favour of the federal government. But legal instruments whether municipal or international are always the result of negotiated settlements. Where this is not so as it is the case with current Nigerian constitution³⁶, agitations and counterclaims will continue to emanate from segments of people and levels of government who feel shortchanged in the distribution of national cake that is baked in their kitchen with their ingredient coming back to the two bills, one cannot find any difference in the intention and purpose of the two bills the only difference being in the formal usage of terms. Without any fear of contradictions, the contiguous zone used by the president's bill is part and parcel of the exclusive economic zone and a symbiotic part of the continental shelf, which are the offending terms the president is quarrelling with. The contiguous zone, exclusive economic zone, exclusive economic zone and the continental shelf are international territories recognized by international law. Nigeria as a sovereign state is the only recognized subject of that law.

³⁵ CFRN 1999 2nd Schedule, part 1

³⁶ Ibid

In spite of the above, Nigeria and all the states of the federation recognize and accept the fact that a percentage of revenue accruing to the Federation Account derived from natural resources located onshore or offshore should as a right be allocated to the litoral states. Clause 1(2) of the two bills do not differ on this point. The question which ought to be the basis of dichotomy is whether 13% derivation is enough or not. 13% being the minimum approved by the constitution³⁷.

It is important to note that the bills either prepared by the president or as amended by the National Assembly do not cede or intend to cede contiguous zone, exclusive economic zone or the continental shelf to the litoral states but provide that these sea areas shall be DEEMED to be part of those states for the purpose of computing the revenue accruing to the Federation Account from the litoral states pursuant to the provisions of the constitution. As such, the implications of signing the bill as amended by the National Assembly is in consonance with the intention of the original bill presented by the president. Any argument to the contrary will only be showing the hand of Esau while the voice will be that of Jacob³⁸.

Some of the arguments of the president and the federal executive are that the contiguous zone appears to be the farthest out into the open sea over which Nigeria or any coastal state for that matter could claim sovereignty over natural resources therein without engendering counter-claims by neighboring adjacent states. Another argument is that Nigeria has not established its own continental shelf and it will be wrong to make a municipal law on what has not yet been established. Yet another argument is that Nigeria as a country can monitor activities in territorial waters and contiguous zone but not beyond because the country has not started drilling or exploration beyond the 24 nautical miles³⁹.

The above arguments are only stating the likely limitations that may confront federal government when and where exploration will take

³⁷ CFRN 1999 S. 162(2)

³⁸ Holy Bible, Genesis 26 Verse 22.

³⁹ The Comet Newspaper Vol 4. No. 1249 Dec 16, 2002, p. 1 and 5

place offshore. The litoral states are not forcing or encouraging the federal government to do that which is not possible or not allowed to go into direct exploration of natural resources in these territorial sections of the sea. All they are simply demanding for is that the federal government should make available to them minimum of 13% of revenue derived from either the contiguous zone, EEZ of the continental shelf whenever the revenue is derived. It is a known fact that the federal government has discovered huge deposits of oil resources in oil fields offshore and that oil blocks had been allocated to different operators to the region of 2,500 metres of water depths⁴⁰. For example the Agbami oil field which spans 45,000 squares kilometers is ranked among the largest single funds to date in deep water in Africa⁴¹. These are oil fields located in the continental shelf and beyond the limits of the contiguous zone.

The alternative to the bill as amended by the National Assembly is for the different zones to be completely deleted from the bill. In that case, the bill will read as follows:

“Clause 1. As from the commencement of this Act, the sea adjacent and contiguous to a state of the federation without prejudice to international law shall be deemed to be part of that state for purposes of computing the revenue accruing to the Federation Account from that state pursuant to the provisions of Subsection (2) of Section 162 of the constitution of the Federal Republic of Nigeria 1999”

Subsection 2 of clause 1 and 2 not being in dispute should remain as they are.

It should be noted that the silence of the bill on sea zones as recommended (as alternative version) above has the same

⁴⁰ Ibid

⁴¹ Ibid

implication as if all the zones are mentioned seriatim. This is because the continental shelf where the mineral resources are found has a distance starting from the baseline up to a maximum of 350 nautical miles. In this stretch of continental shelf, different littoral state has its oil deposit at 20 nautical miles and another at 50 nautical mile sand the federal government is deriving revenue from both oil fields, it will not only be wrong but absurd if the federal government will not allow the two states to equally benefit from the principle of derivation.

There are many more areas of socio-economic and political relations in Nigeria with one dichotomy or the other. In order for peace and harmony to reign in Nigeria leading to economic development and attainment of social justice, the Nigerian federations must be re-negotiated. All Nigerians and ethnic nationalities including governments at different tiers should know the quantum and limit of their rights and obligations.

It is not enough to have a national constitution but the constitution must be a document made as a result of all encompassing negation and agreement among all the stakeholders in the Nigeria Dream. Until that is done, Nigeria will continue to be governed on ad hoc basic.