

Assessing the Impact of the Brent Spar Incident on the Decommissioning Regime in the North East Atlantic

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ABSTRACT

The advent of deep-water oil exploration has increased concern for the impact of oil activities on marine environment, especially regarding disused or decommissioned facilities offshore. Before the Brent Spar incident, which galvanised international efforts to protect the environment, international and regional legal instruments on decommissioning of offshore oil installations was weak and ineffective in protecting the environment from the effect of disused facilities. This paper examined the efforts made by international and regional actors to remedy the lapses of the pre-Brent Spar legal instruments on decommissioning of offshore oil facilities, especially regarding the new provisions on environmental protection. The paper concluded that the supplementary legal instruments made post-Brent Spar have not radically transformed the legal regime on decommissioning of offshore oil facilities because contracting states still reserve the discretion to permit abandonment of disused facilities.

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1. Introduction

Many states of the world have laid down the groundwork for an agreed normative framework intended to govern decommissioning of offshore installations¹ at the regional and international level.² These include the United Nations Convention on the Continental Shelf (Geneva Convention) 1958, the United Nations Convention on the Law of the Sea (UNCLOS) 1982, the London Convention on the Prevention of Marine Pollution 1972 and Convention for the Protection of the Marine Environment of the North East Atlantic (OSPAR Convention) 1992. These instruments govern

¹ Woodliffe, J. (1999). "Decommissioning of Offshore Oil and Gas Installations in European Waters: The End of a Decade of Indecision?", 14 *IJCL* 101.

² Park, P., et al. (2001). "Evolution of International law on the Decommissioning of Oil and Gas Installation", 9 *IELTR* 199.

decommissioning of offshore installations internationally and particularly, in the North East Atlantic.³

Despite this seemingly copious legal regime impacting on the decommissioning process of oil facilities, there are obvious shortcomings with the instruments, especially in the area of the environment. Thus, although, the Brent Spar incident in the North Sea⁴ accelerated changes in the framework for decommissioning⁵ with greater emphasis on protection of the environment,⁶ this paper argues that these changes are not robust enough as they are largely superficial. The paper is therefore, divided into three parts, part one discusses the pre-Brent Spar regime on decommissioning in the North East Atlantic; part two examines the Brent Spar incident and the changes it introduced in the decommissioning regime in the North East Atlantic adducing reasons to show that those changes are largely superficial. Part three, is the conclusion.

2. The Pre-Brent Spar Regime on Decommissioning

2.1. Geneva Convention 1958

The Geneva Convention 1958 was the first international instrument relating to decommissioning. Article 5(5) provides that any offshore installations abandoned or disused, must be entirely removed.

It is worthy of note, that this provision quickly fell into 'desuetude',⁷ owing to the impracticability of total removal. From 1987 it became "difficult if not impossible to meet"⁸ the requirements of this provision because of the location of installations in deep water where removal was not so easy.⁹

2.2. UNCLOS 1982 and IMO Guidelines 1989

The issue of redundant installations was revisited in UNCLOS 1982,¹⁰ which provides that:

*Any installation...which are abandoned or disused shall be removed...taking into account generally accepted international standards established by a competent international organization...appropriate publicity being given to... any installations... not entirely removed.*¹¹

The competent international organization referred to in UNCLOS is the International Maritime Organization,¹² which laid down guidelines for decommissioning.¹³

³ Paterson, J. (2011). "Decommissioning of Offshore Oil and Gas Installations" in Greg Gordon *et al* (eds.) *Oil and Gas Law: Current Practices and Emerging Trends*, Dundee University Press, 2nd Ed, p. 238.

⁴ Huxham, M., *et al.* (1999). "Emotion, Science and Rationality: The Case of Brent Spar", 8 *Environmental values* 349.

⁵ Paterson, J. *Op.Cit.*, p. 301.

⁶ Zyglidopoulos, S. (2002). "The Social and Environmental Responsibilities of Multinationals: Evidence from the Brent Spar case", 36 *Journal of Business Ethics* 141.

⁷ Higgins, R. (1993). "Abandonment of Energy Sites and Structures", 6 *J. En. & Nat. Res L.8.*

⁸ Paterson, J. *Op.Cit.*, p. 289.

⁹ Higgins. *Loc.Cit.*

¹⁰ Paterson, J. *Op.Cit.*, p. 290.

¹¹ UNCLOS 1982, Article 60(3).

¹² IMO, "Implications of the UNCLOS for the International Maritime Organization", available at: <http://www.imo.org/.../implications.IMO.pdf> (accessed 15th March, 2015).

¹³ *Ibid.*

The provisions of UNCLOS have been criticized for not being robust for the protection of the environment. Park, for instance, identified a number of interests that are relevant in addressing the issue of decommissioning.¹⁴ These interests are “the safety of navigation; fisheries; protection of the marine environment; and the imperative to search for and produce oil and gas”.¹⁵ He obvious that Article 60(3) of UNCLOS seems to have tilted the scale in favor of the oil industry because it permits the whole or partial abandonment of oil installations on the sea, an act that is inimical to the protection of the environment and other interests.¹⁶

The IMO guidelines too, have not been helpful in ensuring the complete removal or decommissioning of oil installations. It provides that “where complete removal will involve unacceptable risk to personnel...or would involve extreme cost, the coastal state may direct that complete removal be dispensed with”.¹⁷ This means that “any coastal state or operator wishing to avoid complete removal of any structure has simply to declare that the cost of removal would be extreme and it is presumably let off the hook”¹⁸ even though the environment is worse for it.

2.3. London Convention (LDC) 1972

The LDC places an outright ban on the use of some substances, while permitting the use of others.¹⁹ The convention groups various wastes into one of three categories in Annex I, II, and III (the Black List, the Grey List, and the White List respectively). Dumping of Black list wastes is prohibited.²⁰ Dumping of grey list wastes is allowed upon the issuance of a special permit by the state concerned, while dumping of white list wastes requires prior general permit.²¹ Crude oil is categorized as Black list waste²² except where it is contained as trace elements. Interestingly, LDC provides that:

*The disposal of wastes directly arising from or related to the exploration, exploitation and associated offshore processing of seabed mineral resources will not be covered by the provisions of this convention.*²³

Article III (4) of the Convention defines waste as “material or substance of any kind, form or description”. Parmentier,²⁴ has interpreted this provision to mean that the Convention does not cover the disposal or dumping of waste arising from exploration of oil, which includes offshore installations, meaning that they will be expressly categorized as falling into the definition of waste as exempted in Article III (1) paragraph A.

¹⁴ Park, P., *Op.Cit.* p. 15.

¹⁵ *Ibid.*

¹⁶ *Ibid.*, 16.

¹⁷ Ighiehon, M. (1996). “The Abandonment Controversy and Environmental Protection”, 7 *OGLTR* 300.

¹⁸ *Ibid.*

¹⁹ Hollis, D. “Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter 1972”, available at: http://www.eoearth.org/article/151448/#endnote_11 (accessed 20/03/2014).

²⁰ London Convention, Article VI.

²¹ *Ibid.*

²² *Ibid.*

²³ *Ibid.*, Article III (1) (a)(ii).

²⁴ Parmentier, R. (1999). “Greenpeace and the Dumping of Wastes at Sea: A Case of Non-state Actors’ Intervention in International Affairs”, *International Negotiation*, 4(3): 7.

2.4. OSPAR 1992

The OSPAR provides that no disused offshore installation or pipeline shall be dumped or left wholly or partly in place in a maritime area without a permit issued by a competent authority of relevant contracting party on a case by case basis.²⁵ Where such a permit for dumping is to be issued after 1st Jan.1998, the contracting party shall notify other contracting parties of its reasons in order to make further consultation possible.²⁶ The convention has been criticized for giving contracting parties the room to maneuver decommissioning in favor of economic considerations even though it may be damaging to the marine environment.

In the light of the lapses of these instruments in relation to protection of the environment, the Brent Spar incident has been credited with the introduction of some changes in the legal regime for decommissioning with emphasis on greater protection for the environment.²⁷ However, an appraisal of these changes will show that they are largely cosmetic and did little to remedy the defects of existing instruments in relation to environmental protection.

3. The Brent Spar Episode and Post effects

The Brent Spar platform used by Shell Company for the storing of oil in the North Sea became redundant in 1991.²⁸ In May 1995, the U.K government gave Shell the license to dispose the platform in the Deep Water.²⁹ Greenpeace, an environmental organization opposed the deep-water disposal of the Spar on the grounds that “the damage to the environment would be significantly greater”.³⁰ In the end, Shell decided to go along with public opinion and settled for the re-use option, which tilted in favor of environmental protection than deep-water disposal.³¹

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3.1. The 1996 Protocol to the London Convention 1972

The 1996 Protocol, which came into force on 24th March 2006 to amend the LDC,³² has been credited with introducing the following changes in the framework for decommissioning in the North Sea as an aftermath of the Brent Spar incident. Firstly, the Protocol requires the parties to “protect and preserve the marine environment from all sources of pollution”³³ and to take all practicable steps in line with their capabilities to prevent and eliminate pollution from dumping. Under the LDC, the basic provision is that so long as the dumping will not cause pollution it may be permitted, provided

²⁵ Article 5(1) of Annex 111, (n 20) *Ibid.*

²⁶ Article 5(3), *Ibid.*

²⁷ Park, P., *Op.Cit.*, p. 19.

²⁸ Paterson, J. *Op.Cit.*, p. 295.

²⁹ Zyglidopoulos., *Op.Cit.*, p. 143-144.

³⁰ *Ibid.*

³¹ *Ibid.*

³² Kirk, E. (1997). “The 1996 Protocol to the London Dumping Convention and the Brent Spar,” 46(4) *ICLQ* 958.

³³ Article 2 of the 1996 Protocol.

of course that it is not prohibited under Annex I. In contrast, the Protocol prohibits all dumping except for that allowed under its Annex 1.9 and those exceptions may be dumped only if a permit has been granted.³⁴ In other words, the emphasis in the Protocol has shifted from “permissive” under the London Convention to “restrictive”.³⁵

Secondly, the Protocol provides that “particular attention shall be paid to opportunities to avoid dumping in favor of environmentally preferable alternatives”.³⁶ Finally, it extends the definition of dumping to include abandonment.³⁷ Not minding the seemingly robust nature of these provisions in favor of environmental protection, the Protocol is fraught with some lapses that make its provisions largely superficial. The Protocol provides that:

*The disposal or storage of wastes or other matter directly arising from, or related to the exploration...and associated off-shore processing of seabed mineral resources is not covered by the provisions of this Protocol.*³⁸

It defines waste or other matters to mean, “materials and substances of any kind, form or description”.³⁹ A combined reading of both sections would mean as argued by Parmentier⁴⁰ that the dumping or abandonment of offshore oil installations is exempted from the auspices of these Protocol. This means that the Protocol is utterly irrelevant in relation to dumping or abandonment of installations arising from decommissioning of offshore oil installations.

3.2. OSPAR Decision 98/3

The OSPAR decision adopted in July 1998 contain traces of the effect of the Brent Spar case in the following provisions. Firstly, the preamble recognizes “re-use, recycling or final disposal on land as the preferred option for decommissioning”.⁴¹ Secondly, the decision prohibits dumping and the leaving wholly or partly in place of disused offshore installations⁴² except if the competent authority of the contracting state is satisfied that there are significant reasons why an alternative disposal is preferable to re-use, recycling or final disposal on land.⁴³ Such permission may be issued following an assessment and consultation with the other contracting parties in accordance with Annex 3.

This particular provision, which form the crux of the OSPAR decision, has been criticized as being superficial and “a bad decision”.⁴⁴ Firstly, the said paragraph “leaves a large amount of discretion in the hands of the individual contracting parties to determine the definition of significant reasons”.⁴⁵ Annex 2 offers no definition of the phrase “significant reasons” but goes ahead to list different considerations, which shall

³⁴ Kirk, E. *Op.Cit.*, p. 33.

³⁵ *Ibid.*

³⁶ The 1996 Protocol, Article 4(1.2).

³⁷ Woodliffe, *Op.Cit.*, p. 107.

³⁸ The 1996 Protocol, Article 1.3.

³⁹ The 1996 Protocol, Article 1.8.

⁴⁰ Remi., *Op.Cit.*, p. 25.

⁴¹ OSPAR Decision 98/3, Preamble.

⁴² *Ibid*, paragraph 2.

⁴³ *Ibid*, paragraph 4.

⁴⁴ Bellamy, D., *et al.* (2001). “OSPAR 98/3: An Environmental Turning Point or a Flawed Decision”, 42 *Marine Pollution Bulletin*, 2, p.90.

⁴⁵ Kirk, E. *Loc.Cit.*

be taken into account⁴⁶ in assessing such circumstances warranting non-removal or partial removal of such installations.⁴⁷ Interestingly, the considerations include economic aspects, which apparently involves cost. Annex 2 provides that the options to be considered for the assessment include “other options for disposal at the sea”.⁴⁸ If then the arguments for and against dumping in a specific instance were to be evenly balanced, under paragraph 3, the contracting party could approve the disposal at sea if in her own opinion it is cheaper to do so even if it affects other interests like protection of the environment.

Again, even where any of the other contracting party objects to the permit in the course of consultation in Annex 3 on grounds of protection of the environment, it would only have persuasive effect on the contracting party’s decision to issue such permit. This is because the competent authority of the relevant contracting party is only required to “consider...any views expressed by contracting parties in the course of consultation,”⁴⁹ but is not bound to follow such views.

4. Conclusion

This paper has established that the Pre-Brent Spar regime of decommissioning in the North Sea Atlantic was not robust in the protection of the environment as voiced out by Greenpeace. However, the paper establishes that the changes made in the regional and international framework of decommissioning to remedy the existing gap were largely cosmetic as they gave individual states room to maneuver decommissioning in favor of their economic interests even though such decisions would have environmentally damaging effects.

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⁴⁶ *Ibid*, p. 465.

⁴⁷ *Ibid*.

⁴⁸ Annex 2.6.d, *ibid*.

⁴⁹ Annex 3.9, (n 43).

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