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**DECOMMISSIONING AND DUMPING OF OFFSHORE INSTALLATIONS
IN THE UKCS: Effect on Transfer of Assets Within the Mature Province.**

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1. Introduction

a. Statement of Thesis:

This thesis will examine the need to balance the requirement on operators to dispose their offshore facilities in an environmentally friendly manner with the desire of the Government to maximise the profits from the North Sea Wells whilst at the same time ensuring that it is able to meet the Energy requirement of the Society, This thesis will examine the legal framework Pre-Brent Spar and Post-Brent Spar period. It will also seek to review the provisions of SS.29 & 34 of the Petroleum Act, 2008 and the Pilot Progressing Partnership Work Group Scheme vis-à-vis the stand of various stakeholders in the Industry. There will be an objective and balance assessment of the case for the stakeholders' economic interest as well as a rational analysis of the various legislative provisions promulgated as a result of the Brent Spar case. The importance and relevance of this thesis hinges on the need to reconcile the interest of the Government and the investing Multi-Nationals to maximize their profit from oil exploration whilst at the same time ensuring that the Society need for fuel supply is met on the one hand as against the interest of new entrants into the UKCS on the other hand. The poser in this thesis is whether the Government stance on the need to minimise risk of a default on decommissioning obligations complement the need to encourage further investments in the Industry particularly by new entrants.

b. The Importance and Relevance

The first significant gas discovery in the UK continental Shelf took place in 1965, with that for oil following in 1967. Oil and gas production from the UK continental Shelf has reached its mature phase. Production has peaked and the oil and gas fields that are being developed are generally reducing in size. Larger companies have started reviewing their strategies and there has been a wave of such companies disposing of interests in UK Continental Shelf fields to smaller companies, some of which are new entrants to the UK Shelf Oil and Gas industry. One notable example is the January 2003 sale by BP of its Forties Field to Apache Corporation.

Both the government and the Industry encourage the transfer of such interests to smaller companies. These Companies are often willing to carry out work, which the larger ones might not. This effectively prolongs the productive lives of the fields and defers the time for payment of the Liabilities associated with decommissioning the fields.

The government has for some years recognized that the process of redistributing interests in licences and other assets can be facilitated by a reduction in administrative barriers to new entrants to the UK Continental Shelf and the use of model form documentation for transfers between companies.

The common interest held by the government and the industry in promoting the long-term future of the UK Continental Shelf oil and gas industry led to a joint collaboration between them in the form of the establishment in 2000 of the Pilot Taskforce. In 2001, the Pilot Taskforce set up the Progressing Partnership Working

Group to address concerns over commercial and behavioural barriers to UK Continental Shelf development, drawing on best practice in the Gulf of Mexico, Australia, Canada and United Kingdom.

Disposal of obsolete offshore petroleum installations is a relatively new issue involving tens of billions of dollars globally¹. Powerful players –multinational oil companies, environmental organisations and governments-all have high stakes here. A major point of dispute is the magnitude of social costs in terms of externalities to other users of the marine environment. The issue of petroleum installation decommissioning also raises important questions about, firstly, the public's willingness to pay for removal and, secondly, the reputation effects for oil companies associated with different disposal decisions.

Brent Spar is the most recent case that has highlighted the public's concern about the disposal of oil installations and the potential importance of reputation effects. The Brent Spar was taken out of operation in 1991 after some 15years of service in the Brent Field in the Northern part of the North Sea. Very large floating oil storage and loading buoy, the spar, had stored oil from the Brent "A" platform and acted as a tanker loading facility for the whole of the Brent Field. Studies by several independent companies established that deepwater disposal of the Spar at a site in the deep Northern Atlantic was the so-called "Best Practicable Environmental Option" (BPEO). It was concluded that deepwater disposal would have negligible impact on the marine environment, which was confirmed by independent scientists. The UK government approved this original plan in February 1995.²

During the summer of 1995, a public protest arose in many countries against the planned deepwater disposal of the Spar Installation-strongly supported by environmental organisations. Reputational considerations lead Shell to abandon deepwater disposal, and instead dismantle the installation on land. The UK Government approved the new decision. Disposal costs increased from an estimated 38.5 million USD for a deepwater disposal to a final total of 71.4 million for the onshore dismantling, according to Shell.³ This gives an indication of Shell's valuation of the reputation effects.

In the process of developing a decommissioning plan, the oil companies use independent consultants and contractors to carry out environmental assessments, safety studies and cost analyses. These are predominantly technical reports, undertaken by engineers and they are generally not available to the public. In Spite of the interesting policy issues and large sums involved, decommissioning of petroleum installations seems to have been given scant attention by researchers of economics.

The absence of a specific legal definition for the word "decommissioning" has always created problems in dealing with offshore platform decommissioning which situation has not been made any easier with the absence of the word "decommissioning" in most international legal lexicon.

¹ . IMO Assembly Resolution A 672(16) adopted 19 October 1989.

² . A.D.M Forte, Legal aspects of decommissioning –In: D.G.Norman and J.Neilson, Editors, Decommissioning of Offshore Structures, Springer, New York (1998).

³ . Lode (1999). Lode, A., 1999. Brent Spar Expensive for Shell. Brent Spar ble dyr for Shell.Stavanger Aftenblad, 2 September 1999, P 6 (in Norwegian).

The term “decommissioning” is conspicuously absent in the 1958 Geneva Convention on the Continental Shelf and the 1982 United Nations Convention on Law of the Sea (UNCLOS). Equally, it is not defined in both the 1989 International Maritime Organization (IMO) Guidelines and Standards and the 1982 Convention for the Protection of the Marine Environment of the North-Atlantic (OSPAR) and other regional treaties that deal with marine pollution.⁴ Notwithstanding the lack of specific definition for the word “decommissioning” in all these international treaties, they did acknowledge the need to abandon offshore platforms that are not in use. Prior to the Brent Spar incident in 1995, the words “Abandonment” and “Decommissioning” were used interchangeably with reference to offshore platform decommissioning. Removal of abandoned offshore platform was generally referred to as “abandonment”. However, it is pertinent to note that “Decommissioning” is more extensive and comprehensive in its application in comparison to the word “abandonment” as used in various treaties relevant to offshore installations removal.

The choice to decommission or not is usually the prerogative of the Government though the process to initiate platform decommissioning is undertaken by the operator of the installation in question in consultation with the (DBERR), the regulatory agencies responsible for the issuance of Approval for Decommissioning in the United Kingdom. By virtue of the provision of S.29 of the Petroleum Act, 1998 the Government acting through the Department of Business and Regulatory Reform (DBERR) which took over the functions of the Department of Trade and Industry (DTI) in this regard, can serve a notice on various parties requiring the submission of a decommissioning programme⁵. The process will usually includes plan, gain approval for or implement the approval from the Department of Business and Regulatory Reform (DBERR). Disposal or reuse of an installation when it is no longer needed or has ceased to produce oil or gas, as well as site rehabilitation are treated as part of the decommissioning process in the UK. The process of decommissioning usually takes place after the offshore platform has been abandoned or ceased to be productive or operative. When production of gas or oil from a field becomes uneconomical, a decision may be made by the relevant regulatory agencies in conjunction with the operator of the platform to cease production, abandon the field and decommission the infrastructure. In the United Kingdom, oil companies are legally required to submit to the Government, a decommissioning plan, a few years prior to the cessation of further operations of the platform in question even though such approval may take up to 4years before it is granted.

As earlier noted, the 1958 Geneva Convention on the Continental Shelf, the 1982 UNCLOS, the 1989 IMO Guidelines, and the 1992 OSPAR refer to abandonment as the process of dismantling and disposal of the unused platform, which said term is prevalent in the legal community. Accordingly, AM Forte has stated that the confusion is an “unfortunate choice”, and the word “decommissioning” is a preferable term for the description of the process and procedures associated with disposal of installations, as well as site rehabilitation after they are no longer needed.⁶

⁴ IMO Assembly Resolution A672 (16), adopted 19 October 1989; and 32 International Legal Materials (ILM) 1993 p. 1072

⁵ See Section 29 of the Petroleum Act 1998, Part IV

⁶ . See Footnote No.2

In the United Kingdom, the procedure for platform decommissioning is spelt out in detail in the guidelines notes for industry: Decommissioning of Offshore Installations and Pipelines Under the Petroleum Act, 1998.⁷ This process can be long and tedious taking in the average up to 5 years. In comparison to other Jurisdiction where the technical experience and legal framework are relatively limited the process could take a longer span of time. Getting the approval from the relevant authority for every step of the operation can be quite a challenge In the United Kingdom; an environmental impact assessment (EIA) is mandatory before an abandoned platform is decommissioned. The EIA is a process for anticipating the effects on the Environment caused by a development. This would also entail consultation with the Joint Natural Conservation Commission (JNCC). The objective of the EIA is to incorporate environmental considerations into the project planning and design stages, so as to ensure that the best environmental practice is adopted. The EIA process also provides a platform for other stakeholders to express their views and concerns if any so that the same will be addressed immediately. Through an EIA it is possible to ensure that planned activities are inline with company policy and legislative requirements.

The Departments Decommissioning Unit in Aberdeen is responsible for coordinating the consideration and approval of decommissioning programmes for installations and pipelines in the United Kingdom. The Unit acts as a one-stop-shop whenever possible and will consult with the other Government Departments and Agencies which have an interest in the consideration of decommissioning proposals. There may, however, be occasions when the DBERR will ask the Operator to make contact with a particular Government Department on an aspect which may have specific implications for the marine life and/or the environment i.e. Security, Fisheries etc.

It should be noted that the decommissioning process adopted by the DBERR in the United Kingdom is not necessarily the same for other European Countries, United States of America or the less developed countries. For instance, the proposed PETRONAS PMU Guidelines in Malaysia have identified four phases: pre-decommissioning, implementation, post decommissioning and field review. Another review approach is to divide the decommissioning process into three phases mainly for the purpose of environmental assessment: cold phase, removal and disposal. Whatever procedure is adopted, the main purpose of the decommissioning is to ensure a safe removal of platforms and installations with minimal damage to the marine and environmental life whilst maintaining the safe usage of the Sea for other users.

⁷. The Guidelines Notes For Industry: Decommissioning of Offshore Installations and Pipelines Under the Petroleum Act 1998. London HMSO, 1999

2. Structure of the Law on Decommissioning

a. The Pre And Post Brent Spar Era:

As rightly noted by John Paterson⁸ -“the starting point for any discussion of decommissioning outside of territorial waters, involving as it does operation on the Continental Shelf, must be international law”. The relevant statute in this case is the United Nations Convention on the Continental Shelf 1958 amongst others. Article 2 thereof granted states the Sovereign rights for the purpose of exploring the continental shelf and exploiting its natural resources whilst Article 5(2) entitled them to construct and maintain or operate.Installations” to that end. Article 5(5) provides that any installations which are abandoned or disused must be entirely removed. This provision was a bit draconian in nature and thus difficult for the UK government to comply with. In the premise it argued that the 1958 Convention should be interpreted in a purposive manner. This is reflected in the provision of Article 5(1), which stipulates that the exploration of the continental Shelf and the exploration of its natural resources must not result in any unjustifiable interference with navigation, fishing or the conservation of the living resources of the sea.⁹

The next International law to consider is the 1982 Convention on the Law of the Sea (UNCLOS). Its preamble explicitly recognises “that developments since....1958...have accentuated the need for a new and generally acceptable convention on the law of the Sea”.¹⁰ Article 60(3) thereof provides that “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”.¹¹ It would be noted that the UK did not accede to the 1982 UNCLOS until 1997. Subsequent to that ascension, the UNCLOS 1982 provision became the UK pivotal legislation as far as its’ international obligation in relation to decommissioning was concerned.

In the light of the provision of Article 60(3) regarding a competent international organisation, it became imperative that a generally accepted international standards is established which body is the International Maritime Organization particularly its Maritime Safety Committee.¹² The Maritime safety committee of the IMO produced guidelines which were adopted in October 1989.¹³ It states that, “abandoned or disused offshore installations or structures on any continental shelf or in any exclusive

⁸ . G.Gordon and J.Paterson-Oil and Gas Law-Current Practice and Emerging Trends (2007)(Reprint 2008) Dundee University at p152, par.7.7

⁹ . See T. Daintith, G. Willoughby and A. Hill, United Kingdom Oil and Gas Law (3rd Edition, 2000) Para 1-1304

¹⁰ . 1958 Convention, Art 60(3) applied to the Continental Shelf Art.80

¹¹ . See footnote no.9 above.

¹² . The Inter-Governmental Maritime Consultative Organisation Convention of 1948 established the IMO, an agency of the United Nations.

¹³ See Resolution A, 672(16)

economic zone are required to be removed except where non-removal or partial removal is consistent” with its guidelines/standards.¹⁴ By virtue of these guidelines, state parties are obliged to remove all abandoned and disused offshore installations on any continental shelf or in any exclusive economic zone except where non-removal or partial removal is consistent with the guidelines. By the same token, states are permitted to impose more stringent regulations than provided for in the Guidelines. In a sense the guidelines have set only the minimum standards. The duties of the Maritime safety committee also includes the consideration of “aids to navigation, construction and equipment of vessels, manning from a safety standpoint, rules for the prevention of collisions, handling of dangerous cargoes, maritime safety procedures and requirements, hydrographic information, log-books and navigational records, marine casualty investigation, salvage and rescue and any other matters directly affecting maritime safety”.¹⁵ The 1989 IMO guidelines and standards provide that structures weighing less than 4000 tonnes in air and stands in less than 75m of water depth, it should be entirely removed.¹⁶ However, for structures put in place after 1st of January 1998 the water depth is increased by 100 m.¹⁷ Though partial removal in deeper water is deeper waters is permissible provided that 55 metres clear depth is maintained, this will have to be at the discretion of the coastal state concerned. It is pertinent to note that installations or structures located in certain defined areas, which are important for navigation, should be removed in its entirety and this should not be subject to any exceptions.¹⁸ Where there is a new use or justification for allowing all or part of the installation or structure to remain, the guidelines do envisage their reuse as artificial reefs particularly if they will serve to enhance fisheries.¹⁹ It should be noted that guidelines do not have the force of law and thus not legally binding. It should be noted that though the IMO Guidelines deals with the removal of installations, it does not deal with their disposal as the same is governed by the Convention for the Protection of the Marine Environment of the North East Atlantic 1992(the OSPAR Convention).

There are two sections to the IMO Guidelines: Guidelines and Standards. The “Guidelines” provide for a case-by-case decision on whether to remove the abandoned installation or not with emphasis on the following:

- Any potential deterioration of the material and its impact on navigation and marine environment and other uses of the sea.
- The costs, technical feasibility and risks of injury to personnel associated with removal of the installation or structure.
- New Uses for the platforms or other reasonable justification for allowing the platform or parts of it to remain on the seabed.

¹⁴ IMO Guidelines, Para 1.1

¹⁵ See Art 18,1948 Convention referred to in note no: 11 above.

¹⁶ See IMO Guidelines, para 3.1

¹⁷ See IMO Guidelines, para 3.2

¹⁸ See IMO Guidelines, para 3.7

¹⁹ See Footnote 31 at page 155 of G. Gordon and J.Paterson- Oil and Gas Law- Current Practice and Emerging Trends (Reprint 2008) Dundee University Press. See also IMO Guidelines 3.4.1 and 3.12.

Where it pertains to the safety of navigation, the emphasis is on the proximity of the abandoned installations to sea-lanes or whether they are located in an approach to or in straits used for international navigation or in archipelagic waters. In other words, there exists a general requirement to remove disused or abandoned platforms in straits, access to ports or in navigational routes. The determination of any potential effect on the marine environment should be based on scientific evidence.

Under the sub-heading “Standards”, complete removal is required of all installations standing in less than 75m of water and weighing less than 4000 ton in air (excluding deck and superstructure), and all installations placed on the seabed after 1998 standing in less than 100 metres of water and weighing less than 4000 ton. The exceptions are those installations that have been assigned for new uses if permitted to remain partially or wholly in place or where the entire removal is not technically feasible or would involve an extreme cost or an extreme risk to the personnel and environment. The Standards further require that no installations should be placed on the continental shelf or in the EEZ after 1st January 1998 unless the design and construction is such that it makes feasible to remove the installation in its entirety.²⁰

Existing installations in water depths of greater than 75m or weighing less than 4000 ton can be wholly or partially left in place, provided they do not cause unjustifiable interference with other users of the sea. Installations, which are in straits used for international navigation or located in approaches to ports or in customary deep-draft lanes and IMO adopted routing systems, must be removed. Any installation in the straits of Malacca, for example, would be subject to this rule.

Where installations or structures remain above water they should be adequately maintained to prevent structural failure. In the case of partial removal, the coastal states must ensure an unobstructed water depth of no less than 55m above the structure to facilitate navigation. Coastal states are also required to ensure that any residue from the left-over installations do not cause or result in a hazard to navigation. At the same time, coastal states have an obligation under the IMO Resolution to ensure that navigational aids are in place and maintained on those installations that have been abandoned and that those installations not removed in entirety be marked on charts. States are also required to ensure that the legal titles to the installations, which have not been fully removed, remain unambiguous and that the liabilities for future damages are clearly established.

The IMO Guidelines and Standards also make specific mention of converting abandoned platforms for use as artificial reefs. But states are required to make sure that the reefs are away from the customary traffic lanes and are consistent with the IMO Guidelines and other established standards for the maintenance of navigational safety standards.

There is also an environmental provision in the IMO Guidelines for compliance. Paragraph 3.3 states that the means of removing the installations should not cause a significant adverse effect on living resources. Some authorities exclude the use of explosives. What constitutes adverse environmental effects is not spelt out but left to the discretion of the coastal state.

²⁰ See footnote 12 above.

The overriding concerns of IMO Guidelines are navigational safety and marine pollution. Nonetheless there is a notable absence of any environmental impact assessment as a standard procedure to be adopted. Presumably this is left to the discretion of coastal states. The purpose of the IMO Guidelines is to provide a set of minimum standards and leave the coastal states with wide discretionary powers on how to move forward. It should be noted that the OSPAR regime applicable in the North Sea is more stringent than the standards imposed in IMO Guidelines. For example, OSPAR does not permit deep sea dumping.

London Convention 1972 and the 1996 Protocol: The Offshore installations installed in the 1950s were relatively small and could be easily removed. None was actually in deep or treacherous water. Similarly the onshore installations in Texas, for example, were small pumping units and they were easily decommissioned after they had become redundant. The small Texas installations were used as benchmarks for the 1958 Convention on the Continental Shelf. Few then thought the new generation of offshore installations would be huge infrastructures, complete with landing pads for helicopters, hospitals, accommodation facilities, firewalls, etc. Anchored to the seabed these structures are not easily removed. Removing them could be a financial nightmare. Retaining them in situ could result in residual or third party liabilities as well as a source of pollution.

The debate on offshore installations must also be seen in the context of the 1945 Truman Declaration on the Continental Shelf. Intended to demonstrate that the continental shelf was an extension of the landmass, the declaration gave the US the right to exploit all natural resources on its continental shelf. Oil was one of the resources over which the United States wanted to have exclusive jurisdiction, and at the same time to deny other super powers the opportunity to exploit it.

A legal framework to govern every aspect of platform decommissioning has been put in place in Europe through various treaty mechanisms. The two most important treaties dealing with platform decommissioning are the Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircraft, 1972(OSLO Convention) and the OSPAR Convention, which, upon its entry into force in 1998, largely replaced the OSLO Convention. These regional treaties were intended to complement the international treaties on Marine Pollution by Dumping of Wastes and other Matters and its 1996 Protocols, as well as the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 (MARPOL 73/78) The Paris Convention for the Prevention of Marine Pollution from Land-based sources 1974 is also relevant to this discourse. It should be noted that legal framework such as this is still non-existent in most, if not all third world countries as none of the third world countries has yet to produce a comprehensive national legislation on platform abandonment.

The first Global Instrument in relation to the dumping of installations is the London Convention on the Prevention of Marine Pollution by Dumping of Wastes and other matters of 1972. When there is need to dispose of any installation or structure in the sea where no new use is intended, this will normally be done in line with the provisions of the various Dumping Conventions. The London Convention divides waste into three categories. Wastes listed in Annex 1 to the convention are prohibited while the dumping of wastes listed in Annex II requires a prior special

permit. Dumping in respect of all other waste will require a prior general permit. On the other hand the disposition of offshore installations are covered by the provision of Art III (1)(a)(ii).²¹

OSPAR 1992: This is the Regional instrument affecting the United Kingdom Continental Shelf .It combine and updated the OSLO Convention of 1972 & the Paris Convention of 1974. General obligations on contracting parties are set out in Article 2 thereof i.e. “to prevent and eliminate pollution and. ...take necessary measures to protect the maritime area against the adverse effects of human activities so as to safeguard human health and to conserve marine ecosystems and, when practicable, restore marine areas which have been adversely affected”.²²They must also “ensure the application of best available techniques and best environmental practice taking into account the criteria set out in Appendix 1 to the Convention.

Article5 (1) of the Annex III to the Convention prohibits the dumping of disused offshore installations/pipelines or the leaving partly or wholly in place in the maritime area of disused offshore installation without a permit issued by the competent authority of the contracting state on a case-by-case basis. Article 5(3) provide that where a contracting state intending to issue a permit under the provision of Article 5(1) shall through OSPAR Commission inform other contracting parties of its reasons for accepting such dumping in order to make consultation possible.²³

Though it has been noted by a learned scholar that the OSPAR Decision does not have the force of law in the United Kingdom it still forms the basis of the UK Practice as far as decommissioning is concerned as the provisions of the OSPAR Decision have been indirectly incorporated into the UK legal for as a soft law i.e. a recommended set of rules to be complied with in an application for decommissioning programmes approval by operators in the North Sea.²⁴

The controversy surrounding the Brent Spar incident rekindled an interest in Decommissioning as a subject both for the legal person, the environmentalist and the general public at large. The issue of the maturing of a large number of offshore oil, third party liabilities, accountability and good practices in the oil industry raised serious concern for the oil producing states and the industry at large. What then looms large in the heart of key players in the industry is the determination of the party that will be responsible for the cost of the discharge of the liability that will definitely arise as a result of decommissioning. The cost of removing and disposing of all the unused platforms is expected to be high whilst removal of the large structures in the deep sea can be costly. There is an unfinished debate of who should pay to remove the unused platforms amidst the growing global concern for a more responsible marine environment management structure. Coastal states came under pressure to adopt a more responsible approach to ocean governance, including taking steps to remove unused offshore platforms. The Concern for the freedom of Navigation and, its

²¹ See G.Gordon and J.Paterson -Oil and Gas Law- Current Practice and Emerging Trends (2007)(Reprint 2008) Dundee University, P.155 Para.7.10-7.11 for a fuller discussion.

²² OSPAR 1992,Art 2 (1)(a)

²³ See G. Gordon and J. Paterson – Oil and Gas Law- Current Practice and Emerging Trends (2007)(Reprint 2008) at P.156-158, Para. 7.12- 7.16 for a fuller discussion.

²⁴ See Daintith, T.et al., United Kingdom Oil & Gas Law at page 1412. (London: Sweet & Maxwell, 2000)

navigational safety acted as a catalyst for the development of the IMO guidelines on removal of offshore platforms.

OSPAR Decision 98/3: The OSPAR decision 98/3 was as a result of the Ministerial Meeting of the Commission in Sintra, Portugal on the 22-23rd of July 1998 which said meeting was as a result of the political uproar resulting from the public outcry against the attempted deep sea disposal of the Brent Spar. The Preamble to the OSPAR Decision 98/3 recognises that re-use, recycling or final disposal on land will generally be a preferable option for the decommissioning of disused offshore installations in the maritime area.²⁵ There is also a general prohibition on the dumping and leaving wholly or partly in place of disused offshore installations within the maritime area. However, paragraph 3 of the Decision 98/3 readily provides for a derogation from the prohibition which allows the leaving of all or part of an installation in place or dumping as appropriate subject to the permission of the competent authority of the competing states in the following circumstances:

- a. all or part of the footings of a steel installation in a category listed in Annex 1, (steel installation weighing more than 10,000 tonnes in air) placed in the maritime area before 9 February 1999, is to be left in place;
- b. a concrete installation in a category listed in Annex 1 or constituting a concrete anchor base, to be dumped or left wholly or partly in place;
- c. any other disused offshore installation to be dumped or left wholly in place, when exceptional and unforeseen circumstances resulting from structural damage or deterioration, or from some other cause presenting equivalent difficulties, can be demonstrated.

It would be noted that derogation is not automatic but will only be granted where it can be shown that an assessment in accordance with the provision of Annex 2 which satisfies the competent authority that “significant reasons why an alternative disposal is preferable to re-use, recycling or final disposal on land and that consultation has taken place with other contracting states in accordance with the provision of Annex 3 with the formal and technical criteria of Annex 4 stated in the permit.”²⁶

Notwithstanding the presumption against offshore disposal whilst favouring re-use, it should be noted that non-recycling disposal is still a valid possibility under OSPAR Decision 98/3.

It should be noted that the OSPAR is not the only organisation concerned with the protection of the Marine Environment. The European Union Council Directive of 27th June, 1985 on the effects of certain Public and Private Projects on the environment 85/337/EEC as amended by the Directive 97/11/EC of 3 March 1997 is particularly relevant. This directive was implemented into the United Kingdom domestic law via the Offshore Petroleum Production And Pipelines (Assessment of Environmental Effects) Regulations S.I 1998 no. 698. The EIA Directive aims at the protection of the environment with the adoption of a case-by-case study of each case in the determination of ten Best Practicable Environmental Option. The EIA Directive 97/11/EC of March 1997 was implemented in the United Kingdom in 2008. It should be noted that OSPAR as a regional treaty is only applicable in Europe whilst the 1989 IMO Guidelines are binding on contracting states. Aside from this, it is not all oil producing parties that are party to UNCLOS and IMO. Though the OSSPAR

²⁵ OSPAR Decision 98/3, Para 2.

²⁶ OSPAR Decision 98/3, paras.3, 4,5 and 9.

convention is sanctioned by the UK, there are large numbers of installations on the UKCS for which decommissioning is not regulated directly by the Convention. For instance, the UK government has full discretion for concrete installations. Concrete installations and steel jackets with weight above 10,000 tonnes are exempted from the OSPAR ban on sea disposal.

3. Transfer of Asset within the Mature Province:

a. Regulatory Requirement and Licensing Policy Issues

Acquisition of an interest in oil and gas can be effected by number of different means but it is always necessary to distinguish between a share acquisition and an asset acquisition. The former consist of a situation where the purchaser acquires the entire issued share capital of the holding company whilst the latter is made up of situation where the purchaser acquires the interest itself. Asset acquisition may be by way of a straight sale for cash, asset swap, a farm-in or earn-in. By virtue of the provision of S.76 of the Energy Act, 2008 the Consent of the Secretary of State is required before the transfer of any rights granted to a licensee or assignee in respect of a license under Section 2 of the Petroleum (Production Act 1934 or Section 3 of the above.²⁷ Any acquisition of a share or an asset transfer will readily require the consent of the Secretary of State for Trade and Industry acting through the relevant department (DBERR) with the financial capability and technical competence of the proposed assignee being of paramount importance to the department of Business and Regulatory Reform (DBERR). The requirement for the secretary of state consent will normally have been incorporated into the terms of the relevant Model Clauses in compliance with the requirement of Model Clauses of the Petroleum (Production)(Seaward Areas) Regulations 1998 which are incorporated into all licences.

LICENCES:

Licence generally connotes the permission authorizing the carrying on of an activity, which ordinarily would otherwise be unlawful. The state is the legal owner of Petroleum in the United Kingdom thus anyone who undertakes petroleum work and lifting without the permission of Her Majesty would forfeit the Petroleum and also pays a penalty.²⁸ The exclusive right of searching and boring for and getting such petroleum existing in its natural conditions in Great Britain in the Crown.²⁹ The Powers to grant licences to search, bore for and get petroleum within Great Britain lies with the Crown.³⁰ As a member state of the European Union, United Kingdom is subject to the main provisions of this directive. The main focus of this

²⁷ Section 76 of the Energy Act 2008

²⁸ See Petroleum (Production) Act 1918

²⁹ See S.1 (1) Petroleum (Production) Act 1934

³⁰ See S. 3(1) Petroleum (Production) Act 1998

directive is to prevent the Minister from distorting competition by discriminating against persons from other member states of the European Union.³¹

UKCS currently has two major distinctive licenses: Seaward and Landward Licences. There are varied kinds of licences applicable to the United Kingdom Oil and Gas Industry, which are normally issued during a specific licensing round. A 90days notice normally precedes licensing round before the closure date for applications by interested parties. Sometimes the department may grant licenses outside the usual rounds when circumstances necessitate the same.

Seaward Licenses:

Exploration Licences: This is a license to search for petroleum in any seaward area and in those parts of any landward area below the low water line.³² An exploration License is non-exclusive in nature and valid for 3years renewable for another 3years on the giving of a 3months' notice. While it does not convey the right to drill a well, or get petroleum or drill any well with a depth greater than 350 metres below seabed, it is generally used for conducting seismic surveys and other methods of geological prospecting.³³ The applicable Model Clause includes but it is not limited to: avoid harmful methods of work; keep records and samples; file regular returns with the department and provide advance notice of certain activities to the Ministry of Defence and representatives of the local fishing industry.

Production Licenses: This is the classic license "to search for or bore for or get" petroleum situated on the seaward side of the low water line.³⁴ It is an exclusive licence with provisions permitting intervention and operational control by the state. Licensees are required to measure the petroleum they extract from the licensed area and keep a full and correct account. They are also required to keep sundry records and samples; furnish quarterly and annual returns; Liaise with the Ministry of Defence and local fishing organisations before undertaking certain works.³⁵ Generally, the large majority of production licences are standard production licences. Initial work programme are normally agreed to between the licensee and the Minister. However, by virtue of the provision of Model clause 12(2) the Minister is empowered to demand the preparation and submission of an appropriate work programme at any time. Failure to submit the work programme may result in revocation of the licence by the Minister and if there is a dispute between the licensee and the department, the matter may be referred to Arbitration.³⁶ The Standard Production Licence is divided into three distinct phases i.e. initial term, covering exploration; second term, which covers the appraisal and preparation period and finally, the production period. The format was further developed by the PILOT Progressing Partnership Work Group (PILOT PPWG) in 2002 following a review of the United Kingdom Licensing law and practice. It was introduced for the 20th Licensing Round.³⁷

³¹ See Hydrocarbons Licensing Directive, May 30, 1994

³² Petroleum Licensing (Exploration and Production)(Seaward and Landward Areas) Regulations 2004, Sch 1, Model Cl.2

³³ Model Clause 3

³⁴ Petroleum (Production)(Seaward Areas) Regulations 1988 (SI 1988/12130,reg 3(1) and Schedule 1

³⁵ Model Clauses 10,11,25,27,26,39 and 40 respectively

³⁶ Model Clause 12(4)(a)

³⁷ See G.Gordon and J.Paterson-Oil and Gas Law- Current Practice and Emerging Trends (2007)(Reprint 2008) Dundee University Press at PP.53-57 for a fuller discussion.

Frontier Licence: This type of Licence is mainly issued for exploration of those under-exploited areas of the Atlantic margin area to the West of Shetland, which said lack of exploitation was due to the large capital investment that will be required to exploit the frontiers acreage. Majority of licences issued were made to the major oil companies.³⁸ In contrast to the standard production licence the Frontier Licence is has four terms: a 2year initial term, a 4year second term, a 6year third term and a production period spanning 18years which said term may be extended at the Ministers' discretion.³⁹

Promote Licence: This licence is tailored towards small or "niche" enterprises with considerable technical capacity but lacking in financial clout and /or technical and environmental capabilities and not major companies that want to get in on the cheap. The initial set of promote licence was awarded in 2003 during the 21st Seaward Licensing Round.⁴⁰ The initial period is divided into 2 constituent parts by a break point occurring at the end of the second anniversary while the work programme is divided into Part I and II respectively. Licensee must complete all undertakings in Part I before proceeding to Part II whilst the work in Part II must be completed before the expiration of the initial term. If the Licensee survives into a second term, the licence is effectively converted into a standard production licence. A frontier licence may be granted on promote licence terms.⁴¹

Bespoke Licence: By virtue of the provision of Section 4(10(e) of the Petroleum Act 1998, the Minister is empowered to grant licences on non-standard terms and include or exclude Model Clauses as he deems fit. The legality of these discretionary powers of the Minister has been criticised by learned legal authors such as Daintith and Hill & Greg Gordon, which said criticism I agree with; but such criticism will be a discourse for another forum⁴².

Landward Licences: These set of Licences is different from that applied to Seaward areas. Prior to 1995, exploration, appraisal and development licences were generally awarded as operations progressed from one phase to another. This licence regime was abandoned for new licences by the 1995 Regulations, which created the petroleum, exploration and development licence ("PEDL").⁴³ The PEDL is the principal landward licence in current issue. The licence is normally issued for an initial term of 6years, second term of 5years and a third term covering the production period, of 20years.⁴⁴ Landward Licence may be granted on promote terms but not on frontier terms. It may also be issued on bespoke terms.

(b) Economic and Decommissioning Liabilities issues Considered:

The cost and liabilities associated with decommissioning processes is quite considerable and the handling of the same by both the government and industry

³⁸ See P.Carter, "The Regulator's Dilemma: How to regulate yet promote investment in the same asset base-the UK's experience"[2007] IELTR 62

³⁹ Model Clause 1

⁴⁰ See footnote 33 above at Page 61,Par.3.62

⁴¹ See footnote 33 above at Pages 61 -65

⁴² Footnote 33 at p.66, par. 3.70

⁴³ Petroleum (Production)(Landward Areas) Regulations 1995 (SI 1995/1436), Sch. 3

⁴⁴ Model Clause 1

players will determine the survival and/or sustenance of the North Sea. By virtue of the provision of s.29 (1) of the Petroleum Act, 1998, the Secretary of State acting through the Department of Business and Regulatory Reform (DBERR) is empowered to serve a notice upon a variety of parties requiring them to submit “a programme setting out the measures proposed to be taken in connection with the abandonment of an offshore installation or submarine pipeline”.⁴⁵ Where notice is served under the provision of S.29, parties upon whom it is served are jointly and severally liable to carry out the decommissioning programme. Usually, the operator managing the installation, license holder, parties to the joint operating agreement and persons who may own an interest in the installation other than as a security for a loan are usually liable for decommissioning costs. It would be noted that the Secretary of state usually serves S.29 Notices at the approval stage of the commencement of the development of the field with the service of a facility information request. While the Secretary of state reserves the right to withdraw the service of a S.29 Notice on a party divesting itself of assets of ongoing liabilities for decommissioning in the mature province, it reserves the right to issue a fresh notice sometimes in the future thus placing the divesting party in a position of uncertainty.⁴⁶ The issue of residual liability occasioned by the transfer of decommissioning liability to the new assignee whilst still reserving the right to serve a notice on the original licensee, parties to the Joint Operating Agreements and other interested parties has been one of the major problem affecting transfer of assets within the UK Continental Shelf. It is noteworthy to point out that residual liability in case of an installation left wholly or partly in place under a derogation granted under the general position described in OSPAR Decision 98/3 remains with the owner in perpetuity.⁴⁷ In terms of the provision of S.29 of the 1998 Petroleum Act, it effectively means that the government could always place the burden of decommissioning on anyone on whom the same could have been served at any point in time after the service of the initial notice. This has been an issue of major concern for the industry. In response to this the department for business Enterprises and Regulatory Reform set up a consultation from on proposals relating to the decommissioning of offshore energy installations and pipelines and offshore Renewable energy installations and related electric lines which said consultation from 21st June to 13th Sepetember, 2007. The Consultation addressed five main issues:

1. Safeguarding Decommissioning Funds from insolvency
2. Widening the categories of persons on whom decommissioning obligations can be placed
3. Earlier issue of notices and provision of decommission security
4. Information- Ensuring the Secretary of state has access to information to enable him carry out his functions under the renewable and oil and gas energy decommissioning regimes
5. Potential for cross-industry cooperation and collaboration.

⁴⁵ See the Petroleum Act 1998 at Government Office of Public Sector Information (OPSI) at <http://opsi.gov.uk/acts/acts/1998>

⁴⁶ S.31 (5), Petroleum Act 1998 supra

⁴⁷ See G.Gordon and J.Paterson, Oil and Gas-Current Practice and Emerging Trends Supra at p.181, par.7.69

According to the DBERR, 42 responses were received from the organisation and individual within the industries. The government response to the consultation were issued by the DBERR in November, 2007 which said response forms the crux of the new Energy Bill Act of 2008 as far as decommissioning costs is concerned. The stance of the Industry has always been that decommissioning cost should not be deterrence to the entry of smaller companies and new entrants into the UKCS willing to take over old North Sea Assets, which are heading towards maturity. It has always been a consensus of the Industry key players like LOGIC, UKOOA and Oil & Gas UK that the future of North Sea depends on the recovery of the remaining oil and gas within the UKCS. In the premise they are all concerned with the issue of delay to transfer of Asset occasioned by the uncertainty surrounding decommissioning costs, particularly fiscal and regulatory issues.

An overview of the industry response shows that parties are in agreement about the need to safeguard decommissioning funds from Insolvency proceedings by agreeing to disapply the provisions of the Insolvency Act 1986 such that the funds does not fall into the hands of insolvency office –holder and likely creditors which said move is commendable. However, there is still an urgent need for the Secretary of State to consider the need to withdraw the liability imposed by reason of the service of a S.29 Notice on a company leaving a licence partnership or Joint Operating Agreement after the sale of the asset by not seeking to re-impose liability under the Provision of S. 34 of the Petroleum Act, 1998. As has been rightly suggested by the Oil & Gas UK, the use of a Decommissioning Cost Provision Deed (DCPD) will over time allay the problem associated with the provision of financial security for decommissioning which should allay the fear of the government that the cost of decommissioning does not fall on the tax payer in the event of the defunct of both the transferor and the transferee in an asset trading situation. The DCPD is a new industry standard agreement used by joint venture partners in UK offshore oil and Gas assets to agree decommissioning liability ownership and ensure appropriate provisions are in place to cover each company's share of future decommissioning costs. According to the UK Oil and Gas, the DCPD should speed up implementation and reduce the duplication of securities arrangement.

The issue of Tax liability is another volatile issue when decommissioning of offshore facilities, which needs to be considered. Petroleum Revenue Tax (PRT) and Ring Fence Corporation Tax (CT) usually affect production of Oil and Gas in the United Kingdom Continental Shelf. Uncertainty over the future of fiscal treatment of decommissioning costs is forcing company to make extra provisions for costs, making asset security provisions more costly and deterring the trading of assets to companies likely to invest more heavily. Oil & Gas UK has reiterated the need for clarity with regard to the likely tax exposure of trust funds set up to provide for decommissioning and the need to establish an alternative security instruments in replacement of letters of credit. As rightly suggested by the Industry players, the use of the DCPD could be made more effective with the government assurance that Petroleum Tax Relief will be available for decommissioning expenditure taken out of the trusts funds associated with the DCPD.⁴⁸ The Finance Act repealed the Petroleum Revenue Tax, 1993 for fields granted development consent after that date and such field are only subject to

⁴⁸ See G.Gordon & P.Paterson Supra, paras 7.73-7.77 for a fuller discussion

corporation tax. All expenditure relating to an approved decommissioning programme qualifies for a 100 percent allowances and may be carried back for 3 years.⁴⁹ The industry is of the opinion with reference to mature fields, that loss of access to tax relief on decommissioning costs after three years could render it economically liable to decommission early, discouraging the maximising of oil and gas recovery. The Government had responded in its Budget of March 2008 by extending the time limit for access to tax relief to the decommissioning date. However, the Treasury had recently stated in April 2009 that a new finance bill 2009 would include a legislation to prevent companies claiming tax relief for infrastructure decommissioning costs too far in advance of the actual decommissioning being undertaken. It has clearly stated that tax relief for decommissioning will only be given in respect of those costs that relate to the work actually carried out in the accounting period under review. One cannot but wonder whether this will not amount to a further pressure on new entrants to the UKCS. While it can not be denied that the Government is willing to give respite to parties divesting itself of assets of an ongoing liabilities for decommissioning, its eagerness to ensure that the tax payers are not left with the liability for a decommissioning cost of any asset within the UKCS could t the same time act as a barrier to the promotion of new investments by new entrants into the industry. The knowledge of economic, legal as well as technical aspects of platform decommissioning has grown considerably over the years, with the industry gaining invaluable experience from their decommissioning projects in the shallow Gulf of Mexico waters and in the deeper depths of the North Sea.

⁴⁹ See Footnote 48 above at par.7.74

4. The Current Trend in Practice

(a) The Petroleum Act 1998:

This Act was meant to consider and possibly implement relevant legislation, which will cover most issues raised by the Brent Spar incident with regard to decommissioning. However, as noted by J.Paterson⁵⁰ Part IV of the Petroleum Act, 1998 mainly serves to consolidate the pre-existing provisions to be found in the Petroleum Act 1987, Parts I and II whilst the echoes of the Brent Spar Decision are to be found in the subsequent Department Guidance issued to supplement the 1998 Act. By virtue of the provision of S. 29(1), the Secretary of State can serve a notice upon a variety of parties requiring them to submit a programme setting out the measures proposed to be taken in connection with the abandonment of an offshore installation or submarine pipeline.⁵¹ The Secretary of State can also specify the date or time in the future the abandonment programme is to be submitted.⁵² Applying the provision of S.30(1),(2),&(3), Petroleum Act,1998 the Secretary of State can specify the parties upon whom the S.29 Notice can be served on and require such parties to furnish it him with the name and address of every other person whom that party believes fall within those categories on pain of a criminal liability. Even though a programme has already been approved, the secretary of state can⁵³ always request the revision of an approved programme. The power of the secretary of state to request a revision of an approved decommissioning programme has always amounted to a claw back as new entrants are always left open to decommissioning costs that was probably not factored into the agreement entered into when assets were been transferred. It should be noted that the duty to ensure the carrying out of an approved programme is both joint and several on the persons who submitted the programme.⁵⁴ Upon the service of a S.29 notice, the Secretary of state can request parties upon whom it was served to provide information relating to their financial affairs together with supporting documentation. The Secretary of state can request this information and document at any time.⁵⁵ The main idea behind this conduct is to ensure that party who have submitted a decommissioning programme are in the best position to carry them out such that the liability for the same does not fall on the taxpayer in case of a default. The Industry players are very much in support of such request for information by the minister as borne out in the response of the Oil & Gas UK in their response to the consultation of the DBERR, which was carried out between 21st June and 13th September 2007.

(b) The Energy Act, 2008:

The Energy Act 2008 replaced the Energy Act 2004 with respect to renewable energy installations under the 2004 Act. The provision of SS.76 & 77 of the Energy Act 2008 is particularly important with reference to the transfer of petroleum licences without

⁵⁰ Oil and Gas-Current Practice and Emerging Trends Trend, Supra at p.167, par.7.38

⁵¹ See SS. 26 & 45 of the Petroleum Act, 1998

⁵² S.29(2) of the Petroleum 1998 Act

⁵³ S.34 of the Petroleum Act, 1998

⁵⁴ S.36 of the Petroleum Act, 1998

⁵⁵ S.37 & 38 Petroleum Act,1998

the consent of the secretary of state and the establishment of model clauses of petroleum licences. The Consent of the Secretary of State is now required before the transfer of any right granted to a licensee or an assignee of a licence in respect of a licence under S.2 of the Petroleum (Production) Act 1934 or section 3 of the Petroleum Act 1988. The Secretary of State can give notice that the right should revert to the original holder. However the Secretary of State cannot give such right after the end of the period of 3 months beginning with the date on which the Secretary of State learns of the transfer.

S. 77 of the Energy Acts 2008 deals with the provision for Model Clauses of Petroleum Licenses. Schedule 3 thereof amends the model Clauses contained in the instruments specified in that schedule. Where a licence granted under the Petroleum (Production) Act 1934 or the Petroleum Act 1998 and in force immediately before commencement incorporates model clauses amended by a paragraph of schedule 3, the license has effect with the amendments provided for by that paragraph of that schedule.

It also extends the power of the secretary of State to ensure that the cost of decommissioning can be met by the protection of funds set aside for decommissioning in the event of insolvency. It also provides the Secretary of state with additional powers to require information from developers and associated companies to enable an assessment of whether the developer or associate has the financial capacity to meet its decommissioning obligation. It allows the Secretary of state to hold a parent or associate company liable for the cost of decommissioning if a primary developer is unable to meet those costs itself.⁵⁶

(c) Pilot Taskforce Partnership Work Group Initiative Scheme:

As the UKCS loses its attractiveness due to the maturing of the frontiers which makes it more expensive to explore with a resultant reduction in the discovery of new oil wells, it became important for the government to act fast in order to ensure continued economic activity within the UKCS. The Oil and Gas Industry Task Force (OGITF) was established with an objective of creating an acclimate for the UKCS to retain its position as a preeminent active centre for oil and gas exploration, development and production and to keep the UK contracting and supplies industry at the leading edge in terms of overall competitiveness.⁵⁷ This led to the establishment of the “Vision 2010”. The OGITF functioned until 1999 and was replaced in 2000 by the PILOT initiative established to monitor progress towards the vision for 2010 and ensure the realisation of the vision. The first of these is the Fallow Areas Initiative-this aims to deal with the problems of allocated but unexplored acreage and undeveloped discoveries while the second deals with the Brown fields initiatives, which aims to maximise the economic recovery of hydrocarbons from existing developments. This includes the stewardship initiatives.⁵⁸ The PILOT initiatives aimed at reduction of decommissioning uncertainty with an attendant reduction of the impact on asset trading and further development investments are quite commendable. There has been

⁵⁶ SS.73 & 74 of the Energy Act, 2008

⁵⁷ <http://www.pilottaskforce.co.uk/data/aboutpilot.cfm> (27/08)

⁵⁸ See G.Gordon and J.Paterson Supra at page 69 -93 for a fuller discussion.

rejuvenation of fields that have either been fallow or underutilized thus increasing activities within the UKCS.⁵⁹

5. Conclusion

It is imperative that the UKCS remains attractive to both old and new investors seeking to enter the market. Whilst it behoves the authority to also continue to ensure that it does all within its power to ensure that industry participants are not deterred from investing in the UKCS by reason of an overbearing legislation which may tend to stiffen the ability of entrepreneurs to take reasonable steps in their quest for exploration of the maturing province. There is an urgent need for a review of Tax Incentives to new entrants to encourage them to offset it against the corporate tax payable by the new investors. In the same vein, one cannot just dismiss the concern of the state with respect to the need to ensure that companies seeking to acquire interest in the acquisition of assets within the UKCS are not only capable of paying their way but also capable of picking up the costs that may result from the service of a S.29 Notice by the secretary of state or S.34 Notice where a revision of an approved programme is deemed necessary by the Secretary of state, particularly where there has been an identification of an Environmental issue that may ignite another public outcry. In the spirit of the amiable camaraderie that continues to exist between the state and the industry participants, it is instructive for the state to consider the creation of an instrument that will readily replace the letter of credit with respect to the required guarantees for decommissioning costs. Perhaps a consideration of the use of Bonds as obtained in the Gulf of Mexico situation will be ideal.⁶⁰ A detailed study and possible export of the technical skills already in use in the Gulf of Mexico will probably make for more certainty with projection of decommissioning costs. This will allow the new licensee to make more use of the limited funds available to them for investment in the UKCS.

The introduction of the use of the DCPD should go a long way in ameliorating the problem of uncertainty surrounding decommissioning cost as the same contains a template for a trust deed in respect of the payment of decommissioning costs and a form of letter of credit to assist in estimating decommissioning costs thus boosting the trading of assets within the UKCS.

⁵⁹ See PILOT Website at Note 56 above for details of further activities of the PILOT PARTNERSHIP SCHEME

⁶⁰ This has already been identified by the Oil & Gas, UK

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