

TOWARDS A NEW OIL SPILL COMPENSATION SYSTEM IN NIGERIA

SUMMARY

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The current situation regarding oil spill compensation in Nigeria is extraordinarily complex. It needs to be reformed.

A detailed piece of research, sponsored by SDN, reveals that there are numerous laws, which are often contradictory, while the same damage is compensated - if at all - with greatly varying amounts of money. The money paid differs widely from place to place.

The report's author remarks:

“Nigeria lacks a distinct compensation code which specifies the processes and methods that are to be used in compensation assessment under different circumstances compiled into one single document...What exists are a series of separate enactments relevant to operators in different sectors and often subject to multiple interpretations.”

WHY THE EXISTING SYSTEM DOES NOT WORK

The existing system does not work because the existing laws are backed by enabling legislation, which was designed for something else. The process of assessing actual compensation is largely left to the oil companies and has no legal standing, while several other rating systems compete through the law courts. Finally, what is paid varies from place to place, with obvious unfairness, even when compensation is actually finally paid.

THE LAWS:

The legal requirement for compensating those who suffer from oil pollution is based on the provisions of the Land Use Act of 1978. This was introduced 36 years ago, but is still the key piece of legislation to which most other relevant legislation about potential oil spill compensation refers. However, the Land Use Act was not in fact primarily about compensating farmers and others for oil spillage, but about allocating compensation for compulsory purchase of land to be used by the oil and other industries.

It is thus very different from a formal standardisation of compensation seen elsewhere in world “best practice” and causes a considerable degree of confusion in relation to current litigation.

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This confusion is present in much of the legislation that has been enacted and tends to obscure the environmental damage caused by oil spillages. The Nigerian Constitution itself allows for laws that demand compensation for damage to buildings, economic trees and crops. This however is primarily related to the provision of public utilities and the damage that occurs when they are created, rather than when they are fully operational.

Similarly, the Petroleum Act of 2004 requires the payment of 'fair and adequate' compensation for disturbing the surface rights on land, notably the protection of trees, which have commercial value. Once again the emphasis is on the damage done when an onshore oil field is developed, not on operational spills or illegal activities. The Nigerian Minerals and Mining Act of 2007 also makes compensation payable where the surface rights of the land are damaged by the process of extraction, although it does have a clause relating to subsequent pollution.

The law that most directly relates specifically to oil spill compensation is the Oil Pipelines Act of 2004, where the holder of an oil mining or exploration lease is liable to 'pay compensation to the owners or occupiers for any damage' done to buildings, crops or profitable trees. In contrast to the other pieces of legislation however, it does include damage 'as a consequence of any breakage of or leakage from the pipeline, or any ancillary installation, not otherwise made good.

The first point here is that existing legislation relates primarily to the economic value of the damaged land rather than specific environmental damage done to the ecosystem. Secondly, the level of the compensation on offer is effectively decided on the basis of a valuation through the Land Use Act designed to pay for compulsory purchase, rather than on-going damage.

Finally, the Land Use Act itself sets the 'rates' on offer on a 'Mass Appraisal' technique rather than any calculated sum related directly to individual oil spill damage. In effect, it is the 'rateable value' of the property concerned. Furthermore that 'rateable value' may well have been established a considerable time ago at varying times in various parts of the country. What is targeted for compensation is the existing commercial activities on the land rather than for the land itself and then calculated on a system of replacement cost.

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ASSESSMENT OF COMPENSATION LEVELS

This confusion in the law also extends to how compensation is calculated. The Land Use Act was primarily designed to push economic growth after the Civil War. Its provisions basically lay down the compensation levels for compulsory purchase based on replacement costs and decided by the Director of Lands at State level and the Federal Chief Lands Officer. The Act was not designed for the oil industry at all, although its provisions run through all subsequent compensation assessments.

The Petroleum Act specifies compensation on the basis of the 'commercial value' of trees and crops. It does lay down a statutory duty to avoid damage to trees, crops and buildings, but it does not say what happens when this duty is violated. In fact it makes no provision at all for how the compensation is calculated beyond saying that it has to be 'fair and adequate'.

The Oil Pipelines Act demands 'just compensation' for a wider range of potential problems, including pipeline leakage. However, it refers back to the Land Act as a means to calculate this compensation in "so far as they are applicable". The result is the compensation system under the act refers back once more to an inadequate enabling act.

Meanwhile the Nigerian National Petroleum Corporation Act of 2004 also requires compensation for any loss or damage, but in place of any definition of the level of the necessary compensation, it once again refers back to the flawed Land Act.

The Nigerian Minerals and Mining Act of 2007, does at least have an element of best practice in that it specifically requires that compensation be calculated by the Mining Cadastre Office after consultation with the State Minerals Resource and the Environment Management Committee in consultation with a Government licensed valuation expert. This at least allows for specific sites to be examined and valued.

There have been several attempts to harmonise compensation rates. In 2008, the Conference of Directors of Lands in Nigeria (CDLN) adopted new harmonised compensation rates system for the country as a whole, known as the NTDF rates. The trouble is that these rates appear to compete with two other rating systems.

These are the Department of Petroleum Resources Compensation Rates (DPR) of 1998 and the Oil Producers trade Section (OPTS) rates of 1997. These latter are effectively set by the oil industry, after a national outcry that the then existing rate of compensation had not been revised for over a decade.

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In practice, the DPR compensation calculation did not see the light of day, except for purposes of comparison. The majority of claims went via the OPTS system in spite of the fact that it has no legal backing or jurisdiction in Nigeria.

In summary, there are a series of conflicting positions in the law on the calculation of compensation, the majority of cases been based on calculations by the oil companies that have no legal basis. Where there is a legal basis for such calculations, these refer back to enabling legislation that is 35 years old and designed for compulsory purchase.

At present, neither the claimant nor the polluter can be held accountable for over-demanding or underpaying, since there is no real binding statute defining what is 'fair and reasonable' compensation. Furthermore, the driving enabling legislation on compensation – the Land Use Act – largely ignores the issue of pollution and its environmental damage. Compensation for oil spills is not about compulsory purchase of land.

VARIATION IN VALUATION

The existing system of valuation under the Land Use Act contains a number of flaws. First, the rate offered tends to be based on historical values, which may well have changed. The rates are not adjusted on a regular basis for inflation and they focus purely on the value of cash crops and 'economic' trees. They do not take into account the farmer's labour input, or – in the case of trees – any future income that might have come from the damaged tree. There is no compensation for the loss of future income.

Meanwhile the difference in payments for the same crop varies very widely. From the detailed study of Rivers Bayelsa and Akwa Ibom States, the current NTDF compensation rate for bananas is 4000% higher in the north-west than in the south west. Such regional variations continue for coconuts, mango, cassava, yams and so on.

The existence of two potential benchmark rates – the NTDF and DPR rates – adds to the confusion. In many cases the DPR rates, outlined in 1998, are considerably higher than the NTDF rates upgraded in 2008. In any case, the latter do not reflect the market conditions in 2014. Nor do the rates allow for any variation in the level of pollution, nor for replacement costs in buildings or trees. Some rates seem merely arbitrary.

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“INTERNATIONAL BEST PRACTICE”

A detailed analysis of the major global legislation on compensation from oil pollution from the International Convention on Civil Liability for Oil Pollution Damage via the US Oil Pollution Act, to the latest EC Directive on the subject, concludes that there is no standardised compensation rate internationally. It does however show that the major compensation schemes do have a number of principles in common.

1. Damage to property tends to be calculated by reference to the actual cost of repairing or replacing the property, or the difference between the value before and after the spill;
2. Compensation for damage to natural resources (where this is provided for) tends to be calculated by reference to the cost of remediating or replacing the lost or damaged natural resources. The compensation schemes do not generally provide for additional, independent compensation for damage to natural resources;
3. Damages for loss of subsistence use of natural resources can be included;
4. Compensation for consequential losses and pure economic losses (such as loss of income) are generally provided;
5. It can include the cost of bringing a claim, including the use of advisers where appropriate;
6. The heads of loss identified in the compensation schemes are generally not exhaustive or exclusive: for example, the French court awarded damages for non-pecuniary losses in addition to those provided for by the International Convention on Civil Liability for Oil Pollution Damage 1992; similarly, the American OPA does not contain damages for personal injury but these can be claimed under state or admiralty law;
7. Non-pecuniary losses (save to the extent that these might be recoverable as damage to natural resources or loss of subsistence use) and punitive damages are generally not expressly recoverable under the compensation schemes;

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These general principles conflict in a number of ways with the existing Nigerian situation. Clearly a central point is that these international systems calculate compensation on replacement cost rather than an arbitrary valuation of the market value of a crop. Equally, they include compensation for loss of income, costs of the claim, damages for loss of use of a natural resource and costs of remediation. In this regard, the compensation is based on 'site specific' calculation involving detailed examination of the pollution incident.

Significantly, most of these compensation schemes allow for the interim payments. They are also frequently twinned with funds, which provide compensation payments, where those responsible for the damage cannot afford the whole of the cost, while also paying out when the responsible parties cannot be identified. These are effectively a kind of mutual insurance fund paid for by parties that are involved in activities likely to pollute.

There is no single or consistent method of dealing with third parties in these international systems. However responsible parties can in some cases escape liability, if they have taken reasonable precautions against foreseeable acts by third parties. They cannot however escape liability, if their employees, contractors or agents have acted negligently.

“INTERNATIONAL BEST PRACTICE” AND NIGERIA

Part of the problem of adapting international best practice to the Nigerian situation is that most internationally accepted schemes deal primarily with major oil spills from ships or offshore rigs. These are clearly adaptable to the Nigerian context relating to offshore oil production, but not so easy to apply to the frequent spills from onshore pipelines, affecting Nigerian agriculture and villages.

The general rule in the international schemes is that they do not pay out for non-pecuniary losses, although courts in some countries do take it into account. A French court, for example, did demand additional damages for losses of natural heritage and purely environmental damage, when these were not included under the International Convention on Civil Liability for Oil Pollution Damage of 1992.

In the Nigerian context, such international systems take no account of the losses likely to arise from pollution of communal water supplies since these have no calculated monetary value. The same applies to natural resources like mangrove swamps, which are not even communally-owned, but are of great importance to communities. In short, the international schemes in place pay little attention to the complex situation on the ground in Nigeria. This does not mean that lessons cannot be drawn from them.

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QUESTIONS FOR THE SEMINAR:

Broadly, the questions about how compensation should be paid fall into four distinct parts:

1. **How do we ascertain what has been damaged by the oil spills?**

Clearly to relate directly to the damage done requires 'on-site and area specific' analysis of individual spills if it is not to be based on the existing 'rating system'. Equally, this implies that sites have to be examined within a specific period of time from the initial leak. This in turn will require considerable resources, but perhaps not as much as might be thought.

Can a check-list be created that establishes the boundaries of the damage to crops, buildings, the water table and wider environment? In effect, this would allow inspectors to systemize their assessments so that wherever the damage is done, they are all looking at the same list of potential impacts. Should these include, for example, the depth of penetration of the spill into ground?

2. **What are the processes and methods used to put a value on the damage done?**

Clearly the existing system broadly includes the value of an individual crop or tree and defines compensation purely in monetary value terms of those trees and crops, but includes nothing for the longer-term consequences of the damage or the loss of land use. Nor does it include any compensation for damage to many of the community facilities that are not specifically owned by any individual.

Equally, how far should general losses to the community, as likely to be shown up by Social and Environment Impact Assessments, be included in any new scheme? Clearly the impact of spills goes far wider than the immediate loss of any particular crop and may include a significant loss of community facilities, with a distinct impact on the future prosperity of that community.

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3. What is best way to establish the value of the losses?

At the moment this is limited to the market value of the crops and trees destroyed, which is often highly variable. Ideally perhaps, an effective system would both include a market-based price on the crops, but also include a recognized scheme for judging the non-pecuniary losses, that are site specific.

There are other 'values' that should be included, notably 'use value' that calculates the loss of use over future time; 'commercial value' where an enterprise loses turnover and profit from an established business and 'investment value', where investors lose profits.

At the moment, the values attached to compensation tend to be subject to bargaining through the courts. It might produce less variable results if professional valuers were to make the initial assessments, including the damage done to the communities as a whole, notably by assessing the reduction in the value of the land itself caused by any spills.

4. What is the best legal framework needed to make a new compensation system work?

It is a strange fact that in all the legislation produced on the subject, the laws imply that 'fair and adequate' compensation must be paid, but they never define what it actually is, except via the Land Use Act. This relies on an assessment for 'compulsory purchase' that is not strictly relevant for those that wish to stay on the land after the compensation is paid.

Is new legislation required to create a new system of compensation? As noted, the OPTS rate system under which most compensation is currently paid, has no legal backing at all. As things currently stand the members of the Oil Producers Trades Section could theoretically put the compensation rates at 1 Niara per ton of crude spilt and nobody could do very much about it, except protest. In fact the OPTS system is really a voluntary, rather than a legally enforceable scheme.

The above outlined however, introduces another factor. While it is comparatively simple to compensate a group of farmers for single crop losses, clearly compensation for wider communal damage should not be paid to specific individuals. It would have to be paid to the community as a whole, via some kind of fund. Who would administer this? If the compensation system is to be backed by law, this then raises the question of what kind of legislation is required?