# REVISTING RADON JENIK: COULD FOREIGN OIL COMPANIES OPERATING IN AFRICA BE RECEIVING PUBLIC SUBSIDIES?

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There is an emerging view that inadequate domestic environmental legislation could imply that oil companies are receiving public subsidies. Jenik (2008) argues that to the extent that health and environmental costs are not fully borne by oil companies, such companies are effectively receiving public subsidies. He also suggests that, to the extent that those subsidies exist, it is a matter of legitimate public concern, which should never be relegated to a negotiable contractual issue, but should be discussed, debated and addressed in the legislature, as well as in open public forums. He further suggests that in the absence of adequate domestic legislation, host countries should consider incorporating by reference, the applicable laws of a nation experienced in legislating such matters such as Norway or the United Kingdom (UK) except that he concedes that, both the UK and Norway, have still not fully addressed the issue of mandating the corporatization of public external costs caused by oil companies, leaving matters to be resolved by the vagaries of tort law.

## GHANA

Ghana's 1991 Environmental Action Plan, notes that attempts over the years to address environmental problems in Ghana have been patchy, cosmetic, and of

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limited scope . The report noted that existing legislation on various aspects of the environment was neither adequate, nor relevant to present realities. Ghana is, however, currently on the brink of a new experiment with oil and gas exploration and development which poses significant risks to the environment. Article 41(k) of the 1992 Constitution requires every Ghanaian to protect and safeguard the environment of Ghana which includes the territorial waters, but there are clearly problems with environmental regulation and protection in Ghana.

This author argues that parallel Jenik-style public subsidy arguments could be where, due to inadequate or unsatisfactory environmental management systems, oil exploratory and production companies get away without bearing the full cost of environmental damage including future liability caused by their operations.

Incorporation of an anticipatory future liability and reclamation cost clause in the interest of "insuring" a clean marine environment likely to be damaged by oil and gas E&P activities is for instance one issue for consideration by the EPA, this contention is also derivable from the polluter pays principle. Currently in Ghana, there is no attempt by the EPA, the public environmental regulator to assess and determine future values or costs associated with correcting petroleum-deducible marine environment damage. Obviously a marine environment insurance fund along the lines of the climate "insurance" fund can be created to pro-actively to protect the

marine environment. Oil sands recovery is for instance one area of reclamation which the EPA might possibly require future significant land rehabilitation.

Extraterritorial extension of US law has thus also received considerable attention in many oil related environmental damage cases. This attention is vital because if the proposition that aspects of US environmental statutes could apply to conduct outside US territory is upheld, it would mean that in the absence of enforceable domestic environmental regimes, local claimants against US oil companies might subject to some exceptions find remedies through the extraterritorial application of US environmental statutes relating to 'dirty'conduct in international oil and gas operations abroad. In *Steele v Bulova Watch Co,* the US court anchored this extraterritorial extensions of US law is on the proposition that Congress could prescribe standards of conduct for American citizens and American corporations, regardless of locale. If extra-territorial arguments finds favor in US courts, it could imply however remotely that some environmentally improper conduct by American oil companies operating in Ghana which results in injury to local indigenes might subject to some exceptions ground possible international causes of action in tort for environmental damages recognizable in US courts.

**CONCLUSION**

Both the oil-public subsidy and extra-territorial argument deserve in depth research. The national origin of a number of operating companies involved in offshore oil and

gas operations in Africa is American; a trend that is most unlikely to change even in the foreseeable future. The public subsidy postulate is a formidable argument but with major oil exploratory work conducted as a commercial collaboration between foreign oil companies and state oil companies the resulting situation may possibly jointly implicate African states themselves in that event the situation may be nuanced than otherwise.

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