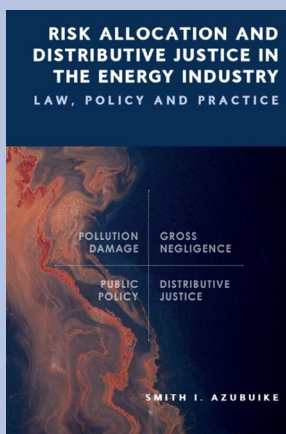


## ***RISK ALLOCATION AND DISTRIBUTIVE JUSTICE IN THE ENERGY INDUSTRY* BY SMITH I AZUBUIKE**

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### **[A] INTRODUCTION**

It is incontrovertible that the energy industry is inherently risky, with volatile markets, and has been at the centre of global economic, environmental, and social challenges occasioned by climate change and energy transition. This is a pivotal period when the shift to sustainable energy sources has increased focus on sustainable development and energy justice. For many developing and fossil fuel-rich, yet dependent countries, particularly those in the Global South, weak regulations continue to ensure multinational corporations' exploitation of these dynamics, culminating in significant cases of environmental damage. Yet, the current international investment law paradigm offers limited pathways for holding them accountable. Thus, as countries continue to grapple with and adapt to the realities of the anthropogenic effects of fossil fuels extraction, several questions about the continued utility of fossil fuels remain unanswered.

Building on Rawls' theory of justice (1971; 1990) and Sen's *Development as Freedom* (1999) paradigm, Smith Azubuike's *Risk Allocation and*

*Distributive Justice in the Energy Industry* situates risk allocation in the energy industry within a framework that emphasizes equity, efficiency, and fairness. Reading and gleaning from his seminal theory-praxis centred treatise, three questions stand out. First, how does the existing risk allocation framework in oil and gas contracts function and what levels of responsibility should multinational energy companies have for damage to the environment and climate-related losses? Second, which risk allocation methods are most suitable to divide the transitional burdens among states, businesses, and impacted communities in a fair manner, and what are the limitations of mutual indemnity agreements? Third, how can frameworks for public policy be created to guarantee distributive justice, and how effectively can they be integrated into contractual risk frameworks to address environmental degradation, particularly communities most impacted by energy development?

The answers to these questions, and many more, enjoy Azubuike's focus in his seminal work, *Risk Allocation and Distributive Justice in the Energy Industry*. Let me therefore review what I believe are the book's most important contributions to the international energy law discourse.

## [B] OVERVIEW OF THE BOOK'S LARGER CONTRIBUTION TO INTERNATIONAL ENERGY LAW

In response to the questions above, as an innovative approach to international energy investment law discourse, Azubuike's theory-praxis-centred *Risk Allocation and Distributive Justice in the Energy Industry* is a timely book. It offers a combination of theoretical and methodological tools to engage with the discourse of risk allocation, tortious liability, and public policy from the lens of allocation of costs and risks of energy extraction and development to ensure energy justice for host communities. Azubuike's innovative book has thus emerged with a multidisciplinary analytical framework that integrates legal analysis, economic reasoning, and philosophical perspectives on justice. He offers a thorough examination of risk allocation frameworks within the oil and gas industry, critically examining the issues of fairness, public policy, and contractual justice. Thus, this book is an original intervention which engages important topics related to justice and risk management in the global energy sector, which is undergoing rapid transformation due to climate imperatives and technological innovation.

As with other scholars in this area of study, Azubuike underscores petroleum and fossil fuels' importance and contribution to global energy

security and the global energy mix (page xiii), and the invaluable impact on resource-rich countries' economic and infrastructural growth. Yet, the resources' contribution to environmental pollution and global warming has shown to be profound, and, so, overcoming these challenges requires a "repurposing of the contractual risk allocation practice of the oil industry, especially in gross negligence cases" (page xiv). Azubuike's central thesis, therefore, is that risk distribution ought to be fair and effective, adhering to distributive justice concepts. This would necessarily require "understanding, defining and mainstreaming a standard of proof for gross negligence to allow its broad application as a term of art in the oil industry" (ibid).

To achieve his objective of remapping the parameters of risk allocation, tortious liability, and public policy in the energy industry, Azubuike adopts a comparative legal approach to examine how risk allocation operates in four countries: Indonesia, Nigeria, the United States (US), and the United Kingdom (UK). Centred on doctrinal analysis, the book assesses the legal principles underlying risk allocation by examining contractual terms, regulatory initiatives, and case law precedents.<sup>1</sup> Theoretically, Azubuike employs Rawlsian distributive justice and other economic and philosophical conceptions of justice as the lens through which to see the phenomena. Presented in seven chapters, my view is that Azubuike has, through theory and comparative case and country analysis, reappraised the entire strata of international energy law's discourse, providing radical and objective platforms to engage energy law scholarship. The book's chapters refuse to prioritize the traditional principles of energy law. Rather, what Azubuike presents us with is a compelling theoretical and methodological approach to tackle the thorny questions surrounding risk allocation, tortious liability, and public policy in the industry.

## [C] SUBSTANTIVE ANALYSIS OF THE THEMES OF THE BOOK'S CHAPTERS

In the book's first chapter, Azubuike outlines his theoretical (Beck, Rawlsian, utilitarian, and capability approaches), core legal and economic concepts, and the nature of systemic risks, and their relevance to energy production and consumption. He enunciates his methodological and analytical frameworks for integrating distributive justice and risk theory in the energy sector through a summary of the intricacies that control risk in the offshore energy industry. Considering the importance

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<sup>1</sup> For instance, he uses *Caledonian North Sea Ltd v London Bridge Engineering Ltd* (2002) to exemplify how the House of Lords describes the energy industry's risk allocation practice as market practice.

of risk allocation in reducing financial and environmental risks, this chapter prepares the reader for the book's more extensive examination of distributive justice. Azubuike expertly outlines the basic ideas of risk allocation, making a distinction between important terms like probability, risk, and uncertainty (page 5). His categorization of risks—operational, environmental, financial—provides a structured approach to understanding liability in offshore operations (pages 5-7). Yet, particularly illuminating is the examination of the legal and economic perspectives on risk (pages 12-13), which shows a sophisticated comprehension of the allocation of risk in contractual frameworks.

The chapter's comprehensive approach and analytical depth is, however, tempered by its cursory engagement with emerging paradigms in environmental justice and regulatory oversight. There is no doubting Azubuike's sophisticated examination of the need for environmental sustainability in offshore activities, yet it would have been interesting to see a discussion of its link to environmental justice. The chapter focuses on conventional models of risk allocation, placing an emphasis on contractual certainty and economic efficiency. He then goes on to argue that new licences "will increase the likelihood of offshore pollution accidents, which can impact environmental sustainability" (page 1), yet the discussion of how risk allocation relates to more general environmental governance concepts yearns for attention. It would have also been interesting to see how a connection of modern trends, including the growing importance of environmental and social governance (ESG) factors into contract structuring and risk allocation, thereby making the discussion more forward-looking in approach. This is because the oil and gas sector is undergoing a paradigm change towards sustainable contracting.

There is also potential for greater critical reflection on contractual practices; while Azubuike effectively outlines the rationale behind mutual indemnity agreements, his analysis could benefit from a more critical perspective on their drawbacks. His argument that these agreements provide "a basis for a party to accept the economic consequence of another party's fault pursuant to a mutual indemnity agreement" (page 16) is logical, yet there is need to include arguments against their potential to obfuscate accountability in circumstances of egregious carelessness. The discussion would have been more balanced if a comparative analysis with other industries that have moved towards more stringent fault-based liability frameworks is engaged.

In chapter 2, Azubuike's focus is on a thorough examination of offshore petroleum drilling operations and the allocation of associated risks with a meticulous outline of the historical and contemporary context of offshore petroleum exploration and the typology of drilling contracts. He also highlights the evolving legal and industry-specific frameworks governing risk distribution. This allows for a holistic comparative analysis of risk allocation through the jurisdictional approaches to regulatory oversights and their implications for contractual risk distribution. While the US uses a model contract framework (page 46), Nigeria operates the standard form contracts (page 53), and the UK adopts the mutual indemnification practice (page 44). However, Indonesia places regulatory constraints on indemnity clauses (page 59).

The chapter also rigorously engages with the classification of drilling contracts used to undertake the production-sharing contracts, joint-operating agreements, and concessions underpinning multinational corporations' operations (see, for example, Smith & Ors 2010; Martin 2004). Azubuike classifies these drilling contracts into three categories: turnkey, footage, and daywork/day rate contracts (pages 35-36). He meticulously defines each contract type with clear explanations of risk allocation between the operator and the contractor. In accordance with industry best practices, the turnkey contract, for instance, transfers all financial risks to the contractor until the well is completed (page 36).

These dynamics underline Azubuike's systematic scrutiny of the justifications for risk allocation, including the accountability doctrine, the doctrine of tradition, and the industry practice justification (page 72). He thus makes a compelling argument that these justifications are frequently influenced by industry standards rather than explicit legal requirements, which in turn, raises concerns about fairness and regulatory oversight. Alongside this, instructively, Azubuike undertakes a thorough analysis of regulatory interventions pertaining to anti-indemnity legislation and its implications for risk allocation (page 78). With the exemplification of the effects of Texas Express Negligence Rule and Louisiana's Oilfield Anti-Indemnity Act, Azubuike successfully underscores how regulatory interventions can limit the enforceability of risk allocation clauses, thereby ensuring greater accountability within the industry.

Therefore, Azubuike succeeds in bringing to scholars and researchers in internal energy law a rich historical account of offshore petroleum exploration, following its development from the 1930s to contemporary deepwater operations (page 31). This strengthens the case for Azubuike's thematic preoccupation—a more standardized strategy for offshore risk

distribution. Thus, for readers who wish to comprehend how technological advancements have influenced risk allocation practice, this historical background becomes invaluable.

Despite the sophistication and comprehensiveness of Azubuike's approach in this chapter, there appears to be an overarching focus on legal analysis and theoretical discussion. One wonders how the use of empirical case studies demonstrating how risk allocation has played out in real-world offshore drilling disputes would have benefited the analysis further. For instance, incorporating data on litigation trends or regulatory enforcement actions in the different jurisdictions could also have provided a more grounded analysis. In addition, a discussion of emergent technologies, such as blockchain, which are increasingly relevant to risk-sharing (see, for example, Aslam & Ors 2022) would have been welcome.

Chapter 3 is a sophisticated and intellectually stimulating contribution to the study of risk allocation in the offshore energy sector. Weaving together the concepts of distributive justice, sustainability, public policy, and contract law, Azubuike offers a comprehensive framework for comprehending risk allocation that goes beyond conventional economic justifications. His focus here is on the fundamental concepts shaping the offshore energy industry's contractual risk allocation mechanisms, via the roles of freedom of contract, public policy, sustainability, and distributive justice in the process based on Rawls, Nozick, and Keating's theories. Azubuike, therefore, does here a meticulous analytical framework that assesses the limitations of traditional risk allocation mechanisms and critiques profit-maximization paradigms that externalize environmental and social risks, and their broader implications for businesses.

One of Chapter 3's key strengths is the purposeful examination of freedom of contract in risk allocation, the author arguing that contractual autonomy is a pillar of private law, allowing parties to allocate risks as they see fit (page 87). He, however, recognizes this principle's inherent limits, especially when economic inequities result in contractual imbalances. The examination of externalities and commodification (pages 89-91) is particularly instructive here since it shows how risk distribution can occasionally place an unfair burden on weaker parties, such as small operations and subcontractors. Also, the author successfully situates risk allocation in the larger framework of public policy, with Lord Denning's well-known description of public policy as an "unruly horse" (page 95) eloquently cited to highlight the difficulty in establishing its boundaries. The discussion on public policy and the veil of ignorance (pages 101-103) is intellectually rigorous, with the author brilliantly deploying John Rawls'



theory to risk allocation in the energy industry. This provides a fresh perspective by arguing that fair risk distribution should be determined without prior knowledge of the benefits or drawbacks of a contract. The chapter also aptly captures the essence of sustainability for risk allocation, the author making a compelling case that risk allocation systems should prioritize sustainability rather than treating it as an afterthought (page 105). In the same vein, the chapter's applicability to contemporary discourse of corporate governance discussions shows in its categorizing of sustainability into environmental, social, and economic components (pages 107-109), which is consistent with current ESG frameworks.

While Azubuike provides an erudite discussion of the theoretical underpinnings (pages 127-141), what remains to be examined in detail is the operationalization of distributive justice within the industry. For instance, the author's argument that a redistributive burden to a party in a contract may be arbitrary when the core injustice is systemic (pages 122-124) is persuasive; yet providing a framework for redressing systemic inequalities in contractual negotiations could make it more compelling. Azubuike's crucial point is that sustainability in risk allocation should serve as a strategy to maximize environmental and social performance (page 144). However, integrating how businesses incorporate sustainability into risk management models like cost-benefit analysis or probabilistic risk assessment can be veritable. Again, a comparative examination of contractual arrangements in other jurisdictions would have enhanced the debate, given Azubuike's instructive discussion of the Deepwater Horizon tragedy (page 99) offers a relevant illustration of moral hazard in risk allocation. To illustrate how public policy affects contractual risk distribution, the chapter could have examined national regulatory responses, such as the US Oil Pollution Act 1990 or the UK's Offshore Safety Directive 2015.

In chapter 4, the confluence of causality, responsibility, and gross negligence—particularly in offshore drilling operations—is rigorously and contextually examined by the author, who excels in setting out its doctrinal clarity, comparative legal insights, and distributive justice analysis. There is a robust theoretical foundation for the concept of causation by distinguishing between factual causation—direct causal link between an act and harm—and legal causation—responsibility under regulatory or contractual provisions (page 149), drawing on seminal works of scholars such as Honoré (1985) (page 150) and Wright (1985) (*NESS Test*) (page 150). This analytical depth enables the chapter to move beyond conventional tort law perspectives and examine causation's role in contractual risk allocation.

The chapter effectively contextualizes *gross negligence* in the context of energy and oil and gas contracts as a separate legal category, with Azubuike contending that gross negligence in offshore operations serves as a deterrent, ensuring compliance with best industry practices (page 151). This perspective is supported by case law analysis, including the *Macondo* and *Montara* oil spills, where operator negligence played a pivotal role in environmental damage (page 153). Through a comparative approach to examine how gross negligence is treated in the UK and US legal systems, Azubuike notes that, in the UK, courts traditionally view negligence and gross negligence as conceptually similar, though contractual interpretations can create distinctions (page 159).<sup>2</sup> Conversely, in the US, gross negligence is often construed as *reckless indifference* to others' rights (page 171).<sup>3</sup> This comparative dimension enhances the chapter's analytical sophistication.

In line with Tamara Lev's justification of strict liability in offshore petroleum operations (2016), Azubuike argues that public policy restricts the contractual authority to avoid culpability for gross negligence (page 150). This position emphasizes how crucial it is to strike a balance between corporate freedom and societal and environmental responsibilities, and with the policy ramifications for distributive justice in risk allocation. Azubuike thus makes the case for considering ethical issues when drafting contractual indemnity clauses to prevent powerful corporations from externalizing risks onto weaker parties (page 174). This argument aligns with Keating's proposition that fair risk allocation requires a balance between liberty and security (2000). Overall, from a justice-oriented perspective, the chapter makes a compelling case for greater regulatory oversight in offshore energy contracts.

Despite the fragmented nature of conceptualizing gross negligence, Azubuike mainly approaches it from the judicial interpretation perspective in this chapter (page 162). But one wonders whether its conceptualization, grounded in regulatory frameworks, referencing the UK's Corporate Manslaughter and Corporate Homicide Act 2007 would have enhanced its strength.

In chapter 5 of this important text, the author undertook a well-structured and theoretically grounded analysis of risk allocation in gross negligence cases. Its strengths lie in its normative approach, particularly its emphasis on distributive justice, sustainability, and public policy as guiding principles. The chapter is particularly relevant given the

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<sup>2</sup> Citing *Camarata Property Inc v Credit Suisse Securities (Europe) Ltd* (2011).

<sup>3</sup> Citing *Wedel v Klein* (1938).



increasing complexity of offshore petroleum operations and the ethical, legal, and economic implications of risk allocation mechanisms. It builds on preceding discussions by establishing normative frameworks that prioritize sustainability, public policy, human rights, and distributive justice as fundamental to allocating liability in gross negligence cases. The chapter's clear articulation of guiding principles—public policy, human rights, sustainability, and distributive justice—that should underpin effective risk allocation is its major strength. As Azubuike argues persuasively, risk allocation “should not be undertaken in isolation; instead, it should be guided by established principles that support human existence and environmental protection” (page 176). This bold attempt by the author to embed these principles into risk allocation frameworks allows him to advance a normative approach that seeks to balance corporate interests with social responsibility.

The discussion of distributive justice is particularly compelling because the author contends that liability in gross negligence cases should be “subject to the proportion of benefit derived from the harmful activity” (page 182), thereby ensuring fairness in the apportionment of responsibility. This strategy is in line with Keating's proportionality principle, which holds that parties bear burdens commensurate with their benefits. The emphasis on this principle reflects a broader commitment to equity in environmental risk management, reinforcing the notion that those who profit from high-risk activities must also bear the costs when things go wrong. Also, the practical approach to contractual strategies allows Azubuike to question the prevailing industry practice of shielding parties through mutual indemnity clauses and argues that liability carve-outs should be designed to prevent moral hazard (page 187). Based on this, the chapter advocates for a liability framework that compels parties to take precautionary measures, fostering an industry culture where safety and risk mitigation are paramount. This is a crucial intervention in contemporary debates on corporate accountability in the energy sector.

Although Azubuike makes a strong case for regulatory interventions, it would have been more interesting to see how the political and economic barriers that may hinder the adoption of stringent liability provisions could be overcome. This is because, historically, the oil and gas industry has resisted regulatory oversight, often leveraging economic arguments to dilute policy proposals. Thus, a more thorough discussion of how these industries influence legislative processes and contractual negotiations would have added depth to the analysis.

In chapter 6, the interplay between institutional frameworks, financial assurance mechanisms, and insurance schemes in managing gross negligence risks within the oil and gas industry is examined. It builds on previous discussions in the book regarding distributive justice and public policy by balancing legal, regulatory, and economic perspectives, whilst setting the stage for a more structured approach to risk mitigation. The incisive articulation of the institutional framework required to enforce risk allocation techniques is one of the chapter's core strengths, with the author making a strong case for a holistic approach to regulatory enforcement by emphasizing collaboration, capacity training, and institutional interoperability (pages 194-195). This rests on the dynamic function of regulatory agencies in mainstreaming energy transition and environmental compliance, as exemplified by using the North Sea Transition Authority (NSTA) (page 195).

The chapter also excels in its analysis of insurance coverage as a mechanism for distributing financial liability by meticulously outlining the range of offshore insurance schemes, including Oil Insurance Limited, Oil Casualty Insurance Limited, and the Offshore Pollution Liability Association Limited Scheme (pages 198-201). References to actual events, such as the Deepwater Horizon accident, which caused offshore insurance rates to rise by 25–30%, support this (page 207), an empirical approach which enhances the chapter's credibility and practical applicability. However, how the enforceability challenges of institutional mechanisms in jurisdictions such as Nigeria, where regulatory capture, corruption, and inadequate legal infrastructure's complexities are present and how they can implement similar frameworks as NSTA would suffice. Also, it would have been interesting to see how reinsurance markets and financial hedging instruments play a crucial role in stabilizing liability and mitigating risks in hazardous industries as posited by Skogh (1991). This would have heightened the author's coverage of insurance exclusions in gross negligence cases (page 212).

The discussion in chapter 7 serves as a culminating dissertation that synthesizes the book's primary arguments and findings. It provides an analytical examination of the implications of mutual indemnity clauses in offshore petroleum contracts and proposes policy, regulatory, and contractual pathways for a more equitable risk allocation framework. The author skilfully consolidates the previous chapters' discussions, underscoring both the strengths and weaknesses of prevailing risk allocation practices while advancing distributive justice as a guiding principle. The author's articulate and dynamic approach to risk allocation in the oil and gas industry helps to highlight inconsistencies in the application of

mutual indemnity clauses by closely analysing how they operate in various jurisdictions. For instance, he points out that “in the deep waters of Brazil, liability is based on fault”, while “in the US and other notable jurisdictions, anti-indemnity statutes and public policy considerations still hinder the use of indemnity clauses” (page 222). This comparative analysis underscores the challenges of developing a universal standard for risk allocation, given the divergence in legal and policy frameworks.

The chapter also makes a strong case against the conventional industrial practice of employing mutual indemnity as a defence against responsibility for egregious negligence. This approach is criticized by Azubuike, who argues that it “negates the ‘polluter pays’ principle and does not seem to support environmental sustainability” (page 222). His engagement with extant literature on pollution liability, particularly the works of Cameron (2012) and Smith and colleagues (2010) situates his arguments within broader scholarly and legal discussions, strengthening the chapter’s analytical depth. The chapter also introduces the concept of *a distributive outcome*, advocating for capped liability in gross negligence cases as a mechanism to strike a balance between industry interests with environmental and public welfare concerns. This perspective is reinforced by Keating’s theory that those who reap benefits should also bear corresponding burdens (Keating 2000). Azubuike echoes this principle, asserting that “a well-structured contractual agreement, which includes an allocation of risk that aligns the burden with the benefits derived from petroleum activities in gross negligence situations, satisfies Keating’s distributive justice” (page 224).

To overcome the shortcomings of the current risk allocation mechanisms, the author effectively integrates policy recommendations, proposing a three-pronged strategy. The first, is legal reforms to redefine the role of mutual indemnity clauses, the second, judicial clarification of gross negligence standards and, the third, regulatory frameworks that guarantee a more equitable distribution of liabilities among stakeholders. These recommendations are pragmatic and align with broader trends in environmental and corporate law, reinforcing the book’s relevance to both legal practitioners and policymakers.

## [D] CONCLUSIONS

It is unarguable that Azubuike’s *Risk Allocation and Distributive Justice in the Energy Industry* is a timely one, in that it brings an innovative, free-thinking, and radical approach to risk allocation in the energy industry within a framework that emphasizes equity, efficiency, and fairness.

By exploring the contours of such concepts as risk allocation, gross negligence, mutual indemnity clauses, sustainability, and distributive justice, we have been gifted an enduring academic classic. Indeed, it is going to be relevant for years to come as we rethink the dynamics of international energy law through a fusion of theories and methodologies in risk allocation in the energy industry. To reiterate an earlier made point, Azubuike's thematic preoccupation—a more standardized strategy for offshore risk distribution presents a roadmap to readers and scholars who wish to comprehend how technological advancements have influenced risk allocation practices. This invaluable contribution also goes for technological advancements that have affected risk allocation practice.

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