Interocean Oil Development Company and Interocean Oil Exploration Company v Federal Republic of Nigeria: The Win and its Twists

Recently, Nigeria prevailed in the International Centre for Settlement of Investment Disputes (ICSID)-administered investor-state arbitration commenced by two United States companies, Interocean Oil Development Company and Interocean Company (together, "Interocean") which had been ongoing since 2013. In its 122-page award dated 06 October 2020 (**Award**), the arbitral tribunal in *Interocean v Nigeria* (**Tribunal**) dismissed Interocean's claims and awarded costs in Nigeria's favour.

For Nigeria, the win must have been a welcome relief, especially in light of the raging post-arbitration battles over an earlier, unrelated award – the P&ID award.[1] Had the decision in *Interocean v Nigeria* gone the opposite direction, then Nigeria could have been confronted with yet another award-debt of potentially billions of dollars.

The commentary that follows presents a high-level review of the Award. **Despite Nigeria's win, certain aspects of the Award, such as its confirmation of the availability of investor-state arbitration against Nigeria based exclusively on a domestic statute and the plausibility of bringing a claim for breach of customary international law pursuant to that statute, might be of interest and concern to foreign investors and the Nigerian State respectively.**

The facts

Interocean's claims against Nigeria were based on "*largely uncontested*" facts.[2] Fundamentally, they complained about the actions of a private citizen which resulted in the dilution of Interocean's shareholding in the Nigerian-incorporated Pan Ocean Oil Company (***Pan Ocean***) and effectively caused Interocean to lose ownership and control of Pan Ocean. Pan Ocean is the holder of Oil Prospecting Licence (OPL) 275 as well as the Operator of, and joint-venture partner of the State-owned Nigerian National Petroleum Corporation (***NNPC***) in, Oil Mining Lease (OML) 98.

As recounted by the Tribunal in the Award,[3] Impex Limited (***Impex***), which was beneficially owned by Dr Vitorrio Fabbri (now deceased), legally owned Interocean, whilst Interocean

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[1] *See* the 05 September 2020 report of the online newspapers, Premium Times, captioned *P&ID: Nigerian govt speaks on $9.6bn judgment debt ruling* and available at https://www.premiumtimesng.com/news/top-news/412551-pid-nigerian-govt-speaks-on-9-6bn-judgment-debt-ruling.html for a summary of where things stand with the P&ID award as of the time of writing this commentary.

[2] Award, paragraph 6.

[3] *See*, generally, Award, paragraphs 6 – 44.

owned Pan Ocean. At all material times before the dilution of Interocean's interest in Pan Ocean, Interocean held a combined total of 2,500 shares, which were the only issued shares at the time out of Pan Ocean's 10,000 authorised shares.[4] Dr Fabbiri was Pan Ocean's Managing Director initially but he was replaced at some point in the 1980s by a Dr Festus Fadeyi who performed the executive duties of a Managing Director but had no ownership rights in Pan Ocean. It was alleged that sometime in 1987, a Mr Rooks (now also deceased), with the authority of Dr Fabbiri, arrived Nigeria to replace Dr Fadeyi as Managing Director but was detained without charge by Nigerian security agencies. Mr Rooks would subsequently depart from, and never return to, Nigeria after his release months later.

Dr Fabbiri eventually passed away intestate in September 1998, with competing claims arising subsequently over how he dealt with his ownership interest in Impex before his passing. There was a claim that via a stock transfer agreement dated 13 January 1998 Dr Fabbiri transferred his entire interest in Impex to his ex-wife, Mrs. Annabella Timolini, and a competing claim that Dr Fabbiri wrote a debt-acknowledgment letter to NNPC on 17 June 1998 which made no reference to the alleged transfer to Mrs Timolini.

Ultimately, Dr Fadeyi, who remained as Pan Ocean's Managing Director, refused to recognise Mrs Timolini's claim of late Dr Fabbiri's ownership interest, replaced Pan Ocean's directors with his own associates, and proceeded to allot the remaining 7,500 shares of Pan Ocean to himself and his associates. Decisions of the Federal High Court (FHC), at Dr Fadeyi-led Pan Ocean's instance, made this possible. The first (in 2004) upheld Interocean's continuing ownership of the 2,500 shares (thus refusing to recognise Mrs Timolini's alleged interest). The second (in 2005) approved for Dr Fadeyi to hold a board meeting of Pan Ocean based on Dr Fadeyi's affidavit evidence to the effect that: (i) the absence of directors was disrupting Pan Ocean's operations; and (ii) Mr. Rooks (who was a then-director) has never returned to country since departing and efforts to locate him have been fruitless. The third (in 2006) ratified the resolutions that *inter alia* allotted the 7,500 remaining Pan Ocean shares to Dr Fadeyi and his associates.

All efforts to regain ownership and control of Pan Ocean by Claimants and Mrs Timolini (who later waived her interest in Impex and resigned as director and shareholder) failed. Those efforts included securing an investigation by the Corporate Affairs Commission and writing to relevant officials of Nigeria for resolution of the matter.

Against the above background, Interocean commenced arbitration against Nigeria pursuant to the investment guarantees and dispute settlement provisions of the Nigerian Investment Protection Act[5] (***NIPC Act***).

The Win

As one would expect, Interocean's claims presented both jurisdictional and merits issues which the Tribunal addressed in the Award.[6] On the merits, the Tribunal decided in Nigeria's favour, as mentioned earlier. In a nutshell, it concluded that Interocean's claims (which alleged, primarily, *creeping expropriation*[7] and *breach of customary international law*,[8] with both case theories relying heavily on the international law *doctrine of attribution*[9]) were not made out, and thus Nigeria could not be held liable for Interocean's loss of their investment in Pan Ocean.

On the issue of Mr Rooks' arrest when he allegedly came into Nigeria to take over from Dr Fadeyi as Managing Director, the Tribunal

[4] It may be worth mentioning that under the current Companies and Allied Matters Act of 2020 (**CAMA**), this would no longer be possible, as all shares of a company must be issued.
[5] Cap. N117, Laws of the Federation of Nigeria, 2004.
[6] The jurisdictional questions considered in the Award were reserved by the Tribunal for consideration together with the merits of the claim, other jurisdictional questions having been disposed of in an earlier Decision on Preliminary Objections dated 29 October 2014.
[7] The term "creeping expropriation" basically refers to the gradual taking of an investor's investment through actions, laws, impositions, policies, measures etc. of a State or persons whose conduct are attributable to the State.
[8] The term "customary international law" basically refers to principles and rules of international law which are derived from the practices of States and opinion of jurists rather than formal legal instruments such as treaties.
[9] In a nutshell, the doctrine of attribution deals with the questions of conditions and circumstances under which conduct of certain persons, especially private persons or non-State actors, are imputed to a State, so that the State bears responsibility/liability for such conduct under international law. For an insightful commentary, *see* Article 2 of the International Law Association (ILA) Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, which is available at: https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf

essentially found that Interocean failed to establish that the arrest was connected to the potential termination of the directorship of Dr Fadeyi and his plot to take over Pan Ocean, and that no further actions of Dr Fadeyi showed a "*concerted effort by* [Nigeria] *to destroy Claimants' investment in Nigeria.*"[10] The Tribunal also rejected Interocean's argument that the "*NNPC's failure to investigate their claims to be shareholders in 2000 and 2005 is further evidence of a creeping expropriation.*"[11] It concluded, having regard to NNPC's functions and powers under enabling statutes, that it was "*not persuaded that the NNPC would have had a duty to investigate the validity and circumstances of any changes to the shareholdings of Pan Ocean.*"[12] For similar reasons, the Tribunal equally failed to find creeping expropriation in the fact that Nigeria apparently failed to respond to certain correspondences that Interocean sent to complain about the dilution of its ownership interest and control of Pan Ocean.[13]

Regarding the decisions of the FHC which enabled Dr Fadeyi to take over Pan Ocean, the Tribunal accepted that "*the actions of* [Nigerian] *courts are attributable to* [Nigeria],"[14] but concluded ultimately that Interocean did not show that Dr Fadeyi and Nigeria were acting in concert, and thus failed to establish a case of judicial expropriation.[15] The Tribunal was likewise not persuaded by other arguments about Nigeria's failure to investigate,[16] resulting in its conclusion on the issue of whether Nigeria was liable for creeping expropriation of Interocean's investment, as follows:

> "[T]*he fact that Respondent and its agencies failed to intervene when they could and perhaps should have to determine the merits of complaints received and suspicions of what was happening at Pan Ocean, itself does not lead directly to culpability on the part of Respondent.*"[17]

With respect to the claim of Nigeria's breach of customary international law, the Tribunal's conclusion on lack of attribution of Dr Fadeyi's actions to Nigeria invariably proved to be dispositive on most of the points.[18] Only the detention of Mr Rooks merited a closer look to see whether it violated *minimum standards of treatment* under customary international law or even the typically treaty-based *fair and equitable treatment* and *full protection and security* standards which Interocean claimed were part of "customary international law." In the end, the Tribunal found that neither the minimum standards of treatment nor the fair and equitable treatment or full protection and security standards had been breached: Interocean "*did not establish the relevance of the detention of Mr. Rooks, which predate the enactment of the NIPC Act, to their expropriation claim.*"[19]

To this end, Interocean's *liability* and *damages* claims were dismissed.

The Twists

Even though Interocean's claims were unsuccessful on the merits, it is important not to lose sight of the fact that they fended off several jurisdictional challenges in order to have the Tribunal hear the substance of the claims in the first place. The nature of Interocean's claims as well as the Tribunal's views on some of the jurisdictional points, even if they seem to have been overshadowed at the moment by Nigeria's ultimate victory, arguably present interesting twists to the future of investor-state claims against Nigeria, as discussed below.

The NIPC Act alone can sustain potential investor-state arbitration against Nigeria

It is instructive that *Interocean v Nigeria* commenced and sailed all the way to a hearing on the merits even though there was neither an investment contract nor any international investment agreement (***IIA***) at play.[20] The

[10] *See* the Award, paragraphs 294 – 296. The Tribunal took specific note of the fact that Interocean had also stated in their Memorial that "*in connection with a disagreement over termination of a crude oil lifting contract and to enforce* [Nigeria's] *rights as a joint venture partner*."
[11] *See* the Award, paragraphs 297 – 309.
[12] The Award, paragraph 298.
[13] The Award, paragraph 302.
[14] The Award, paragraph 310.
[15] *See* the Award, paragraphs 310 – 315.
[16] *See* the Award, paragraphs 316 – 332.
[17] The Award, paragraph 332.
[18] *See* the Award, paragraphs 353 - 355
[19] The Award, paragraph 356.
[20] Interocean are United States companies and there is no investment treaty in force between Nigerian and the United States.

underlying legal instrument for Interocean's claims was Nigeria's domestic NIPC Act which offers ICSID-administered arbitration as an option for settling disputes between an investor and Nigeria.[21] As such, *Interocean v Nigeria* has set a precedent as the first ICSID case against Nigeria that is based on domestic legislation rather than a contract or an IIA.[22]

The practical implication of this is that a foreign investor, in deserving cases, may not necessarily have to depend on an enforceable IIA between its home country and Nigeria in order to commence investor-state arbitration against Nigeria; more so, considering that the Award, as discussed later, arguably broadens the scope of potential claims that may be maintained under the NIPC Act to include claims founded on customary international law.

Non-registration with the NIPC may or may not be a bar to investor-state claims that are based on the NIPC Act

One of the threshold points which the Tribunal was called upon to decide was whether Interocean, which were not registered with the NIPC, could take benefit of the dispute settlement procedure in section 26 of the NNPC Act, considering the definition of "*enterprise*" in section 31 of the NNPC Act.[23]

The Tribunal, by a majority,[24] held effectively that registration with the NIPC was not a prerequisite to a claim under the NIPC Act, because:

> "*it would be both unfair and illogical to decline jurisdiction on the basis of a lack of registration. Here, the person responsible for failure of registration remains the same person accused of orchestrating an expropriation. An alleged wrongdoer's behavior would not normally nullify arbitral jurisdiction.*"[25]

Even though the majority did not consider non-registration with NIPC to be a bar to the presentation of Interocean's claims, having a dissent suggests that this might have been a strongly debated point. Perhaps, the facts that Interocean's investment in Pan Ocean pre-existed the enactment of the NIPC Act in 1995 (a point strongly canvassed by Interocean),[26] and Claimants' correspondences to NNPC and Nigeria to complain about Dr Fadeyi's actions were seemingly ignored, helped to convince the Tribunal. The safest position for an investor, however, would probably be to register with NIPC for whatever it is worth, especially for investments that were made after the NIPC Act came into force, to avoid having to confront the threshold question of eligibility to use the dispute settlement procedures in section 26 of the NIPC Act if a need for recourse to those procedures ever arises in the future.

Claims properly founded on customary international law are potentially actionable pursuant to the NIPC Act

Another keenly contested point in *Interocean v Nigeria* was whether the Tribunal had the jurisdiction to entertain Interocean's claims, to the extent that they were based on customary international law rather than the arguably limited protections in the NIPC Act. The Tribunal concluded that it had jurisdiction to hear the claims because: (a) "*the broadly drafted language in section 26 of the NIPC Act includes claims under customary international law*;"[27] and (b) "*customary international law has become part of Nigerian law, applicable by Nigerian courts to the same extent as is common law*"[28]

It appears at least debatable whether either of the legal bases upon which the Tribunal justified its jurisdiction with respect to claims founded on customary international law is compelling, not the least because: (a) section 26 of the NIPC Act provides for "[d]*ispute settlement procedures*,"[29] which makes the

[21] NIPC Act, section 26.

[22] In the two other ICSID-administered arbitration that had been filed against Nigeria - *Guadalupe Gas Products Corporation v Nigeria* (ICSID Case No. ARB/78/1) and *Shell Nigeria Ultra Deep Limited v Federal Republic of Nigeria* (ICSID Case No. ARB/07/18), the underlying legal instrument for the former was a contract whilst for the latter, it was a Bilateral Investment Treaty. Both cases ultimately settled.

[23] Section 31 of the NIPC Act *inter alia* defines "enterprise" as "an industry, project, undertaking or business to which this Act applies or an expansion of that industry, undertaking, project or business or any part of that industry, undertaking, project or business and, where there is foreign participation, means such an enterprise duly registered with the Commission."

[24] Nigeria's party-appointed arbitrator dissented on the point: *see* the Award, footnotes 137 and 138.

[25] The Award, paragraph 136 (internal citations omitted).

[26] *See* the Award, paragraph 126.

[27] Award, paragraph 164.

[28] Award, paragraph 165.

[29] The NIPC Act, section 26, provides as follows:

blanket reliance on that section as a source of substantive law pertaining to Interocean's claims arguably suspect; and (b) it is doubtful that the legislature intended for the specific investment guarantees provided in the NIPC Act to be further augmented by rights under English common law-derived customary international law. Regardless, the instructive point for present purposes is that if the position in the Award is upheld in future arbitrations, then potential investment claims that could be brought under the NIPC Act may be broader than the NIPC Act's limited substantive protections against expropriation and restriction on repatriation of capital.

Conclusion

Interocean v Nigeria is unique because of its position as the pioneer ICSID arbitration case against Nigeria that was decided on the merits. The decisions reached in the Award, as highlighted above, may have potential implications with respect to the extent of investor-state claims that could be pursued against Nigeria in the future. This would depend, however, on whether future tribunals consider the Award to be persuasive, as the common law tradition of judicial precedent does not apply in arbitration.

Nonetheless, by confirming the plausibility of an investor using ICSID or other international arbitration procedures to arbitrate claims that are based on the NIPC Act as well as customary international law, the Award does potentially expand the investor-state claim options available to foreign investors in Nigeria, especially for those who do not have the benefit of substantive protections under any IIAs.

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Dispute settlement procedures
(1) Where a dispute arises between an investor and any Government of the Federation in respect of an enterprise, all efforts shall be made through mutual discussion to reach an amicable settlement.
(2) Any dispute between an investor and any Government of the Federation in respect of an enterprise to which this Act applies which is not amicably settled through mutual discussions, may be submitted at the option of the aggrieved party to arbitration as follows—
(a) In the case of a Nigerian investor, in accordance with the rules of procedure for arbitration as specified in the Arbitration and Conciliation Act; or
(b) In the case of a foreign investor, within the framework of any bilateral or multilateral agreement on investment protection to which the Federal Government and the country of which the investor is a national are parties; or
(c) In accordance with any other national or international machinery for the settlement of investment disputes agreed on by the parties.
(3) Where in respect of a dispute, there is disagreement between the investor and the Federal Government as to the method of dispute settlement to be adopted, the International Centre for Settlement of Investment Disputes Rules shall apply.