



School of International Arbitration

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International Arbitration Case Law

**School of International Arbitration, Queen Mary, University of London
International Arbitration Case Law**

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Award Name and Date: Interocean Oil Development Company and Interocean Oil Exploration Company v. Federal Republic of Nigeria (ICSID Case No. ARB/13/20) – Award – 6 October 2020

Case Report by: Alexandros-Cătălin Bakos**, Editor Ignacio Torterola***

Summary: Claimants brought an action for relief against Nigeria, based on the Nigerian domestic investment statute. They alleged several violations of its provisions, with the most important one being the prohibition against illegal expropriation. At the same time, the Claimants also relied on customary international law (minimum standard of treatment, fair and equitable treatment, and full protection and security) to substantiate their claims for the same set of facts. The dispute was mainly based on the alleged inactions of State organs (and a State-owned private entity) as concerns a private corporate governance dispute between the two Claimants and one of the directors on the Board of a company owned by the former. The Tribunal dismissed the claims in their entirety because the State-owned enterprise's behavior was not attributable to Nigeria, while the acts of State organs did not reach the threshold necessary for finding a violation of the expropriation standard or of several applicable customary rules.

Main Issues: attribution of the conduct of a State-controlled private entity to the Respondent; threshold necessary to reach a finding of indirect expropriation when the State does not get involved in affairs between the investor(s) and another private party; relevance of customary international law when the applicable law on the merits is domestic law.

Tribunal: Prof. William W. Park (President); Prof. Julian D.M. Lew (Arbitrator); Hon. Justice Edward Torgbor (Arbitrator).

Claimant's Counsel: Mr. Oba Nsugbe QC (Pump Court, Temple); Mr. Olasupo Shasore, SAN, Mr. Bello Salihu, Ms. Fadesike Salu (ALP); and Ms. Bimpe Nkontchou LL.M, MCI Arb TEP.

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Digest:

1. Factual Background

Interocean Oil Development Company and Interocean Oil Exploration Company are two companies incorporated under the laws of Delaware (¶1). The two claimants entered into a joint venture agreement with the Nigerian National Petroleum Corporation (NNPC) in order to own and operate one Oil Mining Lease (OML) and one Oil Prospecting License (OPL) in Nigeria, with 40% being held by the two Interocean companies and the rest being held by NNPC (¶¶8-9). The Claimants acted *via* a Nigerian corporate entity, Pan Ocean Oil Company (Pan Ocean), in which they initially held all of the allotted shares (2.500 out of 10.000) (¶11).

Essentially, the dispute arose from various events that mainly revolved around the Claimants' corporate control of Pan Ocean. However, it was in 1987 when the first event leading to the present dispute arose. Nigeria detained Herbert Rooks, one of the then-directors of Pan Ocean, for reasons that were unclear and disputed between the parties (¶14). After that, certain events (starting in 1998) led to lack of clarity as regards the beneficial ownership of the two claimant companies. This led to one of the directors (who also became managing director), Dr. Fadeyi, refusing to acknowledge the alleged owner of the Interocean enterprises and essentially preventing them from operating their investment. More specifically, until 1998, the two Interocean companies were owned by Dr. Fabbri, who was also sitting on the board of Pan Ocean (as managing director), alongside two other individuals: Dr. Festus Fadeyi and Herbert Rooks (¶12).

However, in January 1998, Dr. Fabbri transferred his interest in the two claimant companies to his ex-wife, after being diagnosed with a terminal illness (¶¶16-18). Subsequently, Dr. Fadeyi stated that it was not informed of the transfer (¶18), while the Claimants alleged that Dr. Fabbri's ex-wife informed Dr. Fadeyi of the change in ownership in September 1998 (¶21). From that moment on, the claimants (who were allegedly represented by Dr. Fabbri's ex-wife) were not given access to Pan Ocean's internal documents (including accounts) or to relevant business information concerning the joint venture (¶¶259-60). This was because Dr. Fadeyi (who also assumed the role of managing director) refused to acknowledge the transfer in ownership from Dr. Fabbri to his ex-wife (¶¶22-3). The former's representatives argued that the transfer was not valid because it had not been authorized by NNPC – this position was also subsequently acknowledged by the Nigerian courts (¶¶25-6). Nonetheless, it was the main legal advisor to NNPC who held a contrary position – that authorization by NNPC for the transfer of the beneficial ownership from Dr. Fabbri to his ex-wife was not actually necessary (¶27). Dr. Fadeyi also proceeded to remove Herbert Rooks from Pan Ocean's board, while also

appointing two of his associates in his place – this was eventually declared irregular by the relevant authorities (¶24).

In any case, uncertainty concerning the ownership of what was until 1998 Dr. Fabbri’s stake in Pan Ocean, together with the absence of the company’s board members from Nigeria, except for Dr. Fadeyi, determined the latter to hold several board meetings in 2005 pursuant to which resolutions were passed allotting the remaining 7,500 unissued shares of Pan Ocean (with the claimants being the sole owners of shares in Pan Ocean up until that point) to himself and his associates; he also appointed his associates to the Board of Directors (¶¶34-7). This took place in the absence of the two Claimants from the Board Meetings, with Dr. Fadeyi arguing that he had attempted to serve notice of the meetings to the Interocean companies, while the latter argued that Dr. Fadeyi used an address that had not been relevant anymore (¶¶35, 37). Nonetheless, a domestic court validated the resolutions through which these operations took place (¶37). In the end, this led to the Claimants losing their controlling interest in Pan Ocean, which was ceded to Dr. Fadeyi (¶¶37, 40). This also was reflected in the percentage held by the Claimants in the oil leases, which decreased following their loss of control of Pan Ocean.

2. Procedural History

The Claimants filed a Request for Arbitration on 30 July 2013, which was registered by ICSID on 9 September 2013 (¶¶46-9). The Tribunal was constituted on 11 December 2013 (¶51). The first session was held at the World Bank office in Paris on 13 February 2014 (¶52). On 26 June 2014, a Hearing on Preliminary Objections to Jurisdiction was held (¶58). On 29 October 2014, the Tribunal’s Decision on Preliminary Objections was issued, with most objections being dismissed and some of them joined to the merits (¶65). The Tribunal held a Hearing on the Merits from 2 to 4 August 2016 (¶65), with another Hearing on the Merits being held from 19 to 21 July 2017 (¶78). On 29 September 2020, the Tribunal denied the Respondent’s application (¶98) and the Final Award was dispatched on 6 October 2020.

3. The Claimants’ Position

3.1. The Claimants’ position on the first challenge to the Tribunal’s jurisdiction: Claimants were not registered as investors (see, infra, at 4.1., for the Respondent’s challenge to jurisdiction)

The Claimants responded to the Respondent’s challenge, firstly, by pointing to an exception from registration carved-out in the definition of an enterprise under the Nigerian foreign investment act (essentially, justifying non-registration when “the context otherwise requires”) and by arguing that the act did not apply retroactively to companies which had already committed their capital before the statute’s entry into force (¶¶124-5). Secondly, the Claimants also pointed to various sections of the act which, according to their interpretation, exempted already-existing foreign investors from registration requirements. Moreover, the Interocean companies claimed that it was unclear what the legal effects of registration were (¶126). The Claimants also pointed to alleged irregularities in the administrative practice of managing the registers (¶¶127-8). As an additional argument, the Interocean companies raised the waiver/*estoppel* defence, by arguing that the respondent, entering into the joint venture agreement with the investors, waived its right to challenge the lack of registration or was *estopped* from doing this (¶129).

3.2. The Claimants' position on the second challenge to the Tribunal's jurisdiction: lack of any attempt on their part to amicably settle the dispute (see, infra, 4.2., for the Respondent's position)

The Claimants responded to this challenge by showing that they, on numerous occasions, addressed the existing dispute with the Respondent and its organs/representatives (¶146). They also went on to argue that negotiated settlement preconditions are not jurisdictional and mandatory (¶147) and that they, in any event, attempted to reach a settled solution, since losing control of Pan Ocean – but which was subsequently rebuffed by the Respondent (¶148).

3.3. The Claimants' position on the third challenge to the Tribunal's jurisdiction: the claims fell outside the scope of arbitration on the basis of the domestic investment law (see, infra, 4.3., for the Respondent's position)

The Claimants started by showing, firstly, that the challenge was unduly raised and that, in any case, there were provisions in the domestic investment act that could qualify as protection against expropriation (including indirect expropriation) (¶¶159-60). Then, in order to support the argument that violations of customary international law also came under the tribunal's jurisdiction, the Claimants pointed to two aspects: (i) the dispute resolution clause in the domestic investment law was wide enough to also encompass violations of customary international rules; (ii) such rules are also part of Nigerian law, thus being applicable in the present dispute (¶162).

3.4. The Claimants' position on the third challenge to the Tribunal's jurisdiction: the acts were not attributable to Nigeria

The Claimants started by pointing out that the 2005 decision of the Federal High Court of Abuja in 2005 (in the domestic case concerning the legality of the 2005 Board Meetings and resolutions) was attributable to Nigeria, as this was an organ of the State (¶173). Then, the Claimants moved on to Dr. Fadeyi's acts, construing them as the acts of a representative of the Respondent (¶174). Finally, the Interocean companies argued that the failure of NNPC and of the Ministry of Petroleum Resources to protect the investment was attributable to Nigeria; in the case of NNPC, even if this was a state-controlled private entity, it acted as a Governmental representative – with the Claimants arguing that this was an organ of the State (¶175).

3.5. The Respondent was internationally responsible for the expropriation of the investment

The Claimants relied on the protection against expropriation (including indirect, and creeping, expropriation) provisions in the domestic investment act in order to challenge what in their view was an alleged collusion between State organs and Dr. Fadeyi to deprive the investors of their investment. While the Interocean companies did not allege direct seizure of their company and acknowledged that the ultimate beneficiary of the events leading to the alleged expropriation was Dr. Fadeyi, they also argued that this all occurred with the aid of the Respondent – through its acts and omissions, especially those of the domestic court confirming the transfer of shares by Dr. Fadeyi in 2005 (¶¶199-204, 250-4) or the failure of the Nigerian authorities to investigate the corporate affairs of Pan Ocean, for alleged criminal behavior (¶¶255-6). The domestic court proceedings were also alleged to constitute a denial of justice. Another point that was raised by the Claimants was that NNPC had illegally continued its relationship with Pan Ocean, irrespective of the existing irregularities – especially the

impossibility of the Interocean companies and of their beneficial owner to operate their investment, *via* Pan Ocean (¶¶244-9).

The Claimants also argued that the expropriation had led to an impossibility on their part to receive any dividends, profits, or other proceeds from their investment, thus entailing another violation of the domestic investment act (¶205).

Essentially, the crux of the Claimants' argument was that the Nigerian state and its instrumentalities conspired with Dr. Fadeyi to deprive the Interocean companies of their investment.

3.6. The respondent violated its obligations under customary international law

The Claimants' final claim concerned the violation, on the part of the respondent, of its obligations under customary international law (minimum standard of treatment; fair and equitable treatment; full protection and security) (¶335). This claim was based, essentially, on Article 42(1) of the ICSID Convention, which allowed the Tribunal to apply international law – including customary rules (¶¶336-41). This request for relief essentially entailed the same acts that were criticized under the domestic investment law provisions.

4. The Respondent's position

4.1. Respondent's first challenge to the Tribunal's jurisdiction: Claimants were not registered as investors

According to the Nigerian foreign investment law, an investor (and/or its investment vehicle) must be registered as such in Nigeria (¶114). In turn, the Respondent claimed that this rendered irrelevant the Claimants' acceptance of Nigeria's offer to arbitrate, which was contained in the same domestic law that also laid down the registration requirements (¶¶114-5). Although the act laying down the registration obligation incumbent on foreign investors was enacted in 1995, the Respondent argued that it still applied to an investor having made its investment before, since registration requirements were seen as prerequisite for an *enterprise* under the act to resort to arbitration (¶¶116, 118).

4.2. The Respondent's second challenge to the Tribunal's jurisdiction: The Claimants commenced the arbitration prematurely

Nigeria attempted to deny the Tribunal's jurisdiction by arguing that the Claimants commenced arbitral proceedings prematurely, without seeking a negotiated solution beforehand (¶140). Essentially, the Respondent tried to frame its argument in a manner that showed lack of interest on the part of the investors to amicably settle the dispute (¶144), by not addressing it directly when setting up meetings between the involved parties (¶141), and by not filing in a timely manner documents which could prove the Claimants' attempt to discuss the dispute with the Respondent's representatives (¶142).

4.3. The Respondent's third challenge to the Tribunal's jurisdiction: the claims fell outside the scope of arbitration on the basis of the domestic investment law

A third challenge that was raised by the Respondent to the Tribunal's jurisdiction was based on certain claims (for indirect expropriation and violations of customary international law)

falling outside the agreed scope of arbitration because they did not come under the ambit of the Respondent's consent given in its domestic law on foreign investment (¶155). Essentially, Nigeria argued that the Tribunal's jurisdiction extended only to those claims which were based on protections offered by the Nigerian domestic law – those did not include protection against expropriation or protection against violations of customary international law (¶¶156-7). An important aspect of Nigeria's contention was that consent to arbitration was based on the Respondent's domestic law, with no investment treaty being concluded between Nigeria and the United States and no determination that customary international law was part of Nigerian law – in case the tribunal would decide to apply Nigerian law in its entirety (¶157).

4.4. The Respondent's fourth challenge to the Tribunal's jurisdiction: the acts were not attributable to Nigeria

This challenge was based on the nature of the acts that were challenged before the arbitral tribunal: since they were committed by Dr. Fadeyi, they were not attributable to the Respondent. This was because the former was not a Government representative; he did not exercise Governmental authority; and he did not act under the control or guidance of Nigeria. Thus, applying the principles on attribution (also) found in the International Law Commission's Articles on State Responsibility for Internationally Wrongful Acts, Dr. Fadeyi's acts could not be attributed to Nigeria (¶169). An important aspect raised in this context was the behaviour of Dr. Fadeyi and of NNPC, as Pan Ocean's joint venture partner. Nigeria insisted on the lack of any relevant connection, for purposes of attribution, between those two and the Respondent (¶¶170-1). It is important also to clearly identify the two types of acts that were analyzed here: on the one hand, there were Dr. Fadeyi's acts and the corporate governance issues that arose since the transfer of ownership from Dr. Fabbri to his ex-wife (¶170); on the other hand, there were the acts of NNPC, the joint venture partner and its status as a State-controlled entity (¶171).

4.5. Respondent's position on the expropriation claim

Nigeria, firstly, argued that the legal protection offered by the investment protection act covered only direct expropriation (¶209). As such, neither transfer of title to property, nor any act of physical seizure, had taken place; this applied to both Pan Ocean (as the claimants did not lose any of the 25% of shares that they owned) and to the Joint Venture, since there was no direct interest in this arrangement (¶210).

Regarding the alleged indirect expropriation, Nigeria argued that Dr. Fadeyi's acts were not attributable to it (¶215). And even if it were accepted that the State actually had a duty to protect the investors and their investment against such acts, failure to comply with this duty does not amount to a breach of the indirect expropriation standard (¶216). In any case, failure of the Nigerian Government, or of NNPC, to intervene in favor of the Claimants – in their dispute with Dr. Fadeyi – would not have been (legally) justified, as this was a private affair (¶¶217-9, 226, 265-7, 271-7, 293). Even NNPC continuing to engage with Pan Ocean, which operated under the control of Dr. Fadeyi, was justified. And, in any case, the State-controlled entity acted in a private capacity – not a sovereign one (¶218).

As concerns the 2005 and 2006 domestic judicial decision, this did not entail any procedural irregularity (so that it could be qualified as a denial of justice or as contributing to the expropriatory acts) and that, in any case, the Claimants failed to extinguish available remedies in order to correct such outcomes (¶¶222-3, 228-32, 280-9). As regards the Interocean

companies' impossibility to receive, and freely transfer, profits and dividends from their investment, this did not apply. The dispute between them and Dr. Fadeyi was between private parties and no consequences of Dr. Fadeyi's acts were caused by the State imposing certain transfer restrictions (¶¶233-4).

4.6. Respondent's position on the violation of customary international law claim

The first argument brought by the Respondent here was that, save for the minimum standard of treatment, no other rule of customary law that was relied on by the Claimants actually existed (¶¶342, 347-9, 351-2). In the case of the minimum standard of treatment, however, Nigeria argued that its acts (and omissions) did not amount to a violation of this rule, since none of the impugned acts (and omissions) reached the proper threshold for the finding of a violation of the aforementioned customary rule. And, in any case, it was not for the State to intervene in the dispute between the Claimants and Dr. Fadeyi (¶¶344-6).

5. Tribunal's analysis

5.1. On the first jurisdictional challenge

The Tribunal dismissed the challenge concerning the lack of registration by looking at the wider context – something which was expressly allowed by the Nigerian foreign investment act and which enabled the Tribunal to ignore registration requirements if the specific set of facts so warranted (¶¶132, 135-6). An important point acknowledged by the Tribunal was also the fact that Dr. Fadeyi, who was alleged to be ultimately responsible for the events that led to the claims in this arbitration, was the managing director of Pan Ocean – thus, he contributed to Pan Ocean's failure to comply with registration requirements (¶¶135-6).

5.2. On the second jurisdictional challenge

The Tribunal quickly rejected this jurisdictional challenge by concluding that the Claimants actually attempted to find a negotiated solution to the dispute, but that this was ignored by the Respondent (¶¶150-2). The Tribunal also confirmed ICSID's jurisdiction over the dispute, since this was contested by the Respondent, on the basis of the domestic investment statute's relevant provisions (¶154).

5.3. On the third jurisdictional challenge

This challenge was also dismissed. Firstly, the Tribunal interpreted the domestic act as also protecting against indirect expropriations, since direct expropriations had already been covered. A different interpretation would have led to unreasonable results and to the ineffectiveness of the protection against direct expropriation (a contrary interpretation would allow the State to renege on its obligations by indirectly expropriating the investor's property) (¶153). As concerns claims arising under customary international law, the tribunal essentially considered this body of rules to be part of Nigerian law (applicable in the present case) and, therefore, coming under the jurisdiction of the Tribunal (¶¶155, 184).

5.4. On the fourth jurisdictional challenge

The Tribunal decided to focus on the attribution issues at the merits phase of the proceedings, when looking at each relevant event (¶176).

5.5. On the expropriation claim

The Tribunal started by acknowledging that there was no issue of direct expropriation on the part of the State, but rather whether there was an indirect expropriation (¶235). It was found that this was not the case either. Firstly, Herbert Rooks' detention in 1987 was not proven to be linked to the alleged expropriatory acts (¶¶294-6). Secondly, as concerns NNPC's non-involvement in the corporate affairs of Pan Ocean, the Tribunal found that there was no Governmental nexus existing between the State and NNPC (which did not exercise Governmental authority). As such, NNPC's acts could not be attributed to Nigeria (¶¶297-299). As concerns the duty of the Respondent and its organs to intervene in the affairs between the Claimants and Dr. Fadeyi, the Tribunal considered that such an obligation did not exist (¶302). Then, as concerns the fact that NNPC dealt with Pan Ocean, with the latter represented by Dr. Fadeyi, this was considered to be justified. NNPC relied on a reasonable and justified belief that it was dealing with the Pan Ocean's authorized representative (¶¶303-5). Moreover, the Tribunal also considered that there was, in fact, no duty incumbent on NNPC to scrutinize the Corporate Affairs of Pan Ocean (¶¶306-7).

As concerns the allegations that the domestic courts' decisions contributed to the alleged expropriation, the Tribunal rejected this assertion as well. It considered that there was no proof that the Courts and their decisions were somehow connected to Dr. Fadeyi's attempts to deprive the Claimants of the ownership of their investment (¶¶310-1). And while the Tribunal accepted that the Nigerian courts' decisions might have amounted to a miscarriage of justice, it nonetheless took into consideration the fact that the Claimant failed to exhaust domestic remedies (a prerequisite for a denial of justice claim) (¶312).

A different issue was raised by the alleged failure of Nigeria's corporate authorities to investigate the irregularities taking place with regards to Pan Ocean. Not even here did the Tribunal consider that there was an expropriation – or contribution to expropriatory acts – on the part of the State. While it was admitted that Dr. Fadeyi's acts raised issues of legality and there were strong concerns related to them (¶¶318, 322), inaction on the part of the Respondent's instrumentalities was not enough to conclude that this necessarily was the determining factor leading to a deprivation of the investors' investment – or that Nigeria was complicit in this outcome (¶¶322, 331-2). The Tribunal also clarified that no act committed by Dr. Fadeyi could be attributed to Nigeria, even if he was considered to be acting as a representative of the joint venture (¶323).

Finally, the Tribunal agreed that the Claimants could not argue that they were barred from the right to receive funds, dividends, or profits from their investment since the provision on which the Claimants relied in this instance was misinterpreted by the latter (¶309).

5.6. On the violation of the Respondents' obligations under customary international law

The Tribunal started by showing that it was not necessary to analyse most of the impugned actions – Dr. Fadeyi's behaviour; failure on the part of the State to investigate Pan Ocean's corporate affairs; and the judicial decisions – under customary international law. The first could not be attributed to Nigeria, while the latter two were justified, as already demonstrated during the expropriation analysis (¶355). The only issue that remained to be scrutinized under customary international law was Herbert Rooks' detention. However, as already mentioned, the Tribunal considered that the Claimants did not substantiate this claim enough, in order to link the detention to the subsequent events. Moreover, the two Interocean companies could not

prove the unlawfulness of the detention. As such, this could not be criticized under customary international law either (¶¶356-7).

6. Costs

The Tribunal did not need to award any legal costs, as the Respondent had been represented *pro bono* (¶378). In terms of the other costs, the Tribunal decided to initially apply the “costs follow the event” principle and order the reimbursement of the other costs that the Respondent had incurred (¶384). However, the members of the Tribunal were skeptical of the amounts claimed by Nigeria and refrained from ordering the reimbursement of these costs to the Respondent (¶¶384-6). Finally, the tribunal also applied the “costs follow the event principle” to the arbitration costs, ordering the Claimants to cover the Respondent’s expenses in this area (¶389).