Shareholder Disputes and the Nigerian Foreign Investment Framework: Attribution Under the Prism of the Interocean Case

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Following the P&ID $6.6 billion stay a month ago, Nigeria has obtained victory in a multi-billion-dollar petroleum arbitration dispute.[1] This case sheds light on a unique feature of non-treaty based ISDS ("Investor-State Dispute Settlement") claims. The *Interocean* case thus falls in the 8% category of ICSID cases that arise from national investment law provisions. This feature of the dispute allowed for a unique analysis by the arbitral Tribunal of shareholder disputes under two main instruments of Nigeria's Foreign Investment Framework: the Nigerian Investment Promotion Commission Act ("NIPC Act") and the Nigerian National Petroleum Corporation ("NNPC Act"). The case fundamentally reveals the difficulties shareholders face regarding attributing conduct to the Nigerian State when such shareholders are deprived of their investment. This article aims to demonstrate that the *Interocean* case is a paradigmatic decision, testing the limits of the Nigerian Foreign Investment Framework. The analysis concludes with tactical considerations regarding the designation of the State as well as its National Oil Company ("NOC") in ICSID proceedings. It concludes that the *Interocean* case has paved the way for shareholder disputes in oil and gas to be heard in Nigerian Courts.

Factual Overview of the *Interocean* case: A Protracted Shareholder Dispute

The Claimants are Interocean Oil Development Company and Interocean Oil Exploration Company, both incorporated under the laws of Delaware. The Respondent is the Federal Republic of Nigeria (FRN). Interocean owned a Nigerian corporation, Pan Ocean Oil Company ("Pan Ocean"), which entered into a joint venture with the Nigerian National Petroleum Corporation ("NNPC"), a state-owned company, forming the NNPC/Pan Ocean Joint Venture (JV). The JV involved an oil mining lease (OML 98) and an oil prospecting license (OPL 275). Notably, the NNPC NOC is listed as a designated subdivision/agency consenting to ICSID arbitration under Articles 25(1) and 25(3) of the ICSID Convention, but it was not a brought as a Respondent in this case. Additionally, in this JV, NNPC was not the operator; rather, it was a private corporate individual (Dr. Fadeyi).

Until 1998, the Claimants (Pan Ocean) were the 100% beneficial owners of the 40% participating interest in the JV. The Claimant alleged that the NNPC was the owner of 60% of the participating interest. Interocean alleged that NNPC's acts were attributable to the Respondent – FRN - which contributed to the illegal dilution of the Claimants' shareholding control of Pan Ocean.

As a consequence, Interocean claimed indirect expropriation derived from the total loss of its investment, as it has been unable to receive profits and dividends[2] Interocean separately alleged breaches of the Minimum Standard, Fair and Equitable Treatment, Full Protection and Security.[3] Based on those requests, it sought 1 Billion USD in damages and (still an unusual remedy in ISDS) restitution of its 40% participating interest in OML 98.

The preliminary objections to jurisdiction were partially decided by the Tribunal following written submission and oral argument, while the remaining three were relegated to the merits determination.Nigeria raised six jurisdictional objections

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- Respondent did not consent to submit this dispute to arbitration by ICSID;
- Section 26 of the NIPC Act did not provide a basis for consent on the part of Respondent;
- Interocean was not registered with the NIPC and therefore could not rely on Section 26(3) of the NIPC Act to invoke ICSID;
- Respondent is not a competent party to this arbitration;
- Claimants' claims were barred by statute; and
- The request was premature because Claimants failed to explore local remedies/conditions precedent contained in the NIPC Act.

The Tribunal eventually rejected all six objections. Objections 1 (consent), 3 (registration), and 6 (premature filing) relegated to the merits determination.[4] Surprisingly, the Respondent chose not to raise non-attribution in the preliminary objections;[5] rather it solely contended at that stage that the FRN was not a competent party to the arbitration.[6] As it was not raised preliminarily,[7] it further explains why the Tribunal considered it in the liability portion of the award.[8] In addition to preliminary objections, Respondent ambitiously and unsuccessfully challenged the entire Tribunal. A challenge to the whole Tribunal although increasingly raised at ICSID, is still uncommon. The peculiarity is even more palpable in this case, where the challenge included a party-appointed member rather than the ICSID appointed arbitrator.

The High Standard of Attribution and Regulatory Limitations of the NNPC Act

1. **The Claimant Bears the Burden of Proof on Attribution**

Interocean is no exception to the rule that the burden of proof lies on the Claimant to advance its claim. International law tribunals have long held that the burden of proof in establishing *prima facie* attribution relies with the Claimant. For instance, the UNCITRAL Tribunal in *Thunderbird* held that*:* "[t]he Tribunal shall apply the well-established principle that the party alleging a violation of international law giving rise to international responsibility has the burden of proving its assertion".[9]

The Claimant in *Interocean* failed to meet the decisive burden of proof. Despite the corporate individual's (Dr. Fadeyi) position as a "beneficiary and perhaps even architect" of the acts against Complainant, the Tribunal found there to be insufficient evidence showing that Dr. Fadeyi conspired with the Respondent to deprive the Claimants of their investment.[10]

The Tribunal warned in its Decision on Preliminary Objections that "if the alleged conspiracy involving Respondent is not established, Claimants will be found to have filed unfounded claims". Although the Tribunal did not explicitly label the claim as unfounded, it consequently dismissed all claims and attributed costs to Claimant.[11]

2. **The Regulatory Limitations under the NNPC Act: No Duty of NNPC to Investigate Shareholder Claims**

In addition to the collusion claims, Interocean attempted to attribute to the State a failure of the NNPC to investigate the shareholder and change of control claims. Essentially, the Tribunal found that "[t]he regulatory mandate of the NNPC derives from the enabling statute, the NNPC Act".[12] Respondent notably argued that the NNPC is an entity only engaging in "private or commercial activities"[13] and that in principle, a State-controlled entity's actions are separate from the State "unless they exercise elements of governmental authority within the meaning of ILC Article 5".[14] The Tribunal noted that NNPC's mandate did not authorize the NOC's interference in neither internal shareholder disputes nor the "private disputes of Joint Venture partners."[15]

What is more, even if such duties existed, the Tribunal found that the Claimants did not meet the burden to prove that Nigeria orchestrated NNPC's failure to investigate either claim as a State and, therefore, were not attributable to Nigeria.[16] Concerning the ownership change issue, the Tribunal noted that " even if the NNPC had abused its authority", the Claimants should have found remedy through the Nigerian Courts in the first instance.[17]

As subtly indicated by the Tribunal, this dispute would have been more appropriately brought against the corporate individual (Dr. Fadeyi), in another forum, namely the Nigerian courts.[18]

The NIPC Act as an Atypical Investment Instrument: the *Interocean* Contours of the Dispute Resolution Mechanism and Substantive Protections

Nigeria currently has 15 BITs in force, none of which provide for arbitration with U.S. investors. Therefore, the 1995 NIPC Act is a logical tool for bringing an arbitration dispute. While the Tribunal did not find attribution to Respondent, the Tribunal proceeded to a thorough analysis of the Act. With regard to the scope of the NIPC Act, the Tribunal crucially defined the contours of the applicability of the Act relative to (1) the functioning of the dispute mechanism, and (2) the substantive investment protections under the Act.

1. ***Interocean*'s Pragmatic Approach to the Default Dispute Resolution Mechanism**

The NIPC Act provides for an atypical forum selection, or rather non-selection. That means that under Article 26(3) of the NIPC Act if there is a dispute between the investor and the State, unresolved by settlement, the dispute defaults to ICSID (unless both parties agree on another forum, which is unlikely in a litigious situation).[19] The Tribunal opted for a pragmatic approach to both the NIPC registration requirement and the cool off period in the multi-tier arbitration clause of Article 26 of the NIPC Act.

Indeed, Article 26 of the NIPC Act contains a registration requirement. Before the investor is allowed to use the dispute resolution clause, it must register with the Nigerian Investment Promotion Commission. Notwithstanding this requirement, investment arbitration tribunals have found in favor of jurisdiction, absent material illegality rendering the investment illegal.[20] Similarly, in *Interocean*, lack of registration was not a barrier to the Tribunal's jurisdiction. The Tribunal held that "it would be both unfair and illogical to decline jurisdiction on the basis of a lack of registration". Additionally, in a classic estoppel bar, the person responsible for the failure of registration (the operator of the JV) was the same person accused of orchestrating the expropriation".[21]

Another preliminary objection was the alleged failure to exhaust "local remedies/conditions precedent contained in the NIPC Act."[22] Interestingly, even if Nigeria mentioned "local remedies", it did not argue a "fork in the road" or *res judicata* defense. To which Claimants responded that the Act does not provide for a "cooling-off" period before commencement of arbitration. The Tribunal did not even cease the occasion to address whether the Act contained such a requirement, denoting again a pragmatic approach to procedural provisions. Satisfied with Interocean efforts to mediate the dispute, the Tribunal quashed the objection.[23] In contrast to the State's procedural tactic to reach settlement, here, the Respondent remained silent. The Tribunal concluded, "[it could] not deny jurisdiction in circumstances where one party appears to have been unwilling to entertain settlement."[24]

2. **The Substantive Investment Protections of the Act**

The Tribunal refused to follow a narrow approach as to the substantive protections afforded by the Act. Respondents argued that indirect expropriation and customary international law protections were excluded from the NIPC Act's protections. However, the Tribunal clarified that "there is nothing in the NIPC Act to indicate that indirect or creeping expropriation is excluded from its score, and such a narrow and limited interpretation is unwarranted."[25] Indeed, contrary to other investment instruments, the Act does not contain a specific carve-out regarding types of claims.

As to the alleged inapplicability of customary international law, the Tribunal found that "customary international law has become a part of Nigerian law, applicable by Nigerian courts to the same extent as common law". Therefore, Interocean's claims under international law were found to be properly before the Tribunal.[26]

Article 24 of the NIPC Act concerns "investment guarantees, transfer of capital, profits and dividends". On this point, coherent with its literal approach, the Tribunal refused to read into Article 24 an obligation of the State to intervene in payment for ancillary claims in shareholder disputes.[27]

The *Interocean* award therefore decisively serves as a test to the limits of the NIPC Act regarding both the functioning of the default ISDS mechanism of Article 26, as well as the substantive protections of the Act.

A Scrutinized Assessment of Legal Costs

As a result of the Tribunal not finding Respondent liable for any of Claimants' losses, it declined to award any damages to Claimant. The cost allocation, which is usually a non-contentious aspect at ICSID[28] was atypical in this case. First, the Tribunal recalled its broad discretion to assess expenses under the ICSID Convention Article 61(2). Despite finding that Respondent prevailed and thus that "costs follow the event" would "normally lead to the recuperation of legal fees",[29] the Tribunal rather found that Respondent had not incurred any of the USD 1.5 Million in legal costs it claimed. The panel took into account that Nigeria was represented *pro bono* by a law firm in this case. It also scrutinized the costs claimed for Witness Costs, Travel and Accommodations, and Disbursements,[30] finding those "so obviously odd".[31] In view of the criticisms regarding high costs in arbitration, the close scrutiny and assessment of costs by the Tribunal is a welcome development.

"Costs follow the event" was only applied to the ICSID arbitration costs. The panel ordered Interocean to reimburse Nigeria USD 660,129.87, representing half of the arbitrators' fees and expenses, ICSID's administrative fees, and direct expenses associated with the arbitration.[32] In concrete terms, Interocean ended up disbursing USD 1.6 Million plus USD 15.3 Million for its own legal cost. This turned out to be an expensive claim, particularly given its resolution in the dismissal of all claims.[33]

Conclusion

This decision defines the contours of the Nigerian foreign investment framework through the lens of ISDS. The *Interocean* ICSID case highlights the difficulties shareholders can face in bringing a claim within the NIPC Act. Article 26 of the NIPC Act's particular default to ICSID, puts a litigious claimant in the arduous probatory task because of the high standard of attribution to the State. The second limitation is substantive, as Article 24 of the NIPC Act (guarantees of the transferability of funds), is also narrowly construed. In particular, it does not require the State to intervene in payment disputes between two private parties.

The decision concomitantly analyzes the NNPC Act and the foundation of the NNPC NOC prerogatives. It notably construes shareholder disputes outside of the regulatory prerogatives of the NNPC. A tactical aspect this article highlights is the challenge to designate the NNPC in ICSID proceedings for oil and gas disputes. If an arbitration against NNPC is foreseeable in another commercial arbitration scenario,[34] an ISDS claim against the NOC remains difficult. The *Interocean* case is a reminder that the burden of proof for "attribution" is a high legal standard.

The interplay of the NNPC and NIPC Act in the ISDS context proves of paramount relevance in view of the 2020 reforms to autonomize the NNPC from the Nigerian Government. Would the NNPC divorce from the State, a successful ICSID claim against the Nigerian NOC seems even more uncertain?

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[1] *Interocean Oil Development Company and Interocean Oil Exploration Company v. Federal Republic of Nigeria*, ICSID Case No. ARB/13/20, Award, 6 October 2020.

[2] Award, para 42 citing to Claimants' Memorial, para 16. Claimant initially intertwined its claim for indirect expropriation with a "denial of justice" allegation, Award, para 353 citing to Claimants' Post-Hearing Brief paras 33, 45.

[3] Award, paras 337-341.

[4] Decision on Preliminary Objections, 29 October 2014, para 51; This decision was part of the basis for Respondent's challenge of the Tribunal. (Decision on the Proposal to Disqualify All Members of the Arbitral Tribunal October 3, 2017, para 44.

[5] Award, para 166 et. seq. citing to Respondent's Counter Memorial; *see*, *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, where Respondent raised non-attribution as a preliminary objection. Respondent could also have attempted an objection based on ICSID Arbitration Rule 41 (5) for Manifest Lack of Legal Merit; *see*, A. DIOP (2010) Objection under Rule 41(5) of the ICSID Arbitration Rules, ICSID Review - Foreign Investment Law Journal, Volume 25, Issue 2, pp. 312–336; *but see*, *Almasryia for Operating & Maintaining Touristic Construction Co. L.L.C. v. State of Kuwait*, ICSID Case No. ARB/18/2, Dissenting Opinion on the Respondent's Application under Rule 41(5) of the ICSID Arbitration Rules, 1 November 2019.

[6] The FRN raised it as “further objections”, Award, para 106; Respondent’s Counter-Memorial, 17 November 2015, paras 321 et. seq.

[7] Award, explaining that “the jurisdictional landscape became more complex after Respondent’s Counter-Memorial” which raised jurisdictional objections related to *inter alia* attribution, para 106.

[8] *Interocean* Award, para 176. *Hamester*, Award, considering attribution at the merits for a complex factual case, paras 143-145 citing to *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction, 28 June 2006, para. 85; *but see*, C. SÖDERLUND, E. BUROVA (2018) Is There Such a Thing as Admissibility in Investment Arbitration?, ICSID Review - Foreign Investment Law Journal, Volume 33, Issue 2, Spring 2018: “[i]f admissibility is discussed at all it must proceed further to a decision on jurisdiction or – alternatively and exceptionally – a finding that the “admissibility” objection is relevant for the merits”, p. 525; *see also*, F. FONTANELLI A. TANZI (2017) Jurisdiction and Admissibility in Investment Arbitration. A View from the Bridge at the Practice”, Brill, pp. 17-18.

[9] *International Thunderbird Gaming Corporation v. The United Mexican States* , UNCITRAL, Award, 26 January 2006, para 95; *see also*, *Marvin Feldman v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002, para 177; *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania*, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility, 24 September 2008, para 96.

[10] Award, para 192 [emphasis added].

[11] Award, paras 395-400; see also, *infra* fn. 28.

[12] Award, para 307.

[13] Award, para 170; *contra* the finding in *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, July 23, 2001, para 35; *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award dated October 31, 2012.

[14] Under international law, is attributable to the State the conduct of any “State organ […] whether the organ exercises legislative, executive, judicial or

any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State" (Article 5 of the ILC). Furthermore, Article 5 of the ILC Draft Articles provides that "[t]he conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance." Finally, Article 8 of the ILC Articles provides that "[t]he conduct of a person or group or persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct".

[15] Award, para 307.

[16] Award, para 299.

[17] Award, para 308 [emphasis added].

[18] Award, *ibid*.

[19] Article 26.3 of the Act provides that "[w]here in respect of any dispute, there is a 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."; *See also* Award, paras 143, 153-54.

[20] *See*, *eg.* ICSID cases: *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 27 2008, paras 129,135; *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, 2 August 2006, paras 230-239; *Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Philippines*, ICSID Case No. ARB/03/25, Award, 16 August 2007, para 401; *World Duty Free Company v Republic of Kenya*, ICSID Case No. Arb/00/7, Award dated 4 October 2006, para 136.

[21] Award, para136.

[22] Award, para 19.

[23] Award, para 150

[24] Award, para 152.

[25] Award, para163.

[26] Award, para 165.

[27] Award, para 309.

[28] *But see*, *UAB E energija (Lithuania) v. Republic of Latvia*, ICSID Case No. ARB/12/33, Dissenting Opinion on Costs, 22 December 2017.

[29] Award, para 377; *see also*, *LG&E Energy Corp, LG&E Capital Corp. & LG&E Int'l Inc v. Argentine Republic*ICSID Case No. ARB/02/1, Award, 25 July 2007:"[t]he Tribunal notes that Article 61(2) of the ICSID Convention and Rule 28 of the ICSID Arbitration Rules grant discretion to ICSID tribunals with regard to the award of costs. The Tribunal further notes that there is no uniform practice in treaty arbitration with regard to this matter. However, recently, tribunals have made recourse to the basic principle 'costs follow the event' or 'loser-pays-rule", para 112.

[30] Award, paras 383-387.

[31] Award, para 387.

[32] Award, para 389.

[33] Awards dismissing all claims are rare, only 27% of awards were dismissed on that basis in ICSID Caseload (1966-2019) The ICSID Caseload Statistics 2020, p. 14. Accessible at: https://icsid.worldbank.org/sites/default/files/publications/Caseload%20Statistics/en/The%2 1%20Edition%29%20ENG.pdf.

[34] *Statoil (Nigeria) Limited, Texaco Nigeria Outer Shelf Limited v. Nigerian National Petroleum Corporation*.

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