**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

In the arbitration proceeding between

**INTEROCEAN OIL DEVELOPMENT COMPANY AND INTEROCEAN OIL EXPLORATION COMPANY**

Claimants

and

**FEDERAL REPUBLIC OF NIGERIA**

Respondent

# ICSID Case No. ARB/13/20

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## AWARD

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***Members of the Tribunal***
Prof. William W. Park, President
Prof. Julian D.M. Lew
Hon. Justice Edward Torgbor

***Secretary of the Tribunal***
Mr. Benjamin Garel

*Date of dispatch to the Parties:* 6 October 2020

## REPRESENTATION OF THE PARTIES

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Mr. Oluwasina Ogungbade
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| Arbitration Rules | ICSID Rules of Procedure for Arbitration Proceedings 2006 |
| C-[#] | Claimants' Exhibit |
| CAC | Corporate Affairs Commission |
| CAMA | Companies & Allied Matters Act 1990 |
| CL-[#] | Claimants' Legal Authority |
| Claimants' Counter-Memorial | Claimants' Counter-Memorial Pursuant to Procedural Order No. 1 of 24 February 2014, dated 11 April 2014 |
| Claimants' Memorial | Claimants' Points of Claim, dated 18 June 2015 |
| Claimants' Observations on Costs Allocation | Claimants' Observations on Costs Allocation, dated 30 June 2020 |
| Claimants' Post-Hearing Brief | Claimants' Post-Hearing Brief, dated 13 June 2018 |
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| Claimants' Statement of Costs | Claimants' Statement of Costs dated 8 June 2020 |
| Continued Hearing | Continued Hearing on the Merits held 19-21 July 2017 in London |
| Decision on Preliminary Objections | Tribunal's Decision on Preliminary Objections, dated 29 October 2014 |
| EFCC | Economic and Financial Crimes Commission |
| Hearing | Hearing on the Merits held 2-4 August 2016 in London |

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|---|---|
| Hearing on Preliminary Objections | Hearing on Preliminary Objections to Jurisdiction held on 26 June 2014 in London |
| ICSID Convention | Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated 18 March 1965 |
| ICSID or the Centre | International Centre for Settlement of Investment Disputes |
| JOA | Joint Operating Agreement |
| NIPC | Nigerian Investment Promotion Commission |
| NIPC Act | Nigerian Investment Promotion Commission Act |
| NNPC | Nigerian National Petroleum Corporation |
| OML 98 | Nigerian Oil Mining Lease 98 |
| OPL 275 | Oil Prospecting Lease 275 |
| Pan Ocean or POOC | Pan Ocean Oil Company |
| R-[#] | Respondent's Exhibit |
| Respondent's Counter-Memorial | Respondent's First Memorial, dated 17 November 2015 |
| Respondent's Memorial on Jurisdiction | Respondent's Memorial on Objection to Jurisdiction, dated 14 March 2014 |
| Respondent's Observations on Costs Allocation | Respondent's Observations on Costs Allocation, dated 30 June 2020 |
| Respondent's Post-Hearing Brief | Respondent's Post-Hearing Brief, dated 13 June 2018 |
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| | |
|---|---|
| RfA | Request for Arbitration |
| RL-[#] | Respondent's Legal Authority |
| Transcript Day, [#] [page:line] | Transcript of the Hearing |
| Tribunal | Arbitral Tribunal constituted on 11 December 2013 |

## I. The Parties

### A. *Claimants*

1. Claimants are Interocean Oil Development Company and Interocean Oil Exploration Company, both of which were incorporated under the laws of Delaware and maintain registered offices at 901 N. Market Street, Suite 705, Wilmington, Delaware 19801, U.S.A.

2. Claimants are represented in this arbitration by Mr. Olasupo Shasore, SAN and Mr. Bello Salihu of ALP, Lagos, Nigeria; Mr. Oba Nsugbe QC of 3 Pump Court, Temple, London, United Kingdom; and Ms. Bimpe Nkontchou of ADR Africa Limited, London, United Kingdom.

### B. *Respondent*

3. Respondent is the Federal Republic of Nigeria. Claimants' Request for Arbitration ("RfA") was notified to the Attorney General for the Federation and Minister for Justice, Federal Ministry of Justice, Shehu Shagari Way, Central Area, Abuja, Nigeria.

4. Respondent is represented in this arbitration by a team led by Mr. Aare Afe Babalola SAN and comprising Mr. Adebayo Adenipekun SAN, Mr. Olu Daramola, Mr. Oluwasina Ogungbade, Mr. Kehinde Ogunwumiju, Mr. Ola Faro, and Mrs. Esther Adenipekun, all of Emmanuel Chambers, Lagos, Nigeria, Mr. Robert Volterra and Mr. Álvaro Nistal of Volterra Fietta, London, United Kingdom, and Ms. Rose Rameau of Rameau Law Firm in Washington, D.C., USA.

## II. Overview of the Dispute

5. The Tribunal has considered all of the Parties' submissions and the arguments and evidence presented by them in these proceedings. This Award will focus on the materials determinative to its decisions and the resolution of this dispute. All issues have been considered. Any request for relief not expressly granted in this Award is hereby denied.

A. ***Summary of Facts***

6. The facts giving rise to this dispute on the merits are largely uncontested. The main differences between the Parties reside in the legal qualification of these events and in whether Respondent bears culpability or liability for them. The Tribunal adopts the "Overview of the Dispute" contained in its Decision on Preliminary Objections. Below, the Tribunal summarizes the factual submissions that were most relevant to the Tribunal's decisions. The Tribunal's factual findings as they relate to the arguments submitted and the claims raised are presented within the Tribunal's analysis.

7. Nigeria is among the world's largest producers of oil and its oil assets are managed by the state-owned authority, the Nigerian National Petroleum Corporation ("NNPC").[1] This dispute centers on Claimants' investment in the oil and gas industry in Nigeria, which resulted in the joint venture, ownership, and operation of Nigerian Oil Mining Lease 98 ("OML 98") and Oil Prospecting License 275 ("OPL 275") through a Nigerian corporate entity, Pan Ocean Oil Company ("POOC" or "Pan Ocean").

8. This joint venture is known as the "NNPC/POOC Joint Venture." Pan Ocean is the operator of OML 98 and holder of OPL 275. The current lease output is approximately 50,000 bpd of crude oil.[2] Until 1998, Claimants were the 100% beneficial owner of the 40% participating interest in OML 98 and related assets (as Pan Ocean) and Respondent was the owner of 60% of the participating interest (as NNPC).[3] The subject of this arbitration is Claimants' 40% participating interest in OML 98 and OPL 275, created by the joint venture.[4]

9. Claimants allege that they alone invested capital in the Asaboro and Ogharefe fields to make OML 98 profitable. Since July 1998, Claimants made further investments by discharging the 40% of the contributed operational costs to the production of OML 98 and all other operations of Pan Ocean, including the acquisition of a second rig and the purchase of another oil block

[1] Claimants' Memorial ¶ 5.1.

[2] Claimants' Memorial ¶ 4.2.

[3] RfA ¶ 14; Claimants' Memorial ¶ 1.3.

[4] Claimants' Memorial ¶ 7.2.

OPL 275, in 2007 or 2008. OPL 275 is co-extensive of Claimants' original investment in OML 98.[5]

10. Dr. Vittorio Fabbri was the beneficial owner of Impex Limited, which had been the legal owner of both Claimant companies since 1983.[6]

11. Impex owned Claimants, which owned Pan Ocean.[7] Claimants allege that the authorized share capital of Pan Ocean is Naira 10,000 divided into Ten Thousand Ordinary Shares of Naira 1.00 each.[8] Claimants hold 1,250 shares each (2,500 shares total) in Pan Ocean and allege that these are the only shares of Pan Ocean that have been validly issued and allotted.[9]

12. In the mid-1980s, the Board of Pan Ocean consisted of three directors: Dr. Fabbri, Dr. Festus Fadeyi, and Mr. Herbert Rooks, with Dr. Fabbri acting as Managing Director.[10] Dr. Fadeyi later became Managing Director of Pan Ocean. He performed executive duties but held no ownership rights in the company.[11]

13. According to Respondent, on 9 October 1984, Pan Ocean and NNPC concluded a Crude Oil Sales Contract. Respondent alleges that, three years later in 1987, Pan Ocean lifted certain cargoes of crude oil without payment, in violation of the Crude Oil Sales Contract.[12]

14. In July 1987, Mr. Rooks was in Nigeria with a power of Attorney from Dr. Fabbri to relieve Dr. Fadeyi of his duties.[13] According to Claimants, Mr. Rooks and two others were detained without charges and were finally released from detention in Nigeria on 23 December 1987, after 5 months.[14] Claimants allege that this was part of an effort by Respondent to enforce its

[5] Claimants' Memorial ¶ 5.3; Respondent's Appendix A.

[6] Claimants' Memorial ¶ 6.2; Claimants' Reply ¶ 3.

[7] Claimants' Reply ¶ 74.

[8] Claimants' Memorial ¶ 6.1.

[9] Claimants' Memorial ¶ 6.3.

[10] Claimants' Reply ¶ 4.

[11] Claimants' Rejoinder ¶ 5.

[12] Respondent's Counter-Memorial ¶ 30; see also Pan Ocean letter to NNPC dated 17 June 1998, Exhibit R-28, where Dr. Fabbri acknowledges the debt of US$ 371,991,279, owing to this event, and agrees to pay this debt from the proceeds of Pan Ocean's 40% participating interest in OML 98 in specified amounts over a period starting in 2002 and ending in 2012.

[13] Claimants' Reply ¶ 90; Respondent's Appendix A.

[14] Claimants' Memorial ¶ 4.3 (also stating 5 months).

rights as a joint venture partner.[15] From 1987 onward, Dr. Fadeyi was the only Director of Pan Ocean who remained physically present in Nigeria.[16]

15. In May 1989, Pan Ocean and NNPC signed a Settlement Agreement following a commercial arbitration, pursuant to which a debt related to the 1987 dispute was to be repaid from Pan Ocean to NNPC.[17] Pan Ocean agreed to pay NNPC the sum of $371,991,279, comprising the principal sum of US$ 135,610,140, plus interest, in relation to crude oil purchases of 4,928,880 barrels.[18] Pursuant to this agreement, payment would commence in 2002, with the balance fully paid in 2012.[19]

16. In December 1997, Dr. Fabbri was diagnosed with terminal liver cancer.[20]

17. Claimants allege that Dr. Fabbri transferred 100% of the beneficial interest in Impex to his ex-wife, Mrs. Annabella Timolini, via stock transfer agreement on 13 January 1998, in the presence of his eldest son, Mr. Patrizio Fabbri.[21]

18. Respondent states that on 17 June 1998, Dr. Fabbri, as Chairman of Pan Ocean, acknowledged the outstanding debt to the NNPC and proposed a debt repayment plan, pursuant to which the debt owed to NNPC would be repaid from 2002 – 2009, with the balance fully paid in 2012.[22] The letter makes no mention of any change in the ownership of Impex.

19. On 20 or 24 July 1998, at a Board Meeting of Pan Ocean, there was an allotment of shares purportedly made by Mr. Rooks to Mr. Jacob Tomisin.[23] Mr. Rooks in an affidavit of 26 August 2003 stated that he did not do this transaction.[24]

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[15] Claimants' Memorial ¶ 4.3.

[16] Claimants' Reply ¶ 4.

[17] Respondent's Appendix A.

[18] Claimants' Memorial ¶ 4.3.

[19] Letter from Dr. Vittorio Fabbri to the NNPC Managing Director, 17 June 1998, Exhibit R-28.

[20] Respondent's Appendix A.

[21] Claimants' Reply ¶¶ 5, 77; Respondent's Appendix A.

[22] Respondent's Appendix A; Letter from Dr. Vittorio Fabbri to the NNPC Managing Director, 17 June 1998, Exhibit R-28.

[23] Respondent's Appendix A.

[24] Claimants' Reply ¶ 85.

20. Months after contracting a terminal cancer, Dr. Fabbri died intestate on 1 September 1998.[25]

21. On 28 September 1998, on the invitation of Mrs. Timolini, Dr. Fadeyi attended a meeting in Geneva where Claimants allege that they informed Dr. Fadeyi and Justice Duro Adebiyi (Legal Secretary of Pan Ocean) of Mrs. Timolini's status as shareholder and Chairman of the Board of Impex.[26]

22. Claimants allege that, since September 1998, Claimants have been denied information about or access to joint venture meetings or joint operating committee deliberations and the accounting, financial, and business affairs or production status of the joint venture operations.[27]

23. Claimants' representatives Mr. John Brunner and Mr. Richard Evans made plans for late 1998 to travel to Nigeria to review Pan Ocean's accounts on Mrs. Timolini's behalf, but these were cancelled by Dr. Fadeyi.[28] Dr. Fadeyi directed all communication through his lawyers, the Law Union, who refused to accept the validity of the Deed of Transfer that Dr. Fabbri allegedly executed before his death.[29]

24. On 15 October 1998, Dr. Fadeyi called a meeting where he removed Mr. Rooks as Director and appointed two of his associates in his place: Mr. Alhaji Muhammed Dikko Yusufu and Justice Duro Adebiyi. This was later declared irregular by the Corporate Affairs Commission ("CAC").[30]

25. On 21 October 1998, the Law Union wrote to Mrs. Timolini's attorney, Mr. Jacques Jones, stating that the consent of the NNPC was required before any transfer of the interest of Pan Ocean could be valid.[31]

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[25] Claimants' Memorial ¶ 6.2; Claimants' Reply ¶ 5; Respondent's Appendix A.

[26] Respondent's Appendix A.

[27] Claimants' Memorial ¶ 9.6.1. Further discussion of Claimants' allegations about events in 1998 were summarized in their Post-Hearing Brief at Section 23.

[28] Claimants' Reply ¶ 78.

[29] Claimants' Reply ¶ 78.

[30] Claimants' Reply ¶ 86.

[31] Claimants' Reply ¶ 78.

26. It is unclear whether Dr. Fabbri's ex-wife, Mrs. Timolini, ever held the beneficial interest in Claimants. Dr. Fabbri and Mrs. Timolini divorced prior to his death. While the Parties agree that Mrs. Timolini yielded whatever interest she may have had to the estate of Dr. Fabbri in 2010, her alleged ownership of Impex, which owns Claimant companies, may have been an intervening factor with respect to Respondent's refusal to acknowledge communications from Mrs. Timolini regarding the ownership of the shares.[32] Claimants have alleged that the beneficial interest of Claimants was owned by Dr. Fabbri until his death.[33] Claimants have also alleged that, prior to his death, Dr. Fabbri transferred 100% of the beneficial interest in Impex to his ex-wife via stock transfer agreement on 13 January 1998, in the presence of his eldest son, Mr. Patrizio Fabbri.[34] Respondent never recognized the validity of this transfer, and the transfer was declared invalid by Justice Olomojobi of the Federal High Court of Nigeria.[35]

27. In March 2000, Chief Sena Anthony, Legal Advisor to the NNPC, wrote a letter in response to an inquiry by Mrs. Timolini and confirmed that the NNPC's consent was not required in case of change of Pan Ocean's ultimate beneficial ownership.[36] Chief Anthony advised, however, that they seek the consent of the Government and of the other shareholders. Claimants allege that this is how they discovered the first irregular issuance of shares by Dr. Fadeyi to a third person, Mr. Tomisin. Respondent submits that the communications sent to the NNPC on behalf of Mrs. Timolini were only aimed at obtaining an acknowledgment or confirmation of her asserted beneficial ownership of Pan Ocean.[37]

28. In May 2002, Pan Ocean and NNPC entered into a Joint Operating Agreement.[38]

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[32] Claimants' Reply ¶ 79; Witness Statement of Jacques Jones ¶¶ 24-37.

[33] Claimants' Memorial ¶ 1.4.

[34] Claimants' Memorial ¶ 1.4; Claimants' Reply ¶¶ 5, 77; Respondent's Appendix A.

[35] Claimants' Memorial ¶ 1.4.

[36] Claimants' Reply ¶ 20; Respondent's Counter-Memorial ¶ 41, citing Letter from Chief Sena Anthony (Group General Manager, NNPC) to Mr. Jacques Jones, dated 30 March 2000, original Exhibit C-36, renumbered Exhibit C-42.

[37] Respondent's Counter-Memorial ¶¶ 39-41.

[38] Respondent's Appendix A; Joint Operating Agreement between Pan Ocean Oil Corporation (Nigeria) and the NNPC, 28 May 2002, Exhibits R-11(1) and R-11(1)PLUS.

29. On 16 December 2002, Claimants initiated a claim against Dr. Fadeyi and others, seeking declarations that Claimants were the beneficial owners of Pan Ocean and seeking to nullify all purported general and board meetings following September 1998, among other actions occurring after that date. The action was withdrawn by notice of discontinuance on 11 March 2004.[39]

30. On 3 February 2003, Claimants petitioned the CAC to conduct an investigation into the affairs of Pan Ocean.[40]

31. On 29 March 2004, Pan Ocean (under the leadership of Dr. Fadeyi) filed an action against Mrs. Timolini, alleging that neither Mrs. Timolini nor Mr. Patrizio Fabbri were shareholders or directors of Pan Ocean ("2004 Fraud Case").[41]

32. The Parties dispute whether, in 2004, Claimants' representatives scheduled a meeting with the then-Presidential Advisor to the President Nigeria on Petroleum and Energy Matters to seek a settlement of the dispute. According to Claimants, the Presidential Advisor subsequently refused to meet with Claimants' representatives, who had traveled from Geneva to Abuja for the meeting.[42] Respondent disputes that in 2004 representatives of the Estate of Dr. Fabbri secured an appointment with the then-Presidential Advisor on Petroleum and Energy in an

[39] Respondent's Memorial on Jurisdiction ¶¶ 13-14; *Interocean Companies v. Festus Fadeyi et al.* (2002 Recognition of Ownership Case), Federal High Court of Lagos, Suit No. FHC/L/CS/1217/2002, Writ of Summons, 16 December 2002, Exhibit R-6(1); *Interocean Companies v. Festus Fadeyi et al.* (2002 Recognition of Ownership Case), Federal High Court of Lagos, Suit No. FHC/L/CS/1217/2002, Statement of Claim, 16 December 2002, Exhibit R-6(2); *Interocean Companies v. Festus et al.* (2002 Recognition of Ownership Case), Federal High Court of Lagos, Suit No. FHC/L/CS/1217/2002, Notice of Discontinuance, 11 March 2004, Exhibit R-8.

[40] Respondent's Appendix A.

[41] Respondent's Memorial on Jurisdiction ¶ 15; *Pan Ocean Oil Corporation v. Annabella Timolini et al.* (2004 Fraud Case), Federal High Court of Lagos, Suit No. FHC/L/CS/288/2004, Ruling, 10 November 2005, Exhibit R-7(1); *Pan Ocean Oil Corporation v. Annabella Timolini et al.* (2004 Fraud Case), Federal High Court of Lagos, Suit No. FHC/L/CS/288/2004, Judgment Order, 10 November 2005, Exhibit R-7(2).

[42] Claimants' Memorial ¶¶ 14.1-14.2.

attempt to settle the case.[43] Respondent states that there is no evidence that any meeting was planned.[44]

33. In 2005, at Claimants' insistence while the 2004 Fraud Case was pending, the CAC investigated the affairs of Pan Ocean, pursuant to its statutory powers under Respondent's company law.[45] The CAC issued its report, which confirmed Dr. Fabbri as the sole owner of the beneficial interest in Pan Ocean and, consequently, Claimants' 40% participating interest in the OML 98.[46] As noted above, OML 98 serves as a focus for this dispute, given Claimants' investment in Nigeria having been effected through ownership and operation of Nigerian Oil Mining Lease 98 and Oil Prospecting License 275 through the Nigerian corporate entity, Pan Ocean Oil Company.

34. The 2004 Fraud Case was concluded on 10 November 2005, when a Nigerian Court judgment dated 10 November 2005 declared Dr. Fabbri as the sole and beneficial owner of all the undertaking in Pan Ocean.[47] The case was, thus, resolved in Claimants' favor, finding that Dr. Fabbri and Claimants were the only owners of the beneficial interest in Pan Ocean.

35. The "2005 Board Meeting Case" began on 21 November 2005, when Dr. Fadeyi applied for the Court's leave to hold a Board Meeting of Pan Ocean, and supported the same with an affidavit stating that the absence of directors of Pan Ocean made it impossible to uphold normal business operations in the Country.[48] The affidavit stated that Mr. Rooks "departed Nigeria and had since never returned to the country" and "his efforts to locate him had proven

[43] Respondent's Reply ¶ 70; *Interocean Companies v. Festus Fadeyi et al.* (2002 Recognition of Ownership Case), Federal High Court of Lagos, Suit No. FHC/L/CS/1217/2002, Writ of Summons, 16 December 2002, Exhibit R-6(1); *Interocean Companies v. Festus Fadeyi et al.* (2002 Recognition of Ownership Case), Federal High Court of Lagos, Suit No. FHC/L/CS/1217/2002, Statement of Claim, 16 December 2002, Exhibit R-6(2); Exhibit C-48.

[44] Respondent's Counter-Memorial ¶¶ 256-257; Respondent's Reply ¶ 70; *Interocean Companies v. Festus Fadeyi et al.* (2002 Recognition of Ownership Case), Federal High Court of Lagos, Suit No. FHC/L/CS/1217/2002, Writ of Summons, 16 December 2002, Exhibit R-6(1); *Interocean Companies v. Festus Fadeyi et al.* (2002 Recognition of Ownership Case), Federal High Court of Lagos, Suit No. FHC/L/CS/1217/2002, Statement of Claim, 16 December 2002, Exhibit R-6(2); Exhibit C-48.

[45] Claimants' Memorial ¶ 1.5.

[46] Claimants' Memorial ¶¶ 1.3, 1.6.

[47] Claimants' Memorial ¶¶ 6.3, 9.51.

[48] Claimants' Reply ¶ 88; Respondent's Appendix A.

abortive."[49] This application was granted on 24 November 2005.[50] Claimants filed an appeal on the same day.[51] The requested Board Meeting was held on 29 November 2005, and resolutions were passed allotting the remaining 7,500 unissued shares of Pan Ocean to Dr. Fadeyi and his associates.[52] On 1 and 28 December 2005, Dr. Fadeyi sought to give notice of an Extraordinary General Meeting of Pan Ocean, where he would validate the allotment of shares made on 29 November 2005.[53] Claimants submit that no shareholders were present at that meeting and that "there is no evidence that they were even notified of it."[54] Dr. Fadeyi claimed that he attempted to serve notice of the meeting to Claimants, while in fact he only sent those notices to the Swiss address of Panoco SA, Swiss subsidiary of Pan Ocean that was liquidated in 1995, and did not attempt to serve them at the registered offices of Claimants or their counsel's address, both known to him from other litigations.[55] Respondent states that the court was entitled to rely on Dr. Fadeyi's statement that the notices were returned and points out that the address of the notice was the same address as listed on the annual returns of Pan Ocean, attached to the CAC Report of April 2005.[56]

36. On 19 January 2006, again in the absence of Claimants, an ordinary resolution was passed through which Dr. Fadeyi appointed his associates Justice Duro Adebiyi and Alhaji Muhammed Dikko Yusuf as Directors and the share allocation was effected.[57]

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[49] Claimants' Reply ¶ 88 (i) and (vi).

[50] *Festus Fadeyi v. Pan Ocean Oil Corporation* (2005 Board Meeting Case), Federal High Court of Abuja, Suit No. FHC/ABJ/CS/589/05, Order, 24 November 2005, Exhibit R-43.

[51] *Timolini et al. v. Pan Ocean Oil Corporation and the Corporate Affairs Commission* (2005 Appeal of Fraud Case), Appeal No. FHC/L/CS/2006, Suit No. FHC/L/CS/288/2004, Notice of Appeal, 24 November 2005, Exhibit R-37.

[52] Claimants' Reply ¶¶ 10, 74, 92; Ordinary Resolution of Pan Ocean Oil Corporation, 29 November 2005, original Exhibit C-51, renumbered Exhibit C-56; Respondent's Appendix A; Return of Allotment of Shares and Notice of Ordinary Resolution of the Company, Exhibit R-47.

[53] Claimants' Reply ¶ 93; Respondent's Appendix A; Notice of Extra-Ordinary General Meeting of Pan Ocean Oil Corporation (Nigeria), 1 December 2008, Exhibit R-44; Notice of Extra-Ordinary General Meeting of Pan Oil Corporation (Nigeria), 28 December 2008, Exhibit R-45.

[54] Claimants' Reply ¶ 92.

[55] Claimants' Reply ¶¶ 93-96.

[56] Respondent's Rejoinder ¶¶ 76, 77, citing Report of the Corporate Affairs Commission on the Investigation into the Affairs of Pan Ocean Oil Corporation (Nigeria) Unlimited, April 2005, attachment K, original Exhibit C-45, renumbered Exhibit C-51.

[57] Claimants' Reply ¶¶ 93, 96.

37. The decision of 8 February 2006 of the Federal High Court of Abuja validated the resolutions passed by Dr. Fadeyi.[58] On 8 February 2006, the CAC accepted and endorsed the registered filing of new shares purporting to represent 75% of the participating interest in OML 98 to Dr. Fadeyi, thus effecting the surrender of Pan Ocean shares and thus an alienation of the majority part of Claimants' 40% interest in the joint venture, based on the false assertion that Claimants were nowhere to be found, were non-responsive, or were not interested in the General Meeting of Pan Ocean.[59] Claimants state that, unlike in the prior transfer, Respondent did not provide the required written consent to this transfer as required under Nigerian Law, but continues to give legal effect to it.[60] Claimants filed an appeal on 4 April 2006, which the Court of Appeal of Abuja dismissed as untimely.[61]

38. Mrs. Timolini waived her interest in Impex in 2010 in order to facilitate her children's obtaining Letters of Administration. A Letter of Administration of the Estate of Vittorio Fabbri was granted on 23 August 2011.[62] She resigned as Director and President of Claimant companies on 31 January 2013.[63]

39. On 9 October 2012, 29 October 2012, and 21 March 2013, Claimants wrote to Respondent seeking a resolution of their claims and demands. Respondent did not reply to these letters and disputes whether they were even delivered.[64]

40. Although Claimants have lost control of their investment, that loss does not in itself give rise to international liability. Accepting the facts as pleaded by Claimants, one sees a story of someone (Dr. Fabbri) who gave his ex-wife a company in January 1998, but told no one else

[58] Claimants' Reply ¶ 97.

[59] Claimants' Memorial ¶ 9.5.2; Respondent's Appendix A; Notice of Extra-Ordinary General Meeting of Pan Oil Corporation (Nigeria), 28 December 2008, Exhibit R-45.

[60] Claimants' Memorial ¶¶ 9.4, 9.5.4, 12.1; Claimants' Reply ¶ 7.

[61] Claimants' Motion on Notice in Appeal No. CA/ABJ/76/M/06-*Interocean Oil Development Corporation Nigeria Unlimited & Anor. v. Dr. Festus A. Fadeyi & Anor.*, 4 April 2006, Original Exhibit C-53, renumbered Exhibit C-58; *Interocean Companies v. Festus Fadeyi and Pan Ocean Oil Corporation* (2006 Appeal of the Board Meeting Case), Court of Appeal of Abuja, Appeal No. CA/ABJ/76/06, Suit No. FHC/ABJ/CS/589/2005, Ruling, 18 July 2007, Exhibit R-49.

[62] Claimants' Memorial ¶ 6.2; Respondent's Appendix A; Deed of Surrender by Mrs. Anabella Timolini, July 2010, original Exhibit C-16, renumbered Exhibit C-22.

[63] Respondent's Appendix A.

[64] Claimants' Memorial ¶¶ 3.2, 14.2; Respondent's Memorial on Jurisdiction ¶ 123.

except one of their children. Dr. Fabbri continued to act as if this exchange had not occurred and then, months later, even made an agreement with the Nigerian government to the effect that the very same company would pay a nearly half billion dollar debt, starting in 2002.[65]

41. When Dr. Fabbri died intestate weeks later, his children and ex-wife would be forced to spend over two decades trying to establish their ownership of the company and to wrest control of the company back from Dr. Fadeyi.[66]

### B. *Summary of Relief Requested*

42. In their Memorial on the Merits,[67] Claimants made the following request for relief, which amended and supplemented their prior request contained in their Request for Arbitration:

> Following the actions taken and omissions of the Respondent and its instrumentalities described above, the Claimants will respectfully request an award in their favour-
>
> 1. Declaring that Respondent has breached its obligations to the Claimants under Nigerian law and/or international law;
>
> 2. Directing the Respondent to restore only the nominees of the Claimants as representatives in the 40% participating interest under the operations of all Joint Venture Agreements and in particular OML 98 and OPL 275;
>
> 3. Finding that as matter of Nigerian and/or international law, any purported transfer or acquisition of the 100% interest of the Claimants, or any part thereof in 40% of OML 98/OPL 275 or any other asset, or its accumulated proceeds howsoever executed through the Respondent's instrumentalities without the consent of the Claimants and in breach of Nigerian law, is an indirect expropriation of its participating interest in the leases in violation of NIPCA and Nigerian Law;
>
> 4. Finding that as matter of Nigerian and/or international law, the acts and/or omissions of the Respondent (as particularised above) amount to a breach of the Respondent's duty to ensure

[65] Letter from Dr. Vittorio Fabbri to the NNPC Managing Director, 17 June 1998, Exhibit R-28.

[66] Claimants' Reply ¶ 87.

[67] Claimants' Memorial ¶ 16.

that the treatment of the Claimants did not fall below international minimum standards and/or were not in breach of its duty to treat the Claimants fairly and equitably;

5. Directing the Respondent, its relevant privies and instrumentalities to pay damages in an amount to be proven during these arbitral proceedings which the Claimants estimate at being in excess of US$ 1 Billion (One Billion United States Dollars);

6. Directing the Respondent, its relevant privies and instrumentalities to pay aggravated damages in the sum of US$ 500,000,000 (Five Hundred Million United States Dollars).

7. Restitution of the undiluted 40% participating interest in OML 98 and OPL 275 and all monies accruing thereto by receiving the proceeds of unjust enrichment controlled in trust for the Claimants to date;

8. Directing that the Claimants be reinstated as the beneficial owner [sic] of the 40% participating interest in OML 98.

9. Directing the Respondent to pay the Claimants' interest and taxes on all sums awarded;

10. Directing the Respondents to pay the Claimants' costs associated with these proceedings including professional fees and disbursements on a full indemnity basis;

11. Ordering such further or other relief as the Tribunal deems appropriate in the circumstances.

43. In its Counter-Memorial,[68] Respondent made the following request for relief:

"For all the reasons set out in this Memorial, the Respondent respectfully requests that the Tribunal:

a. declare by partial award on jurisdiction that it lacks jurisdiction over all, or in the alternative, one or more, of the Claimants' claims founded outside of

[68] Respondent's Counter-Memorial ¶ 489.

the NIPC Act, in particular their claims based on indirect expropriation and/or on customary international law;

b. in the alternative, declare in its final award that it lacks jurisdiction over the present dispute;

c. further in the alternative, declare in its final award that it lacks jurisdiction over the Claimants' indirect expropriation claim and over any other claim that is not based on a violation of the NIPC Act, including any claims based upon customary international law;

d. to the extent that it may assert jurisdiction, dismiss all the relevant claims in their entirety;

e. order the Claimants to pay all of the Respondent's costs in connection with this arbitration, including the Tribunal's and ICSID's fees and expenses, and all legal fees and expenses incurred by the Respondent (including, but not limited to, the fees and expenses of legal counsel and experts); and

f. order any such relief as may seem just."

44. In its Rejoinder,[69] Respondent made the following request for relief

"For all the reasons set out in this Rejoinder and in Respondent's First Memorial, the Respondent respectfully requests that the Tribunal:

a. declare that it lacks jurisdiction over the present dispute

b. in the alternative, declare that it lacks jurisdiction over: (i) the Claimants' indirect expropriation claim, including their judicial expropriation claim; and (ii) over any claim not based on a violation of the NIPC Act, including the Claimants' denial of justice claim and their other claims based on customary international law;

[69] Respondent's Rejoinder ¶ 442.

c. to the extent that it may assert jurisdiction, dismiss all of the relevant claims in their entirety;

d. order Claimants to pay all of the Respondent's costs in connection with this arbitration, including the Tribunal's and ICSID's fees and expenses, and all legal fees and expenses incurred by the Respondent (including, but not limited to, the fees and expenses of legal counsel and experts); and

e. order any such relief as may seem just."

## III. Procedural History

### A. *Introduction*

45. This arbitration is between Interocean Oil Development Company and Interocean Oil Exploration Company as Claimants and Federal Republic of Nigeria as Respondent. Their dispute is brought before the International Centre for Settlement of Investment Disputes ("ICSID"), under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States dated 18 March 1965 ("ICSID Convention") and the Nigerian Investment Promotion Commission Act ("NIPC Act").

46. Claimants filed their RfA, dated 30 July 2013, with ICSID pursuant to Article 36 of the ICSID Convention in electronic copy on 31 July 2013 and in hard copy on 5 August 2013. In the RfA, Claimants requested that the Tribunal render an award:

> "a) Declaring that Respondent has breached its obligations to the Claimants under NIPC [Act];
>
> b) Directing the Respondent to restore only the nominees of the Claimants as representatives in the 40 % participating interest under the operations of all Joint Venture Agreements and in particular OML 98 and OPL 275;
>
> c) Finding that any purported transfer or acquisition of the 100% interest of the Claimants or any part thereof in 40% of OML 98/OPL 275 or any other asset including its accumulated proceeds howsoever without the consent of the Claimants is an indirect expropriation of its participating interest in the leases;

d) Directing the Respondent, its relevant privies and instrumentalities to pay damages in an amount to be proven at the hearing but which the Claimants presently estimate to be in excess of $500,000,000 (Five Hundred Million United States Dollars);

e) Directing the Respondent, its relevant privies and instrumentalities to pay aggravated damages in the sum of $150,000,000 (One Hundred and Fifty Million United States Dollars) or such amount as may be proven by the Claimants at the hearing;

f) Restitution of the undiluted 40% participating interest in OML 98 and OPL 275 and all monies accruing thereto, by receiving the proceeds of unjust enrichment controlled in trust for the Claimants to date;

g) Directing that the Claimants be reinstated as the beneficial owner of the 40% participating interest in OML 98;

h) Directing the Respondent to pay the Claimants' interest and taxes on all sums awarded;

i) Directing the Respondents to pay the Claimants' costs associated with these proceedings including professional fees and disbursements on a full indemnity basis; and

j) Ordering such further or other relief(s) as the Tribunal deems appropriate in the circumstances."

47. On 12 August 2013, the ICSID Secretariat responded to Claimants and asked that Claimants answer several questions prior to registration of the RfA.

48. On 19 August 2013, Claimants responded to the Secretariat.

49. On 9 September 2013, the Secretary-General of the Centre registered the RfA pursuant to Article 36(3) of the ICSID Convention.

### B. *Constitution of Tribunal*

50. On 11 November 2013, Claimants requested that the Arbitral Tribunal be constituted pursuant to the formula provided by Article 37(2)(b) of the ICSID Convention. On 9 December 2013, Professor Julian D. M. Lew, a national of the United Kingdom, accepted his appointment as

arbitrator appointed by Claimants, and Justice Edward Torgbor, a national of the United Kingdom and Ghana, accepted his appointment as arbitrator appointed by Respondent.

51. On 11 December 2013, Professor William W. Park, a national of the United States and Switzerland, accepted his appointment as President of the Tribunal appointed by the Parties. The Tribunal in ICSID Case No. ARB/13/20 was constituted on 11 December 2013 in accordance with Article 37(2)(b) of the ICSID Convention.

### C. *First Session and Initial Order*

52. On 13 February 2014, the Tribunal and the Parties held a first session at the World Bank office in Paris. During that session, the Parties agreed on procedural issues and addressed outstanding issues that are outlined in more detail below.

53. On 27 February 2014, the Tribunal issued Procedural Order No. 1 containing a schedule of submissions on the following preliminary objections raised by Respondent, as set forth in its Section 14:

> "14.1.1. Respondent did not consent to submit this dispute to arbitration by ICSID ["Objection 1"];
>
> 14.1.2. Section 26 of the Nigerian Investment Protection Commission Act ("NIPC") does not provide a basis for finding consent on the part of Respondent as it merely provides that disputes should be conducted in accordance with the ICSID Rules ["Objection 2"];
>
> 14.1.3. Claimants are not registered with the NIPC and therefore cannot rely on Section 26(3) of the NIPC Act to invoke the jurisdiction of ICSID, and Claimants misled the Secretariat of ICSID to register their Request for Arbitration when they falsely claimed that their enterprise was registered with the NIPC. Pleadings on this objection shall be limited to whether Claimants are registered and the bearing of registration on the Tribunal's jurisdiction ["Objection 3"];
>
> 14.1.4. Respondent is not a competent party to this arbitration. Claimants' pleadings on this objection should identify the law and legal authorities on which they intend to rely and the corresponding liability of Respondent ["Objection 4"];

14.1.5. Claimants' claims are barred by statute ["Objection 5"]; and

14.1.6. The request is premature in that Claimants failed to explore local remedies/conditions precedent contained in the NIPC Act ["Objection 6"].

D. ***Submissions, Hearing and Decision on Jurisdiction***

54. On 14 March 2014, Respondent filed its "Memorial on Objection to Jurisdiction" ("Respondent's Memorial on Jurisdiction") with supporting documentation.

55. On 11 April 2014, Claimants filed their "Counter-Memorial Pursuant to Procedural Order No. 1 of 24 February 2014" ("Claimants' Counter-Memorial") with supporting documentation.

56. On 25 April 2014, Respondent filed its "Reply Memorial" ("Respondent's Reply") with supporting documentation.

57. On 9 May 2014, Claimants filed their "Rejoinder to the Respondent's Reply in Respect of the Respondent's Notice of Objection to Jurisdiction" ("Claimants' Rejoinder") with supporting documentation.

58. On 26 June 2014, the Tribunal and the Parties held a Hearing on Preliminary Objections to Jurisdiction at the International Dispute Resolution Centre in London. The following persons were in attendance:

| | |
|---|---|
| **Tribunal:** | |
| Professor William W. Park | President |
| Professor Julian D. M. Lew QC | Arbitrator |
| Justice Edward Torgbor | Arbitrator |
| **ICSID Secretariat:** | |
| Mr. James Claxton | Secretary of the Tribunal |
| **For Claimants:** | |
| Mr. Olasupo Shasore | Ajumogobia & Okeke |
| Prof. Oba Nsugbe | Pump Court Chambers |
| Mrs. Bimpe Nkontchou | Addie & Co Advisory |
| Mr. Bello Salihu | Legal Counsel |
| Mr. Jacques Jones | Legal Counsel |
| Mr. Richard Evans | Claimants' Financial Advisor |

| | |
|---|---|
| Mr. Patrizio Di Guevara Fabbri | Director of Interocean Oil Development Company & Interocean Oil Exploration Company |
| Mr. Riccardo Di Guevara Fabbri | Director of Interocean Oil Development Company & Interocean Oil Exploration Company |

**For Respondent:**

| | |
|---|---|
| Mr. Adebayo Adenipekun | Emmanuel House |
| Mr. Olu Daramola | Emmanuel House |
| Ms. Ann Biodun Babalola | Emmanuel House |
| Mr. Oluwasina Ogungbade | Emmanuel House |
| Mr. Kehinde Ogunwumiju | Emmanuel House |
| Mr. Ola Faro | Emmanuel House |
| Mrs. Esther Adenipekun | Emmanuel House |
| Mr. Taiwo Abidogun | Federal Ministry of Justice, Federal Republic of Nigeria |
| Mr. Rufai Khalid | Nigerian National Petroleum Corporation ("NNPC") |
| Mr. Tijani Alkali Gazali | Federal Ministry of Justice, Federal Republic of Nigeria |

59. On 7 July 2014, Respondent submitted documents related to the requirements for registration under the NIPC Act.

60. On 28 July 2014, Claimants submitted comments on the documents related to the requirements for registration under the NIPC Act produced by Respondent.

61. On 30 July 2014, without instruction from the Tribunal, Claimants submitted purported proof of delivery for letters filed as exhibits with the RfA as Annexes 1-3.

62. On 1 August 2014, Respondent wrote to the Tribunal requesting that it refuse to consider the purported proof of delivery submitted by Claimants.

63. On 2 August 2014, the Tribunal invited Claimants to comment on Respondent's letter of 1 August 2014.

64. On 8 August 2014, Claimants wrote to the Tribunal requesting that it disregard Respondent's letter of 1 August 2014 and authorize Claimants to submit additional documents evidencing proof of delivery of the letters.

65. On 29 October 2014, the Tribunal issued its Decision on Preliminary Objections, deciding that:[70]

> Objection 1 (Consent) is rejected insofar as it calls into question whether Section 26 of the NIPC Act constitutes a standing offer to arbitrate. The Tribunal finds that Section 26 does indeed constitute such a standing offer. However, questions related to the adequacy of the Claimants' acceptance of that offer are joined to the merits;
>
> Objections 2 (Role of the ICSID Rules), 4 (Proper Party) and 5 (Time Bars) are rejected; and
>
> Objections 3 (Registration) and 6 (Premature Filing) are joined to the merits.

### E. *Proceedings on the Merits*

66. On 5 February 2014, the Tribunal issued Procedural Order No. 2 with an updated procedural calendar.

67. On 18 June 2015, Claimants filed their "Points of Claim" ("Claimants' Memorial") with supporting documentation.

68. On 17 November 2015, Respondent filed its "First Memorial" ("Respondent's Counter-Memorial") with supporting documentation.

69. On 17 February 2016, the Tribunal issued Procedural Order No. 3 concerning the production of documents.

70. On 20 April 2016, the Tribunal issued Procedural Order No. 4 concerning the production of documents.

71. On 25 May 2016, Claimants filed their "Reply to Respondent's First Memorial dated 17th November 2015" ("Claimants' Reply") along with supporting documentation.

[70] Decision on Preliminary Objections ¶ 147.

72. On 26 July 2016, Respondent filed its "Rejoinder" ("Respondent's Rejoinder") along with supporting documentation.

73. From 2 August until 4 August 2016, the Tribunal held a Hearing on the Merits (the "Hearing") in London. The following persons were present at the Hearing:

| | |
|---|---|
| **Tribunal:** | |
| Professor William W. Park | President |
| Professor Julian D. M. Lew QC | Arbitrator |
| Hon. Justice Edward Torgbor | Arbitrator |
| **ICSID Secretariat:** | |
| Mr. Benjamin Garel | Secretary of the Tribunal |
| **For Claimants:** | |
| **Counsel:** | |
| Mr. Olasupo Shasore, SAN | Counsel for Claimants |
| Professor Oba Nsugbe QC, SAN | Counsel for Claimants |
| Mrs. Bimpe Nkontchou | Counsel for Claimants |
| Mr. Bello Salihu | Counsel for Claimants |
| Ms. Fadesike Salu | Counsel for Claimants |
| **Parties:** | |
| Mr. Patrizio Di Guevara Fabbri | Director of Interocean Oil Development Company & Interocean Oil Exploration Company |
| Mr. Riccardo Di Guevara Fabbri | Director of Interocean Oil Development Company & Interocean Oil Exploration Company |
| Mr. Eric Vazey | Claimants' In-House Counsel |
| Mr. Richard Evans | Claimants' Financial Advisor |
| **For Respondent:** | |
| **Counsel:** | Counsel for Respondent |
| Mr. Adebayo Adenipekun, SAN, FCIArb. | Counsel for Respondent |
| Mr. Olu Daramola, SAN, FCIArb. | Counsel for Respondent |
| Mr. Robert Volterra | Counsel for Respondent |
| Mr. Christophe Bondy | Counsel for Respondent |
| Ms. Ann Babalola | Counsel for Respondent |
| Mr. Oluwasina Ogungbade | Counsel for Respondent |
| Ms. Rose Rameau, MCIArb | Counsel for Respondent |
| Mr. Kehinde Ogunwumiju | Counsel for Respondent |
| Mr. Ola Faro | Counsel for Respondent |
| Mr. Álvaro Nistal | Counsel for Respondent |
| Mr. Chukwudi Maduka | Counsel for Respondent |

| | |
|---|---|
| Mrs. Yemisi Adenipekun, MCIArb. | Counsel for Respondent |
| Ms. Maria Fogdestam-Agius | Counsel for Respondent |
| Ms. Isabella Seif | Counsel for Respondent |
| Ms. Amanda Murphy | Counsel for Respondent |
| Ms. Andrea Mauri | Counsel for Respondent |
| Mr. Matthew Nelson | Counsel for Respondent |
| **Parties:** | |
| Mr. Taiwo Abidogun | Permanent Secretary, Federal Ministry of Justice, Nigeria |
| Mr. Dayo Apata | Director, Civil Litigation, Federal Ministry of Justice, Nigeria |
| Mrs. Adelore Olufolakemi Sarian | Director, Legal Services, Ministry of Petroleum Resources, Nigeria |
| Mrs. Maimuna Shiru | Assistant Director, Civil Litigation, Federal Ministry of Justice, Nigeria |
| **Court Reporter:** | |
| Mr. Trevor McGowan | The Court Reporter |

74. During the Hearing, the following persons were examined:

| | |
|---|---|
| **Witnesses:** | |
| Mr. Jacques Jones | Claimants' Witness |
| Mr. Patrizio Fabbri | Claimants' Witness |
| Mr. John Brunner | Claimants' Witness |
| Mrs. Annabella Timolini | Claimants' Witness |
| **Experts:** | |
| Professor Yinka Omorogbe | Claimants' Expert |
| Professor Fidelis Oditah, QC, SAN | Claimants' Expert |
| Mr. Geoffrey Joel Barker | Claimants' Expert |
| **Witnesses** | |
| Mr. Ahmad Rufai Khalid | Respondent's Witness |
| Mr. Bala Mohammed Yusuf | Respondent's Witness |
| **Experts** | |
| Hon. Justice Emmanuel Olayinka Ayoola, JSC (Rtd.) | Respondent's Expert |
| Prof. Lawrence Asekome Atsegbua, SAN | Respondent's Expert |
| Engr. Mustafa Bello, FNSE | Respondent's Expert |
| Daniel Matthews Harris (Dan Harris) | Respondent's Expert |

75. On 15 October 2016, the Tribunal issued Procedural Order No. 5 on Claimants' Requests Regarding (i) the Authority of Volterra Fietta Lawyers to Represent the Respondent and (ii) the Source and Terms of the Funding of the Respondent's Defence.

76. On 1 February 2017, the Tribunal issued Procedural Order No. 6 concerning provisional measures.

77. On 11 June 2017, ICSID and the Parties received two emails purporting to be from Respondent's Counsel, Mr. Oluwasina Ogungbade, and a letter from him, stating that the emails were not sent by him and asking that their contents and enclosed documents be disregarded.

78. From 19 to 21 July 2017, the Tribunal held a further Hearing on the Merits (the "Continued Hearing") in London. The following persons were present at the Continued Hearing:

| | |
|---|---|
| **Tribunal:** | |
| Professor William W. Park | President |
| Professor Julian D. M. Lew QC | Arbitrator |
| Hon. Justice Edward Torgbor | Arbitrator |
| **ICSID Secretariat:** | |
| Mr. Benjamin Garel | Secretary of the Tribunal |
| **For Claimants:** | |
| **Counsel:** | |
| Mr. Olasupo Shasore, SAN | Counsel for Claimants |
| Professor Oba Nsugbe QC, SAN | Counsel for Claimants |
| Mr. Aloysius Okenwa | Counsel for Claimants |
| Ms. Rebecca Okoria | Counsel for Claimants |
| Mrs. Bimpe Nkontchou | Counsel for Claimants |
| Mr. Bello Salihu | Counsel for Claimants |
| Ms. Fadesike Salu | Counsel for Claimants |
| Mr. Afolarin Shasore | Counsel for Claimants |
| Mr. Folarin Awosika | Counsel for Claimants |
| **Parties:** | |
| Mr. Patrizio Di Guevara Fabbri | Director of Interocean Oil Development Company & Interocean Oil Exploration Company |

| | |
|---|---|
| Mr. Riccardo Di Guevara Fabbri | Director of Interocean Oil Development Company & Interocean Oil Exploration Company |
| Mr. Eric Vazey | Claimants' In-House Counsel |
| Mr. Richard Evans | Claimants' Financial Advisor |
| Mr. Gavin Ward | RISC |

**For Respondent:**

| | |
|---|---|
| **Counsel:** | Counsel to Respondent |
| Mr. Adebayo Adenipekun, SAN, FCIArb. | Counsel to Respondent |
| Mr. Olu Daramola, SAN, FCIArb. | Counsel to Respondent |
| Mr. Robert Volterra | Counsel to Respondent |
| Mr. Christophe Bondy | Counsel to Respondent |
| Ms. Ann Babalola | Counsel to Respondent |
| Mr. Oluwasina Ogungbade | Counsel to Respondent |
| Ms. Rose Rameau, MCIArb. | Counsel to Respondent |
| Mr. Kehinde Ogunwumiju | Counsel to Respondent |
| Mr. Ola Faro | Counsel to Respondent |
| Mr. Chukwudi Maduka | Counsel to Respondent |
| Mrs. Yemisi Adenipekun, MCIArb. | Counsel to Respondent |
| Dr. Maria Fogdestam-Agius | Counsel to Respondent |
| Mr. Alessandro Rollo | Counsel to Respondent |
| Mr. Iurii Rybak | Counsel to Respondent |
| **Parties:** | |
| Mr. Taiwo Abidogun | Permanent Secretary, Federal Ministry of Justice, Nigeria |
| Mr. Dayo Apata | Director, Civil Litigation, Federal Ministry of Justice, Nigeria |
| Mrs. Adelore Olufolakemi Sarian | Director, Legal Services, Ministry of Petroleum Resources, Nigeria |
| Mrs. Maimuna Shiru | Assistant Director, Civil Litigation, Federal Ministry of Justice, Nigeria |
| Mr. Ahmad Rufai Khalid | Deputy Manager, Litigation and Property Law Department, NNPC |
| **Court Reporter:** | |
| Ms. Dawn Larson | Worldwide Reporting, LLP |

79. During the Continued Hearing, the following persons were examined:

**On behalf of Claimants:**

| | |
|---|---|
| **Experts:** | |
| Professor Yinka Omorogbe | Claimants' Expert |
| Professor Fidelis Oditah, QC, SAN | Claimants' Expert |
| Mr. Geoffrey Joel Barker | Claimants' Expert |

**On behalf of Respondent:**

**Experts:**

| | |
|---|---|
| Hon. Justice Emmanuel Olayinka Ayoola, JSC (Rtd.) | Respondent's Expert |
| Prof. Lawrence Asekome Atsegbua, SAN | Respondent's Expert |
| Engr. Mustafa Bello, FNSE | Respondent's Expert |
| Mr. Daniel Matthews Harris (Dan Harris) | Respondent's Expert |

80. On 5 August 2017, Claimants applied to the Tribunal to have the emails received on 11 June 2017 admitted into the record.

81. On 16 August 2017, Respondent filed a proposal for the disqualification of all three members of the Tribunal. The proceeding was thereby suspended in accordance with ICSID Arbitration Rule 9(6).

82. On 4 September 2017, Claimants filed observations on Respondent's proposal for disqualification of the Tribunal members.

83. On 11 September 2017, pursuant to ICSID Arbitration Rule 9(3), the members of the Tribunal furnished their responses to Respondent's disqualification proposal.

84. On 18 September 2017, the Parties filed their observations on the Tribunal members' explanations.

85. On 3 October 2017, the Chairman of the Administrative Council rejected Respondent's proposal for the disqualification of all three members of the Tribunal. The proceeding was resumed pursuant to ICSID Arbitration Rule 9(6).

86. On 31 October 2017, Respondent filed its response to Claimants' 5 August 2017 request for the admission of the 11 June 2017 emails.

87. On 20 March 2018, the Tribunal issued Procedural Order No. 7 regarding the admissibility of the 11 June 2017 emails; Justice Torgbor attached his dissent.

88. On 30 March 2018, Respondent filed a request for the Tribunal to decide on the admissibility of new evidence.

89. On 9 April 2018, Claimants filed observations on Respondent's 30 March 2018 request.

90. On 16 April 2018, the Tribunal granted Respondent's 30 March 2018 request and admitted the judgment of the Court of Appeal of Nigeria delivered on 29 December 2017 in Appeal No. CA/L/530/2014 between InterOcean Oil Development Company (Nigeria) & 3 Ors V. Dr. Festus Alani Fadeyi & Anor into the record.

91. On 14 May 2018, the Tribunal issued Procedural Order No. 8 detailing the schedule and formatting for the Parties' post-hearing submissions.

92. On 13 June 2018, Claimants and Respondent filed their Post-Hearing Briefs ("Claimants' Post-Hearing Brief" and "Respondent's Post-Hearing Brief", respectively).

93. On 11 February 2019, the Parties filed their Reply Post-Hearing Briefs.

94. On 8 June 2020, the Parties submitted their statements of costs.

95. On 30 June 2020, the Parties submitted observations on costs allocation.

96. On 11 September 2020, Respondent submitted an Application to Adduce New Evidence Into Record.

97. On 18 September 2020, Claimants submitted their Comments on Respondent's Application.

98. On 29 September 2020, the Tribunal denied Respondent's Application and declared the proceedings closed in accordance with ICSID Arbitration Rule 38.

## IV. Jurisdiction

### A. *Overview*

99. The Tribunal recalls that Claimants invoked the Tribunal's jurisdiction, pursuant to the ICSID Rules, based upon Section 26 of the NIPC Act, set forth as follows:

> Dispute settlement procedures

(1) Where a dispute arises between an investor an 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.

100. With respect to its jurisdictional determination, the Tribunal's Decision on Preliminary Objections of 29 October 2014 rejected three of Respondent's preliminary jurisdictional objections, summarized in Section 14 of Procedural Order No. 1 as follows:

> "14.1.1. Respondent did not consent to submit this dispute to arbitration by ICSID [Objection 1 (Consent)];
>
> 14.1.2. Section 26 of the Nigerian Investment Protection Commission Act ("NIPC") does not provide a basis for finding consent on the part of Respondent as it merely provides that disputes should be conducted in accordance with the ICSID Rules [Objection 2 (Role of the ICSID Rules)];
>
> 14.1.3. Claimants are not registered with the NIPC and therefore cannot rely on Section 26(3) of the NIPC Act to invoke the jurisdiction of ICISD, and Claimants misled the Secretariat of ICSID to register their Request for Arbitration when they falsely claimed that their enterprise was registered with the NIPC. Pleadings on this objection shall be limited to whether Claimants are registered and the bearing of registration on the Tribunal's jurisdiction [Objection 3 (Registration)];
>
> 14.1.4. Respondent is not a competent party to this arbitration. Claimants' pleadings on this objection should identify the law and legal authorities on which they intend to rely and the corresponding liability of Respondent [Objection 4 (Proper Party)];

> 14.1.5. Claimants' claims are barred by statute [Objection 5 (Time Bars)]; and
>
> 14.1.6. The request is premature in that Claimants failed to explore local remedies/conditions precedent contained in the NIPC Act [Objection 6 (Premature Filing)].

101. Objection 1 (Consent) was rejected insofar as it called into question whether Section 26 of the NIPC Act constituted a standing offer to arbitrate. The Tribunal recalls that Section 26(3) of the NIPC Act provides that where disagreement exists between the investor and the Federal Government as to the method of dispute settlement, the ICSID Rules shall apply. The Tribunal found that Section 26 did indeed constitute such a standing offer to arbitrate under the ICSID Rules.

102. Questions related to the adequacy of Claimants' acceptance of that offer were joined to the merits. In this connection, the Tribunal notes that the adequacy of Claimants' acceptance of Respondent's offer to arbitrate under the ICSID Rules (such as to meet the conditions set by the NIPC Act) intertwines with questions of registration and premature filing,[71] each of which formed an independently articulated objection to jurisdiction, as noted below.

103. The Tribunal joined to the merits of the case two other objections: Objection No. 3 related to Registration under the NIPC Act and Objection No. 6 related to Premature Filing of the Claims.

104. Consequently, following the 2014 Jurisdictional Decision,[72] the Tribunal was left with jurisdictional objections related to: (i) the adequacy of Claimants' acceptance of Respondent's standing offer to arbitrate under the NIPC Act (Objection 1), (ii) registration requirements for an enterprise under the NIPC Act (Objection 3), and (iii) premature filing of Claims (Objection 6),[73] with the first objection (adequacy of acceptance) implicating both registration and timeliness of filing.

[71] Decision on Preliminary Objections ¶ 67.

[72] Decision on Preliminary Objections ¶¶ 67, 96, 104, 145, 147.

[73] Decision on Preliminary Objections ¶ 147.

105. The Tribunal has noted Respondent's objections related to the Decision on Preliminary Objections[74] and responds that each Party presented further arguments and provided additional evidence related to the remaining objections in their subsequent pleadings.

106. The jurisdictional landscape became more complex after Respondent's Counter-Memorial (17 November 2015), which raised jurisdictional objections related to: (i) whether some of Claimants' claims fall outside the scope of the NIPC Act and, therefore, are not covered by any consent to arbitration contained in Section 26 of the NIPC Act;[75] and (ii) whether claims in respect of the actions of private individuals, and their alleged violations of Claimants' rights, are attributable to Respondent.[76]

107. Subject to the comments below on "Further Jurisdictional Objections" (*infra*) the Tribunal has grouped Respondent's challenges to the Tribunal's jurisdiction into five (5) bases, some of which overlap: (i) the adequacy of acceptance of Respondent's offer to arbitrate under the NIPC Act, which implicates registration and premature filing; (ii) Pan Ocean's lack of registration under the NIPC Act; (iii) the premature nature of the filing of claims, due to Claimants' alleged failure to seek amicable settlement; (iv) whether the scope of consent to ICSID arbitration under the NIPC Act includes expropriation claims and claims based on customary international law, and (v) attribution to Respondent of actions of private individuals.

## B. ***Jurisdictional Objections***

### (1) Existence of Dispute

108. Respondent has alleged that none of the three preconditions to the applicability of the ICSID Convention and the ICSID Rules apply and, thus, the Tribunal cannot have jurisdiction. The three conditions are: (i) there must be a dispute, (ii) the Parties were unable to settle the dispute by way of mutual discussion, and (iii) there must be disagreement between the investor and Respondent regarding the method of dispute resolution. As to points (ii) and (iii) (and other aspects of the adequacy of Claimants' acceptance of the offer to arbitrate) the Tribunal

[74] Respondent's Counter-Memorial ¶¶ 312 et seq.

[75] Respondent's Counter-Memorial ¶ 173.

[76] Respondent's Counter-Memorial ¶¶ 321 et seq.

addresses the relevant contentions through its separate analysis of Registration and Premature Filing.[77]

109. In this section, the Tribunal explores the existence of a dispute. The Parties agree that Section 26 of the NIPC Act places upon Claimants the burden of establishing, at the outset, that there is a legal dispute between Respondent and the alleged investor, here, Claimants.[78] Respondent has argued that there was no legal dispute between Claimants and Respondent.[79]

110. Claimants have responded that they are in a dispute with Respondent involving the protection of their investment in Nigeria.[80] The Tribunal noted in its Decision on Jurisdiction that it has jurisdiction over the dispute, so long as that is in relation to Claimants' allegations of a violation of international law.[81] Insofar as Claimants complain to have had their rights violated by Respondent and Respondent denies this, there is a dispute between the Parties that can support a claim.[82]

111. The Tribunal has found that it does not have jurisdiction over Claimants' contractual claims, although they might form part of the factual matrix to be considered in relation to Claimants' arguments about violations of international law.[83] The Tribunal affirms its findings in paragraphs 112 and 115 of the Decision on Preliminary Objections, that this dispute involves Claimants' allegation that Respondent conspired to seize ownership and control of Pan Ocean from Claimants.

112. To the extent that Respondent has alleged that Claimants' failure to exhaust domestic remedies precludes this Tribunal's jurisdiction, the Tribunal notes that a jurisdictional requirement of exhaustion need not be implied into Article 26 of the NIPC.

[77] See *infra* p. 36 *et seq*. and 42 *et seq*.

[78] Claimants' Counter-Memorial ¶ 23; Respondent's Memorial on Jurisdiction ¶ 121.

[79] Respondent's Memorial on Jurisdiction ¶ 121.

[80] Claimants' Counter-Memorial ¶ 24.

[81] Decision on Preliminary Objections ¶ 112.

[82] Decision on Preliminary Objections ¶ 115.

[83] Decision on Preliminary Objections ¶ 112.

113. The Tribunal will address matters related to exhaustion of remedies, to the extent relevant, in the sections on "Liability and Damages."

(2) Registration of Pan Ocean as a Jurisdictional Pre-Requisite

a. The Parties' Positions

i. Respondent's Objection

114. Respondent asserts that the Tribunal does not have jurisdiction over this dispute because neither Claimants nor their purported investment vehicle, Pan Ocean, are registered with the NIPC as required by the NIPC Act, and therefore cannot rely on Section 26(3) of the NIPC Act.[84] In Respondent's words, "Pan Ocean's lack of registration under the NIPC Act prevents the Claimants from properly accepting any offer to arbitrate under the Act."[85]

115. Section 26 of the NIPC Act allows investors to submit to arbitration only disputes "in respect of an enterprise" to which the Act applies,[86] and the definition of "enterprise" under Section 31 "establishes that 'where there is foreign participation' only industries, projects, undertakings or businesses that are 'duly registered with the [NIPC]' may qualify as an 'enterprise' under the NIPC Act."[87] Thus, since Pan Ocean is not duly registered with the NIPC, it does not qualify as an "enterprise" under the NIPC Act. Therefore, the "remedies and standards of treatment offered in the NIPC Act do not apply to Pan Ocean and cannot be invoked by Claimants."[88] Further, since Section 31 of the NIPC Act requires local companies with foreign participation to be registered with the NIPC, Pan Ocean's lack of registration would entail that it cannot be considered as a national of another Contracting State, including for the purpose of Article 25(2)(b) of the ICSID Convention.[89]

[84] Respondent's Memorial on Jurisdiction ¶ 1.

[85] Respondent's Counter-Memorial ¶ 179.

[86] Respondent's Counter-Memorial ¶¶ 183-184, citing Nigerian Investment Promotion Commission Act, Cap 117 LFN 1995, Section 26(2), Legal Authority RL-1.

[87] Respondent's Counter-Memorial ¶ 186, citing Nigerian Investment Promotion Commission Act, Cap 117 LFN 1995, Section 31, Legal Authority RL-1.

[88] Respondent's Counter-Memorial ¶ 204.

[89] Respondent's Counter-Memorial ¶ 208.

116. Respondent contends that the registration requirement applies to entities existing before the entry into force of the NIPC Act. Respondent rejects the interpretation of Sections 19 and 20 of the NIPC Act proposed by Claimants. First, Respondent distinguishes between the requirements that companies must meet to carry on business, governed by Sections 19 and 20, and the possibility to resort to arbitration provided for in Section 26 of the NIPC Act, to which the definition of "enterprise" contained in Section 31 of the NIPC Act applies.[90] Second, Respondent argues that, even if Section 20 of the NIPC Act was considered to apply only to companies commencing business after its enactment, such pre-existing companies wishing to benefit from provisions of the NIPC Act must still register with the NIPC.[91] As for the "grandfather clause" in Section 29 of the NIPC Act, Respondent contends that the provision only applies to approvals granted and not to registration. In any case, there is no evidence that Pan Ocean was granted any approval under previous statutes.[92] Moreover, if the registration requirement does not apply to pre-existing companies, "that must necessarily entail that the NIPC Act is not applicable to those entities."[93]

117. Respondent argues that Claimants have failed to provide evidence that the registers were unreliable. In any case, "the reliability of the registry is irrelevant because the Claimants have not proven that they ever requested that Pan Ocean be registered."[94] The procedure to register a company is straightforward and Claimants bear the burden of proving any shortcoming on the part of the NIPC. Here, Claimants have failed to prove that they attempted to file an application or even communicate about the issue with Pan Ocean.[95]

118. Respondent further argues that Claimants have failed to demonstrate how any act attributable to Respondent would have prevented them from fulfilling the registration requirement[96] or that they ever instructed Pan Ocean's management to comply with the requirement.[97] Claimants

[90] Respondent's Rejoinder ¶¶ 165-168.

[91] Respondent's Rejoinder ¶ 169, citing First Expert Report of Mr. Mustafa Bello ¶ 37, and Second Expert Report of Mr. Mustafa Bello ¶ 9.

[92] Respondent's Rejoinder ¶ 172.

[93] Respondent's Rejoinder ¶ 174.

[94] Respondent's Post-Hearing Brief ¶ 13.

[95] Respondent's Counter-Memorial ¶¶ 213-215.

[96] Respondent's Counter-Memorial ¶ 217.

[97] Respondent's Counter-Memorial ¶¶ 161, 220.

bore the responsibility of ensuring that Pan Ocean, the purported vehicle of their investment in Nigeria, was duly registered with the NIPC.[98] According to Respondent, the registration requirement arose in 1995 when the NIPC Act was enacted, and even if Claimants lost control of Pan Ocean in 1998 as they claim, they should have ensured that Pan Ocean was registered in the intervening period between 1995 and 1998.[99]

119. In these proceedings, Respondent contends that Claimants falsely represented that Pan Ocean was registered and have since admitted that Pan Ocean was not registered.[100] Claimants' alternative argument that they genuinely believed that Pan Ocean would have complied with the registration requirements "confirms that the Claimants themselves undertook no measures to ensure that Pan Ocean was registered since the entry into force of the NIPC Act."[101]

120. At the Continued Hearing of 19 July 2017, the Tribunal admitted into the record, without any determination as to its probative value, a letter from the NIPC to the firm Ajumogobia & Okeke dated 26 September 2016, which confirmed that Pan Ocean is not registered, and acknowledged receipt of two letters of 2012 and 2013 inquiring about the status of the company.[102] At most, the letter shows that Claimants made inquiries about whether Pan Ocean was registered. These inquiries, however, do not satisfy the registration requirement.[103] Moreover, any delay in responding to that inquiry is irrelevant, because Claimants could have verified their registration status by sending one of their representatives to the relevant registry.[104]

121. Finally, Respondent submits that the concepts of estoppel and acquiescence cannot be used to broaden the Tribunal's jurisdiction.[105] Claimants failed to demonstrate how the joint venture

[98] Respondent's Reply ¶ 42.

[99] Respondent's Reply ¶ 42; Respondent's Counter-Memorial ¶ 217.

[100] Respondent's Counter-Memorial ¶ 160, citing Claimants' Rejoinder ¶ 14.

[101] Respondent's Counter-Memorial ¶ 165, citing Claimants' Rejoinder ¶ 12.

[102] Continued Hearing Transcript Day 1, 145:3-17; Letter from the NIPC to Ajumogobia & Okeke, 26 September 2016, Exhibit C-156.

[103] Respondent's Post-Hearing Brief ¶ 13.

[104] Respondent's Post-Hearing Brief ¶ 13, citing Mr. Bello's statement, Continued Hearing Transcript Day 1, 410:1-5.

[105] Respondent's Counter-Memorial ¶ 223, citing *Eureko B.V. v. Slovak Republic* (UNCITRAL), PCA Case No. 2008-13, Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010, ¶ 219, Legal Authority RL-34.

operations between NNPC and Pan Ocean would amount to acquiescence, and did not establish how NNPC's actions would have caused Claimants' alleged detrimental reliance.[106] Moreover, Respondent contends that NNPC's alleged acts or omissions do not constitute "acts of State by the Respondent."[107]

122. Respondent has also submitted that Claimants misled the Secretariat of ICSID to register the Request for Arbitration by falsely claiming that the enterprise was registered with the NIPC. It has urged the Tribunal to refuse jurisdiction on that basis.[108]

ii. Claimants' Position

123. Claimants reject Respondent's contention that an enterprise with foreign participation must be registered to benefit from protection under the NIPC Act in all cases. The stated purpose of the NIPC Act is to encourage and assist investment in Nigeria and to create a conducive environment for the same.[109] These aims would be undermined if foreign investors were denied protections under the NIPC Act simply because they failed to register their "enterprise."

124. Claimants observe that the definition of "enterprise" as being "duly registered with the Commission" in Section 31 of the NIPC Act is subject to the qualification "[i]n this Act, unless the context otherwise requires."[110] The relevant "context" here is that Claimants made a long-standing, significant, and successful investment in Nigeria in partnership with Respondent and that this investment benefitted Respondent.[111] Claimants, thus, should not be automatically deprived of the protections of the NIPC Act for the simple reason that the enterprise was not registered. By insisting on registration, Respondent is relying on an artificial technicality, while Pan Ocean complied "in every way with any reasonable categorisation of an investment."[112]

[106] Respondent's Counter-Memorial ¶¶ 224, 226.

[107] Respondent's Counter-Memorial ¶ 225.

[108] Respondent's Reply ¶ 9.

[109] Claimants' Rejoinder ¶¶ 21-22.

[110] Claimants' Rejoinder ¶ 27, citing Nigerian Investment Promotion Commission Act, Cap 117 LFN 1995, Section 31, Legal Authority CL-1.

[111] Claimants' Rejoinder ¶¶ 24, 28.

[112] Claimants' Rejoinder ¶ 30.

125. In any event, Pan Ocean is exempt from the registration requirement because the NIPC Act does not state that enterprises existing before its enactment, including Pan Ocean, must be registered.[113] Other investment instruments entered into by Nigeria contain language providing for retroactive application, and this suggests that Nigeria would have done the same in the NIPC Act if that was its intention.[114] In the alternative, the absence of such language presents an ambiguity that should be resolved in favor of foreign investors, in light of the stated purpose of the NIPC Act.[115]

126. Several provisions of the NIPC Act confirm that enterprises operating in Nigeria prior to 1995, like Pan Ocean, were not required to register with the NIPC to be "enterprises" within the meaning of NIPC Act and entitled to investment protections and guarantees.[116] The wording of Sections 19 and 20 of the NIPC Act confirms that the duty to register does not apply to pre-existing companies, as these sections provide that an enterprise in which "foreign participation is permitted" shall not "commence" business unless it is incorporated or registered under the Companies and Allied Matters Act 1990 ("CAMA") (Section 19), and shall "before commencing business, apply to the Commission for registration (Section 20)."[117] This interpretation "is reinforced by the documents required for registration which by their nature relate to new businesses."[118] Moreover, the "grandfather clause" contained in Section 29(2) of the NIPC Act made registration unnecessary for existing businesses, which could continue to rely on previous approvals obtained under the repealed legislation.[119] Finally, Claimants point out that the NIPC Act is unclear as to the legal effects of registration with the NIPC.[120]

[113] Claimants' Rejoinder ¶¶ 25-27.

[114] Claimants' Rejoinder ¶ 26, citing Claimants' Digest of Clauses in BITs, original Exhibit C-7, renumbered Exhibit C-13.

[115] Claimants' Rejoinder ¶ 29.

[116] Claimants' Reply ¶ 36.

[117] Claimants' Reply ¶¶ 35-36, citing Expert Opinion of Professor Fidelis Oditah ¶ 19.

[118] Claimants' Post-Hearing Brief ¶ 40, citing Expert Opinion of Professor Fidelis Oditah ¶¶ 19-20.

[119] Claimants' Post-Hearing Brief ¶ 40, citing the statements of Professor Fidelis Oditah, Continued Hearing Transcript Day 1, 225-228.

[120] Claimants' Post-Hearing Brief ¶ 40, citing Expert Opinion of Professor Fidelis Oditah ¶¶ 32 et seq.

127. Claimants also challenge the "reliability" or "comprehensiveness" of the registers produced by Respondent.[121] Respondent provided two versions of the list of registered companies that are inconsistent and contain errors and discrepancies.[122] The entries of one of the lists only started in 2006, eleven years after the NIPC Act.[123] Moreover, "missing from the register(s) are five of the six other (Pan Ocean being the seventh) Joint Venture Partners (foreign investors) with NNPC in Nigeria namely Shell, Mobil, Chevron, Elf and Texaco (in their own rights and/or through their subsidiaries)", which invested Nigeria prior to the establishment of the NIPC.[124] Respondent's suggestion that all these entities could not claim the NIPC Act's protections is "illusionary."[125]

128. Claimants did not seek to mislead the ICSID Secretariat by stating that Pan Ocean had been registered with the NIPC. They state that their requests for proof of registration from the NIPC went unanswered and that they "genuinely believed that Pan Ocean would have registered its undertaking with the Commission."[126] Respondent, however, has an obligation under NIPC Act to keep records of the companies to which it applies and to assist enterprises and foreign investors. The failure to answer to Claimants' inquiries as to registration confirms the uncooperative attitude of Respondent and its instrumentalities.[127] Furthermore, Claimants highlight that they have lost control over Pan Ocean and this left gaps in their knowledge.[128]

129. Finally, Claimants argue that even if the Tribunal concluded that registration is a precondition of consent, Respondent is estopped from raising that objection to jurisdiction. Respondent, by operating as a joint venture partner with Pan Ocean, has not insisted that Pan Ocean be registered even though Respondent's own instrumentality "possesses and controls the register."[129] Since Respondent collaborated with those who control Pan Ocean and failed to

[121] Claimants' Post-Hearing Brief ¶ 43, referring to NIPC Business Registry, 30 June 2014, Exhibit R-15 and Second Expert Report of Mr. Mustafa Bello, Annex 5.

[122] Claimants' Post-Hearing Brief ¶ 43.

[123] Claimants' Post-Hearing Brief ¶ 43, referring to NIPC Business Registry, 30 June 2014, Exhibit R-15.

[124] Claimants' Post-Hearing Brief ¶ 43.

[125] Claimants' Post-Hearing Brief ¶ 43, citing Mr. Bello's statement, Continued Hearing Transcript Day 1, 401:19-22, and 402:1-4.

[126] Claimants' Rejoinder ¶ 12.

[127] Claimants' Rejoinder ¶¶ 12, 14.

[128] Claimants' Rejoinder ¶ 14.

[129] Claimants' Rejoinder ¶¶ 32-33.

raise the lack of registration, it should be considered to have waived the registration requirement or, as a matter of fairness, be estopped from relying on it.[130]

b. The Tribunal's Analysis

130. There is no dispute as to whether Pan Ocean exists, although some uncertainty may exist concerning whether Pan Ocean was registered pursuant to the NIPC Act, and what the legal effect registration might be on Claimants' claims.

131. In its Decision on Jurisdiction, the Tribunal found that the following matters were so intertwined with the merits that they must be considered during the merits phase:

> • "The definition of 'enterprise';
>
> • Applicability of the registration requirement to entities existing before enactment of the NIPC Act;
>
> • Reliability of the NIPC business register filed by the Respondent;
>
> • The Claimants [sic] inability to register Pan Ocean, such inability allegedly deriving in part from the Respondent's actions, as well as the fact that the Claimants are outside the management of the company; and
>
> • Estoppel based on the Respondent's alleged lack of complaint about registration during prior cooperation with the Claimants."[131]

132. The issue before the Tribunal is not whether Pan Ocean was authorized to do business in Nigeria or whether registration for that purpose was validly waived at the latest when NNPC and Pan Ocean renewed the Joint Operating Agreement ("JOA") in 2002. Rather, the first jurisdictional issue is whether and how Nigeria limited its consent to arbitrate to those enterprises that were registered and whether Pan Ocean's lack of registration under the NIPC Act robs this Tribunal of jurisdiction. Below, the Tribunal dismisses these objections because, as envisioned within Section 31 of the NIPC Act's definition of "enterprise" to which the NIPC

[130] Claimants' Reply ¶ 38.

[131] Decision on Preliminary Objections ¶ 102.

Act applies, the context requires it. Sections 31 and 20 of the NIPC Act states in relevant part:[132]

> 31. Interpretation
>
> In this Act, unless the context otherwise requires –
>
> […]
>
> "enterprise" means 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; […]
>
> 20. Registration of enterprise with the Commission
>
> (1) An enterprise in which foreign participation is permitted under section 17 of this Act shall, before commencing business, apply to the Commission for registration. […]

133. Respondent argues that Sections 20 and 31 of the NIPC Act, which evidence the obligation to register, limit the consent to arbitration under Section 26 of the NIPC Act to those enterprises with foreign participation that have been registered with the NIPC. Respondent states that Pan Ocean is not registered with the NIPC and is, therefore, not "qualified for protection" under the NIPC Act.[133] Respondent argues that Claimants bore the responsibility of ensuring that Pan Ocean was registered during the 3-year registration period, from 1995 – 1998 (during Dr. Fabbri's lifetime).[134]

134. According to Claimants, even if there had been no registration, Dr. Fabbri or the owners could have applied to register Pan Ocean during the three-year grandfathering period. Had they done so the business would have been registered.[135]

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[132] Nigerian Investment Promotion Commission Act (NIPC Act), Chapter N117 of Decree No. 16, 16 January 1995, Exhibit R-1(f).

[133] Decision on Preliminary Objections ¶¶ 83-84.

[134] Decision on Preliminary Objections ¶ 85.

[135] Claimants' Rejoinder ¶¶ 14, 30.

135. In the context of the present dispute, a lack of registration would not necessarily preclude the Tribunal's exercise of jurisdiction. The current claims relate to Respondent's alleged failure to protect Claimants' investment in Nigeria in the circumstances of attempts by Dr. Fadeyi, Managing Director of Pan Ocean, to wrest control of that company from its rightful owners.[136]

136. In this context, 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.[137] An alleged wrongdoer's behavior would not normally nullify arbitral jurisdiction.

137. The Tribunal, therefore, dismisses this objection to jurisdiction related to a lack of registration, and all claims and sub-claims related thereto, listed above in this section, are also dismissed.[138]

138. The Tribunal has considered Respondent's argument that Claimants' case should be dismissed, as a punitive measure, for Claimants' alleged intentional misleading of the ICSID Secretariat into registering the RfA.[139]

139. Respondent has provided no basis in law for such sanction. Further, there is no evidence of any intent on the part of Claimants to mislead the ICSID Secretariat concerning Claimants'

[136] Decision on Preliminary Objections ¶ 124.

[137] Justice Torgbor does not share this finding for dismissing Respondent's objection to jurisdiction in the context of circumstances relating to Dr. Fadeyi's attempts to wrest control of Pan Ocean from Claimants for the following reasons:

(i) This restatement of the Parties' dispute in paragraph 135 differs from its accurate statement in paragraphs 130 and 132 above.

(ii) The jurisdictional objection is raised not by Dr. Fadeyi the alleged wrongdoer but by Respondent exculpated from wrong doing (paragraphs 296, 297, 310, 315, 323 and 332 below).

(iii) As the factual context in paragraphs 135 and 136 of the award for dismissing the objection relates to Dr. Fadeyi and not Respondent, and Respondent was neither responsible for Fadeyi's wrongdoing nor for registering Pan Ocean or Claimants, the factual context for dismissing this jurisdictional objection with reference to Dr. Fadeyi's wrongdoing is not the statutory context envisaged by section 31 NIPC Act for determining the legal effect of non-registration of Pan Ocean.

(iv) The Claimants' admission of lack of registration under Section 26(3) NIPC Act disables them from properly accepting the offer to arbitrate under the Act (Respondent's Submission para 108 and Counter-memorial para 179).

[138] Justice Torgbor differs from this conclusion for same reasons stated in footnote 135 above.

[139] Respondent's Reply ¶ 9.

registration with NIPC. The Tribunal, therefore, declines to refuse jurisdiction on that basis and makes no finding on whether Claimants have intentionally misled the ICSID Secretariat.

(3) Premature Filing

a. The Parties' Positions

i. Respondent's Objection

140. Respondent argues that the Tribunal lacks jurisdiction because Claimants did not comply with the preconditions to arbitration contained in in Section 26 of the NIPC Act, which prevents them from commencing arbitration in accordance with Section 26(3) of the NIPC Act.

141. First, contrary to what Claimants allege, there is no evidence of a scheduled meeting with the Managing Director of the NNPC in November 2004. Regardless, such a meeting would not be relevant because the purported purpose of the meeting was not to settle a dispute with Respondent.[140] Respondent rejects Claimants' contention that Respondent refused to meet with Claimants' representatives about the dispute in 2004.[141]

142. Respondent urges the Tribunal to reject tracking reports purportedly evidencing delivery because those documents were not timely filed, and Claimants did not seek leave to introduce them into evidence.[142] Respondent also argues that (i) there is no evidence that the Minister of Petroleum Resources received the letters, (ii) Claimants have not evidenced that the recipients identified in the tracking reports were officials of the Ministry of Petroleum Resources, and (iii) there is no record of the tracking reports on the websites of the corresponding courier companies.[143] Moreover, the letters allegedly sent between 9 October 2012 and 3 May 2013 were never received by the Ministry of Petroleum Resources and, regardless, should have been

[140] Respondent's Counter-Memorial ¶¶ 256-257.

[141] Respondent's Reply ¶ 70.

[142] Letter from Respondent to the Tribunal received on 1 August 2014 responding to Claimants' correspondence to the Tribunal received on 30 July 2014.

[143] *Id.*

addressed to the Attorney-General. These letters cannot evidence Claimants' fulfilment of the requirement to seek amicable settlement.[144]

143. Second, Section 26(3) also imposes a separate requirement that the investor is only entitled to resort to ICSID arbitration and the applicability of the ICSID Rules as a default position, in the event of a dispute as to the method of dispute settlement to be adopted.[145] As recognized by Claimants as a condition precedent in their Points of Claim, there was no such disagreement in this case.[146]

144. Third, Claimants made no attempt to amicably settle the dispute with Respondent as required by Section 26(1) of the NIPC Act. The requirement to attempt to reach an amicable settlement constitutes a condition precedent to the institution of arbitration proceedings.[147] Section 26(2) should be interpreted as establishing that disputes may be submitted to arbitration only when the obligation set out in Section 26(1) has been fulfilled.[148] The purpose of this precondition would be to give the parties the opportunity to address the dispute, engage in good faith negotiations, and implement the internal processes to do so.[149] Respondent urges the Tribunal to reject Claimants' contention that the requirement should not be interpreted as mandatory because, unlike other preconditions, it does not textually impose a "cooling-off" or waiting period.[150]

ii. Claimants' Position

145. Claimants argue that they have fully complied with the requirements under Section 26 and were within their rights to commence this arbitration.

146. Respondent had knowledge of the dispute, and Claimants notified Respondent of the dispute orally and in writing on numerous occasions. Claimants refer to four letters from Claimants'

[144] Respondent's Counter-Memorial ¶¶ 260-268, 272; see also Letter from Respondent to the Tribunal received on 1 August 2014 responding to Claimants' correspondence to the Tribunal received on 30 July 2014.

[145] Respondent's Memorial on Jurisdiction ¶ 123; Respondent's Counter-Memorial ¶ 254.

[146] Respondent's Memorial on Jurisdiction ¶ 124.

[147] Respondent's Counter-Memorial ¶ 242.

[148] Respondent's Counter-Memorial ¶¶ 246, 253.

[149] Respondent's Rejoinder ¶¶ 202, 204.

[150] Respondent's Rejoinder ¶ 195.

counsel to the Nigerian Minister of Petroleum Resources that were exhibited with the RfA as evidence.[151] To evidence that these letters were received by Respondent, Claimants rely on the formal tracking reports from the associated courier companies.[152] Claimants submitted the delivery invoices issued by the courier companies[153] as well as evidence refuting Respondent's argument that there is no record of the tracking reports on the websites of the courier companies.[154]

147. Concerning the requirement to seek amicable settlement, Section 26 of the NIPC Act should not be interpreted as a mandatory jurisdictional precondition.[155] Unlike other statutes, this provision does not contain preconditions such as "cooling-off" or waiting periods for commencing arbitration, which are commonly imposed in the event a settlement is not reached. Moreover, even when these preconditions are imposed, they are interpreted by tribunals as "procedural and directory [rather than] mandatory and jurisdictional."[156]

148. Claimants contend that, since they lost control over Pan Ocean, they made genuine attempts to reach an amicable settlement with Respondent.[157] They allege that in 2004 representatives of their interests scheduled a meeting with an advisor on petroleum matters to the then-President of Nigeria to seek a settlement of the dispute. According to Claimants, the Presidential advisor subsequently refused to meet with Claimants' representatives, who had traveled from Geneva to Abuja for the meeting.[158] Furthermore, Claimants' attorneys wrote two letters in October 2012 and one in March 2013 to the Minister for Petroleum Resources, exposing the issues encountered in relation to their investment and demanding resolution of their claims, which remained unanswered.[159] Claimants state that they had requested *inter alia* the statement of affairs of the NNPC / Pan Ocean joint venture, including the volume of production for the preceding ten years, and had demanded that Respondent (through NNPC) desist from dealing

[151] Claimants' Counter-Memorial on Preliminary Objections ¶ 63; See e.g., Annexures 1-4 to the RfA.
[152] Appendix A to Claimants' Response to Respondents' First Memorial, pp. 14-15. C-60 to C-63.
[153] C-60 to C-63.
[154] WS of Jacques Jones ¶¶ 67-69
[155] Claimants' Reply ¶¶ 40, 45.
[156] Claimants' Reply ¶¶ 41-44.
[157] Claimants' Memorial ¶ 10.7; Claimants' Reply ¶ 47.
[158] Claimants' Memorial ¶¶ 14.1, 14.2.
[159] Claimants' Memorial ¶¶ 14.1, 14.2.

with Dr. Fadeyi and his associates and refuse to give assent to any interest(s) other than that of Claimants in relation to the 40% participating interest in OML 98.[160]

b. The Tribunal's Analysis

149. The Parties dispute whether amicable settlement discussions are a pre-condition to bringing arbitration proceedings under Section 26(1) of the NIPC Act.

150. The factual record indicates that Claimants did seek amicable settlement of this dispute in 2012 and 2013, after Mrs. Timolini yielded her interest to Dr. Fabbri's estate. Claimants cannot be faulted for Respondent having ignored these communications. Thus, to the extent that any requirement may exist, Claimants have fulfilled it.[161]

151. The dispute had been ongoing for years prior to Claimants' filing of this claim in July 2013, and the Parties have had every opportunity to attempt to resolve this dispute.[162]

152. Given the history of this matter, including the procedural history in this arbitration, it is unlikely that further attempts at amicable settlement would have succeeded. Respondent's failure to reply to Claimants' correspondence forms part of the disputed merits in this arbitration. Claimants alleged that Respondent failed to protect their investment and/or conspired to deprive Claimants of their investment.[163] The Tribunal cannot deny jurisdiction in circumstances where one party appears to have been unwilling to entertain settlement or where further attempts may have been futile.[164]

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[160] Claimants' Memorial ¶ 14.2.

[161] Justice Torgbor is persuaded by the uncontroverted factual evidence that the dispute had been ongoing for years prior to the filing of this claim in July 2013 (paragraph 151 below), but with no clear evidence of the opportunities offered by one Party and rejected by the other for amicable settlement, if that "Other Party" is the Respondent, as distinct from Dr. Fadeyi.

[162] Justice Torgbor accepts the evidence that the Claimants have litigated the dispute and activated sub-judice principles that prevented the NNPC and the Minister of Petroleum to act as the Claimants wished. Professor Omorogbe, Claimants' expert witness evidence was that court actions would bar executive intervention and out of court interventions (paragraph 329 below, and Continued Hearing Transcript Day 1, 301:19-22).

[163] See *infra* paragraphs 323-332.

[164] Justice Torgbor is persuaded by the uncontroverted evidence that Claimants themselves prevented their cases from proceeding by discontinuing one, withdrawing an appeal, serially amending their filings and making an incompetent application (paragraph 330 below). There is no evidence of a meeting in November 2004, between Claimants and Respondent or of the Respondent's refusal to negotiate an amicable settlement. Claimants' invocation of the NNPC Act and ICSID Rules is therefore not supported by their non-fulfillment of the requirements of those instruments.

153. Next, the Tribunal considers whether there must be disagreement between the investor and Respondent over the mode of dispute resolution in order for the ICSID Rules to become applicable under Article 26(3) of the NIPC Act.[165] This text is provided below:

> (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.

154. In Claimants' RfA, Claimants inserted the text "or inability to agree" in parentheses following "disagreement", to reflect the *de facto* position at the time of filing the RfA, referring to a lack of consensus.[166] Respondent has argued that these two terms connote different factual situations and that, owing to the absence of a disagreement (based on there having been no opportunity to disagree), the ICSID Rules cannot apply.[167] The Tribunal does not regard this as an attempt to mislead ICSID into registering the RfA.[168] Further, having found that the filing of the RfA was not premature, Claimants cannot be faulted for any alleged failure to "attempt to agree on a dispute resolution mechanism", as argued by Respondent. The Tribunal agrees that this invocation of the ICSID Rules was proper.[169]

(4) Scope of the NIPC Act

a. The Parties' Positions

i. Respondent's Objections

155. Respondent contends that even if the Tribunal were to find that Claimants had accepted the standing offer to arbitrate, their claims for indirect expropriation and violations of customary international law fall outside the scope of the Tribunal's jurisdiction because they are not

[165] Respondent's Memorial on Jurisdiction ¶ 121.

[166] Claimants' Counter-Memorial ¶¶ 64-65.

[167] Respondent's Memorial on Jurisdiction ¶ 129.

[168] *Compare*, Respondent's Memorial on Jurisdiction ¶¶ 42-43.

[169] Justice Torgbor differs from this conclusion because of Claimants' own admission that they were not registered at the date of registering their RfA.

encompassed by Respondent's consent to arbitration contained in Section 26 of the NIPC Act.[170]

156. Tribunals must verify whether the scope of consent is restricted in any way. In the present case, consent is limited to the protections offered by the NIPC Act, which are exhaustively listed in its Sections 24 and 25.[171] Section 25 of the NIPC Act does not provide protection against both direct and indirect expropriation.[172] According to Respondent, "Section 25 provides for protection against direct expropriation only. The provision does not expressly refer to indirect expropriation. Nor does it contain any of the language normally interpreted as implicitly covering indirect expropriation. In particular, it does not refer to 'measures equivalent to expropriation', a term which tribunals commonly understand to denote indirect expropriation."[173] Section 25(1)(b) of the NIPC Act does not refer to indirect expropriation, but rather to "circumstances of compelled transfer of assets",[174] which would not be relevant in the present case because Claimants remain in full possession of their original shareholding in Pan Ocean.[175]

157. The alleged violations of customary international law are excluded from the Tribunal's jurisdiction because they cannot be considered as claims under the NIPC Act. According to Respondent, "[t]here is neither explicit nor implicit language in the NIPC Act that expands the Act's protection or its dispute resolution clause to breaches of customary international law."[176] Respondent rejects any interpretation of consent under the NIPC Act as including disputes related to all breaches of Nigerian law, and states that, in any event, it was not established that customary international law is part of Nigerian law.[177] Moreover, there are no applicable bilateral or multilateral agreements to which Nigeria and the United States are parties that would contain other substantive protections.[178] Respondent also contends that Claimants

[170] Respondent's Counter-Memorial ¶ 274; Respondent's Rejoinder ¶¶ 214-220.
[171] Respondent's Counter-Memorial ¶ 279.
[172] Respondent's Counter-Memorial ¶ 282.
[173] Respondent's Counter-Memorial ¶ 283.
[174] Respondent's Rejoinder ¶ 210.
[175] Respondent's Post-Hearing Brief ¶ 20.
[176] Respondent's Counter-Memorial ¶ 293.
[177] Respondent's Rejoinder ¶¶ 222-223.
[178] Respondent's Rejoinder ¶ 228.

cannot rely on Article 42 of ICSID Convention to broaden the scope of the Tribunal's jurisdiction to include claims based on customary international law, because Article 42 only concerns the rules applicable to the decision on the merits.[179]

158. In addition, Claimants' points of claim referring to the alleged unlawful detention of Mr. Rooks and others would fall outside the Tribunal's jurisdiction both *ratione materiae* and *ratione temporis* because the alleged events took place in 1987, and thus pre-date the enactment of the NIPC Act.[180]

ii. Claimants' Position

159. Claimants urge the Tribunal to decline to hear this belated jurisdictional objection and, in the alternative, request that the Tribunal join its discussion and consideration to the merits phase.[181]

160. Claimants contend that the allegations of indirect expropriation fall within the jurisdiction of the Tribunal. Section 25(1)(b) of the NIPC Act, establishing that no person owning a capital of an enterprise should be compelled "by law" to surrender his interest in the capital to "any other person", provides for protection against indirect expropriation.[182] They also contend that it would be possible to rely on Section 25(1)(a) of the Act.[183] Protections against expropriation would be frustrated if forms of indirect expropriation were excluded from the prohibition on such acts.[184]

161. Claimants assert that through *inter alia* the decisions of Respondent's judiciary, they were indeed compelled to surrender their interest in Pan Ocean to Dr. Fadeyi and his associates.[185]

162. The Tribunal has jurisdiction over claims based on international customary law. First, according to Claimants, the present case should be distinguished from *Tradex v. Albania*, on

[179] Respondent's Counter-Memorial ¶¶ 300, 303.
[180] Respondent's Rejoinder ¶ 238.
[181] Claimants' Reply ¶¶ 24-33.
[182] Claimants' Reply ¶ 69.
[183] Claimants' Reply ¶¶ 54, 55.
[184] Claimants' Reply ¶ 53.
[185] Claimants' Reply ¶ 54.

which Respondent relies, because Section 26 of the NIPC Act is not as narrowly phrased as the dispute resolution clause examined in *Tradex*.[186] Second, the broad formulation of Section 26 of the NIPC Act, which also makes reference to disputes based on bilateral and multilateral agreements, would imply that "breaches of international law are admissible."[187] Moreover, "by their very nature, the allegations against the State of denial of justice as a result of the actions of the State's courts give rise to a liability / State responsibility in customary international law."[188] Finally, customary international law is part of Nigerian law, because Section 32 of the Interpretation Act integrated into the Nigerian legal system the English common law, and the latter includes customary international law.[189]

b. The Tribunal's Analysis

163. The Tribunal rejects Respondent's contention that indirect expropriation and protections afforded under customary international law are excluded from the protection offered under the NIPC Act. As indicated in Professor Oditah's report, there is nothing in the NIPC Act to indicate that indirect or creeping expropriation is excluded from its scope, and such a narrow and limited interpretation is unwarranted. Indeed, as argued, "it cannot have been the intention of the Respondent to accord the investor important safeguards with the one hand but then take them away with the other by permitting the same catastrophic state of affairs to be accomplished indirectly […]."[190]

164. Respondent's contention that, pursuant to Section 26(1) of the NIPC Act, the Tribunal lacks jurisdiction over claims based on customary international law must be rejected. The broadly drafted language in Section 26 of the NIPC Act includes claims under customary international law.

> "26. Dispute settlement procedures

[186] Claimants' Reply ¶¶ 58-61, citing *Tradex Hellas S.A. v. Republic of Albania*, ICSID Case No. ARB/94/2, Award, 29 April 1999, Legal Authority RL-61.
[187] Claimants' Reply ¶¶ 62, 65.
[188] Claimants' Reply ¶ 63.
[189] Claimants' Reply ¶ 66.
[190] Claimants' Post-Hearing Brief ¶ 11.

(1) Where a dispute arises between an investor an 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."

165. The Tribunal further notes that customary international law is part of the English common law and that common law has been incorporated into Nigerian law by Section 32 of the Nigerian Interpretation Act.[191] Thus customary international law has become part of Nigerian law, applicable by Nigerian courts to the same extent as is common law. In this context, Claimants' claims under international law are properly before this Tribunal.

[191] See Second Expert Report of Professor Fidelis Oditah in ¶ 33, opining English law was accepted into Nigerian law by Section 32 of the Nigerian Interpretation Act 1964, to the extent that it is not inconsistent with Nigeria legislation, as confirmed in the Nigerian Supreme Court decision in *Ibidapo v. Lufthansa Airlines*. The Second Expert Report of Justice Emmanuel Ayoola (at ¶¶ 150-156) appears less forceful on this point, accepting that English law becomes part of Nigerian law until changed by Nigerian legislation, but questioning whether that principle extends to customary international law until the Nigerian Supreme Court so decides.

(5) Attribution to Respondent of Harm-Causing Acts

a. The Parties' Positions

i. Respondent's Position

166. Respondent contends that the Tribunal lacks jurisdiction to the extent that the alleged acts of Dr. Fadeyi, even if causing damage to Claimants, were not attributable to Respondent.[192]

167. Section 25 of the NIPC Act does not protect against expropriation "by any person", as suggested by Claimants, but rather "by any Government of the Federation."[193] Thus, in order to apply the provision, the acts of private individuals must be attributable to the State.[194]

168. Claimants failed to prove that Dr. Fadeyi's actions are "attributable to Respondent" within the meaning of international law on state responsibility,[195] nor have they shown that they were victims of "miscarriage of justice or denial of due process" in relation to the court proceedings in which they challenged Dr. Fadeyi's actions.[196] Furthermore, several acts that allegedly caused damages to Claimants only could have been undertaken by Pan Ocean's representatives, and not by Respondent's representatives.[197]

169. Simply put, Dr. Fadeyi's acts are not attributable to Respondent and Claimants have not shown that he acted as an agent of Respondent.[198] None of the principles codified in the International Law Commission's Articles on State Responsibility for Internationally Wrongful Acts ("ILC Articles") would be applicable in this case.[199] First, Dr. Fadeyi was not an "organ" of Respondent nor was he part of the "organization" of Respondent, as required by ILC Article 4.[200] Second, his actions were not "related to the exercise of governmental authority", nor was he empowered by Nigerian law to exercise elements of governmental authority within the

[192] Respondent's Counter-Memorial ¶¶ 321, 328.
[193] Respondent's Counter-Memorial ¶ 322.
[194] Respondent's Counter-Memorial ¶¶ 326-327.
[195] Respondent's Counter-Memorial ¶¶ 330-332.
[196] Respondent's Counter-Memorial ¶¶ 332-335.
[197] Respondent's Counter-Memorial ¶ 329.
[198] Respondent's Rejoinder ¶ 248, citing Claimants' Reply ¶¶ 137, 142.
[199] Respondent's Rejoinder ¶¶ 248-249.
[200] Respondent's Rejoinder ¶¶ 251-252.

meaning of ILC Article 5.[201] Finally, Claimants failed to prove that Dr. Fadeyi was acting as an agent or "on the instructions of, or under the direction or control of" Respondent, as required by ILC Article 8.[202]

170. Pan Ocean's role as "Operator" of the joint venture in charge of the day-to-day conduct of operation does not entail that Dr. Fadeyi represented Respondent in the joint venture.[203] Even assuming that it was the case, the representation would not go beyond the scope of Pan Ocean's role as Operator, and thus would not extend to the private dispute over Pan Ocean's management and control, which involves acts that do not pertain to the joint venture's authority.[204] Moreover, the joint venture exercises a commercial activity, which cannot be considered an exercise of "governmental authority."[205]

171. In principle, state-controlled entities are considered as separate from the state, unless they exercise elements of governmental authority within the meaning of ILC Article 5.[206] The NNPC's operation and its role and powers as described in the Nigerian legislation confirm that the NNPC is a commercial entity that only engages in "private or commercial" activities.[207] The alleged violations of Claimants' rights by the NNPC would, therefore, not be attributable to Respondent.[208]

ii. Claimants' Position

172. Claimants contend that relevant alleged acts were indeed attributable to Respondent.

173. First, the expression "by law" in Section 25(1)(b) of the NIPC Act refers to both legislative acts and decisions by national courts.[209] Courts are organs of the state within the meaning of ILC Article 4, and their acts are attributable to the state even when unlawful or contrary to

[201] Respondent's Rejoinder ¶¶ 253-256.
[202] Respondent's Rejoinder ¶ 257.
[203] Respondent's Rejoinder ¶ 260.
[204] Respondent's Rejoinder ¶¶ 261, 263.
[205] Respondent's Rejoinder ¶ 262.
[206] Respondent's Counter-Memorial ¶¶ 338, 339.
[207] Respondent's Counter-Memorial ¶¶ 340-344.
[208] Respondent's Counter-Memorial ¶ 344.
[209] Claimants' Reply ¶ 70.

instructions (according to ILC Article 7).[210] The decision of the Federal High Court of Abuja in the "2005 case" is therefore attributable to Respondent.[211]

174. Second, Claimants contend that certain actions of Dr. Fadeyi are attributable to Respondent and engage its responsibility.[212] According to Claimants, since Pan Ocean is the "Operator" of OML 98, Dr. Fadeyi, as representative of Pan Ocean, also acted as a representative of the NNPC/POOC joint venture.[213] For Claimants, "Dr. Festu Fadeyi's refusal to respond to the Claimants' demands to restore control of the operator company [and] to provide joint operation financial information to Claimants was an act attributable to the State."[214]

175. Finally, both the NNPC and Ministry of Petroleum Resources failed to protect Claimants' rights, thus triggering State responsibility.[215] The NNPC is not merely a private entity or commercial partner, as argued by Respondent, but rather a representative of Respondent in the petroleum sector.[216] The NNPC is a statutory entity that is owned and controlled by Respondent, and has the Minister of Petroleum as Chairman of the Board.[217] The long title of the NNPC Act states that the NNPC is "empowered to engage in all commercial activities relating to the petroleum industry and to enforce all regulatory measure[s] to the general control of the petroleum sector through its petroleum inspectorate department."[218] Claimants contend that the NNPC acted as an organ of the State, which had the duty to protect Claimants,[219] and for the purpose of attribution, it is irrelevant whether the conduct of an organ of the State is classified as "commercial" or "*acta jure gestionis.*"[220]

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[210] Claimants' Reply ¶¶ 70, 132.
[211] Claimants' Reply ¶ 69.
[212] Claimants' Reply ¶ 137.
[213] Claimants' Reply ¶¶ 137-139.
[214] Claimants' Reply ¶ 142.
[215] Claimants' Reply ¶ 73.
[216] Claimants' Reply ¶ 134(i).
[217] Claimants' Reply ¶ 134(ii).
[218] Claimants' Reply ¶ 134(i).
[219] Claimants' Reply ¶ 134(iii).
[220] Claimants' Reply ¶ 131, citing James Crawford, The International Law Commissions Articles on State Responsibility (2002), p. 94.

b. The Tribunal's Analysis

176. The Tribunal can have no jurisdiction over harms that are not attributable to Respondent. As the Parties have also recognized, however, that analysis is based on the context of each event. In the section on liability *infra*, the Tribunal's presents its analysis of whether the alleged harms should be considered attributable to Respondent.

(6) Further Jurisdictional Objections

a. The Tribunal's Invitation for a List of Issues

177. On 14 May 2018, in Procedural Order No. 8, the Tribunal invited the Parties to consider submitting a joint list of issues, with each side submitting its own list if agreement proved elusive. Following an exchange which included exchanges between the Parties on 13 June 2018, an email to ICSID from Claimants on 19 June 2018, and a letter to ICSID from Respondent on 29 June 2018, no lists were submitted until 18 January 2019, when Claimants submitted a list.

178. The Tribunal renewed its invitation to Respondent to provide a list of its own, or to at least comment on the list of issues submitted by Claimants. On 4 February 2019, Respondent (through its representatives at the firm of Afe Babalola & Co, in a letter signed by Oluwasina Ogungbade, Esq.) declined to comment on Claimants' list of issues, or to provide any list of issues from Respondent itself. That letter of 4 February 2019 stated *inter alia* that "it is not for the Respondent to undertake the work of the Tribunal." The letter continued with citation to Article 48(3) of the ICSID Convention (providing for awards to deal with every question submitted to the Tribunal) and an admonition to the Tribunal on how its failures to consider all issues might result in an "annullable error" under Article 52(1) which relates *inter alia* to corruption, fundamental rules of procedure, and failure for an award to state reasons.

179. For the sake of good order, the Tribunal on 3 June 2019 confirmed through the Tribunal Secretary that it had given Respondent an invitation to confirm its list of issues, and continued that the Tribunal "would welcome a List from the Respondent should it now decide to submit one." No list was forthcoming.

180. The Tribunal has been cautious to ascertain that no jurisdictional objection has been overlooked. In reviewing the Parties' submissions for additional matters that might be characterized as jurisdictional objections, the Tribunal has identified the following two items that arguably contained jurisdictional arguments, addressed below: one related to Mr. Rooks and the other related to the nature of international law. For the avoidance of doubt, these will be addressed here in connection with jurisdiction.

b. The Alleged Detention of Mr. Rooks

181. Claimants have submitted that the alleged unlawful detention of Mr. Rooks is an event that formed part of the alleged "creeping expropriation" of their investment.[221] Claimants have stated that the arrest and detention was a breach of the duty to provide full protection and security under customary law to the foreign investor and its employees.[222]

182. Respondent does not admit that Mr. Rooks was detained in 1987. Respondent has alleged that Claimants' allegations in connection with the detention of Mr. Rooks and others fall outside of the Tribunal's jurisdiction *ratione temporis* (taking place in 1987, 8 years before the NIPC Act).[223] Those actions, even if established, could not constitute a breach of the NIPC Act, which was not in force at the time. Further, the alleged detention appears to be irrelevant to Claimants' claims in this arbitration.[224]

183. Respondent further states that Claimants have not requested that the Tribunal provide a declaration that Respondent failed to provide full protection and security to Claimants' investments. Claimants never provided any rebuttal to Respondent's objection to the Tribunal's jurisdiction over Claimants' claim regarding Mr. Rooks's detention. Claimants' customary law claims are, therefore, beyond the scope of the Tribunal's jurisdiction.[225]

184. The Tribunal found that it has jurisdiction over Claimants' international law claims against Respondent, without temporal restriction. The alleged detention of Mr. Rooks formed part of

[221] Claimants' Post-Hearing Brief ¶¶ 19-22.
[222] Claimants' Reply ¶ 134(v).
[223] Respondent's Counter-Memorial ¶¶ 304, 461.
[224] Respondent's Rejoinder ¶¶ 136-139.
[225] Respondent's Rejoinder ¶¶ 236-237.

Claimants' allegations against Respondent. As indicated *infra*, the Tribunal has found that Respondent bears no liability in respect of Claimants' allegations. The Tribunal, therefore, need not further delineate what jurisdiction, if any, it would have to resolve other claims regarding Mr. Rooks.[226]

c. Nature of International Law

185. In addition to Respondent's objections to the Tribunal's jurisdiction over Claimants' claims based on customary international law, which the Tribunal has addressed *supra*, Respondent has asked whether (i) fair and equitable treatment, (ii) full protection and security, and (iii) denial of justice are standalone protections under customary international law.[227] Respondent has asked whether Claimants' claims under customary international law must be limited to the minimum standard of treatment.[228]

186. The Tribunal has determined that under either interpretation of the scope and extent of that customary law, the result of this award would be the same. The Tribunal does not find a breach of customary international law. The alleged wrongdoings are not attributable to Respondent or do not form part of a concerted effort involving Respondent to deprive Claimants of their investment. This is true regardless of whether one examines the cited standards as protections which standalone under customary international law. Consequently, the Tribunal need not speculate in the form of *dictum* on the matter, given that Claimants' claims fail under either interpretation of scope of international law, as discussed *infra*.

## V. Liability and Damages

### A. *Overview*

187. Claimants allege that their investment in Nigeria has suffered difficulties since at least 1987, when Respondent detained Mr. Rooks, one of their employees, for 5 months for reasons disputed by the Parties. In 1998, the ultimate owner of Claimants' investment, Dr. Fabbri, died

[226] Respondent's Counter-Memorial footnote 448.

[227] Respondent's Counter-Memorial ¶ 432; Respondent's Rejoinder ¶¶ 334, 347.

[228] Respondent's Rejoinder ¶ 247; Respondent's Post-Hearing Brief ¶ 67.

intestate and, according to Claimants, Dr. Fadeyi, the manager of Pan Ocean, seized on the opportunity to steal the company. This alleged theft was later validated by Nigerian Courts.

188. Claimants allege that entities and individuals whose acts are attributable to Respondent contributed to the illegal dilution and seizure of Claimants' shareholding and control over Pan Ocean, and thus of the 40% participating interest in OML 98 and OPL 275, through a series of acts and omissions in violation of Claimants' rights.[229] As a consequence of this conduct, Claimants have suffered a total loss of their investment and have been unable to receive profits and dividends, which has resulted in in a total loss of their investment.[230]

189. Claimants contend that these acts and omissions are attributable to Respondent, which failed to protect Claimants from adverse control of its 40% interest in OML 98 and OPL 275. They argue that this failure constitutes violations of the provisions of the NIPC Act providing for protections for foreign investors. Further or in the alternative, Claimants contend that Respondent violated its duties and obligations under customary international law.[231]

190. Respondent argues that Claimants failed to demonstrate any violation of Respondent's obligations under the NIPC Act or under customary international law, as matters of fact and law.[232]

191. Below, the Tribunal accepts that Claimants have been deprived of their investment in Nigeria and of Pan Ocean. This loss alone, however, does not implicate international responsibility. Rather, in order for this Tribunal to find that an expropriation has occurred, the actions alleged must be attributable to Respondent. As indicated in the Decision on Preliminary Objections (29 October 2014), if the alleged conspiracy involving Respondent is not established, Claimants will be found to have filed unfounded claims.[233] The determinative factual element for whether Claimants' loss is attributable to Respondent is the existence or extent of

[229] Claimants' Memorial ¶ 9.3.
[230] Claimants' Memorial ¶¶ 9.5, 9.7, 10.6.
[231] Claimants' Memorial ¶¶ 1.8-1.10.
[232] Respondent's Counter-Memorial ¶ 345.
[233] Decision on Preliminary Objections ¶ 114.

cooperation and coordination between Respondent, its representatives and agencies, and Dr. Fadeyi in respect of his actions in relation to Pan Ocean.

192. The Tribunal is not persuaded that Claimants' loss is due to breaches of Nigerian law (including customary international law) for which Respondent is responsible. Claimants have presented insufficient evidence to show that Respondent coordinated with Dr. Fadeyi to deprive Claimants of their investment. While the Tribunal can accept that Dr. Fadeyi, a long-time employee of Pan Ocean, was the beneficiary and perhaps even the architect of an alleged plan to deprive Claimants of their investment, it is Claimants' own case that it was Dr. Fadeyi who orchestrated the removal of directors and appointed new ones, including himself. He issued new shares to new shareholders, including himself, and so has reduced Claimants from sole to peripheral shareholders. No evidence demonstrates that Respondent cooperated or coordinated with Dr. Fadeyi to achieve this result. Every role that Respondent has played in Claimants' story has been independent of Dr. Fadeyi. Accordingly, the Tribunal does not find that there has been an expropriation.

### B. *Legal Foundations to Expropriation Claims: The NIPC Act*

193. This case is not based on a treaty, but rather on a domestic investment statute, the NIPC Act. Below, the relevant provisions of the NIPC Act are summarized, followed by the Parties arguments related to the interpretation the Tribunal should give to each provision.

#### (1) Statutory Provisions

> "24. Investment guarantees, transfer of capital, profits and dividends
>
> Subject to this section, a foreign investor in an enterprise to which this Act applies shall be guaranteed unconditional transferability of funds through an authorized dealer, in freely convertible currency, of –
>
> (a) Dividends or profits (net of taxes) attributable to the investment
>
> (b) Payments in respect of loan servicing where a foreign loan has been obtained; and

(c) The remittance of proceeds (net of all taxes), and other obligations in the event of a sale or liquidation of the enterprise or any interest attributable to the investment

25. Guarantees against expropriation

(1) Subject to subsections (2) and (3) of this section –

(a) no enterprise shall be nationalized or expropriated by any Government of the Federation; and

(b) no person who owns, whether wholly or in part, the capital of any enterprise shall be compelled by law to surrender his interest in the capital to any other person.

(2) There shall be no acquisition of an enterprise to which this Act applies by the Federal Government, unless the acquisition is in the national interest or for a public purpose and under a law which makes provision for—

(a) payment of fair and adequate compensation; and

(b) a right of access to the courts for the determination of the investor's interest or right and the amount of compensation to which he is entitled.

(3) Any compensation payable under this section shall be paid without undue delay, and authorization for its repatriation is convertible currency shall where applicable, be issued."

(2) The Parties' Positions

a. Claimants' Position

194. Claimants submit that the alleged Respondent's acts and omissions amount to violations of the investors' protections provided for in Sections 24 and 25 of the NIPC Act.

i. Section 25(1)(a) of the NIPC Act

195. Claimants argue that the acts and omissions attributable to Respondent "have led to a state of affairs tantamount to expropriation, in breach of the guarantee enshrined in Section 25(1)(a) of the Act."[234]

196. Pursuant to Section 25(1)(a) of the NIPC Act "no enterprise shall be nationalised or expropriated by any Government of the Federation."[235] Section 25(1)(a) encompasses forms of both direct and indirect expropriation. According to Claimants, this is confirmed by the NIPC Act's failure to expressly distinguish between the two categories, which would have been done if the intention of the Legislator was to restrict its application.[236] Moreover, this broader interpretation is in line with the nature and purpose of the NIPC Act, as Respondent's intention could not have been to protect investors from direct expropriation, while permitting indirect expropriation.[237]

197. Claimants define indirect expropriation as not involving "physical takings", but "takings […] that […] permanently destroy the economic value of the investment or deprive the owner of its ability to manage, use or control its property in a meaningful way."[238]

198. Claimants' losses fall within the notion of "creeping expropriation", a subcategory of expropriation that "results in a deprivation of property or a loss of control but which occurs gradually or in stages… it encapsulates the situation whereby a series of acts attributable to the State over a period of time culminate in the expropriatory taking of such property."[239] Claimants also rely on the definition provided in *Metalclad v. Mexico*, which includes "[…] covert or incidental interference with the use of property which has the effect of depriving the

[234] Claimants' Post-Hearing Brief ¶ 10.

[235] Nigerian Investment Promotion Commission Act, Cap 117 LFN 1995, Section 25(1)(a), Legal Authority CL-1.

[236] Claimants' Post-Hearing Brief ¶ 11.

[237] *Id.*

[238] Claimants' Post-Hearing Brief ¶ 10, citing UNCTAD Series on Issues in International Investment Agreements II, "Expropriation: A sequel" Chapter 1: Categories of Expropriation, Requisite Elements and Conditions of Lawfulness, p. 6, Legal Authority RL-78.

[239] Claimants' Post-Hearing Brief ¶ 12, citing UNCTAD Series on Issues in International Investment Agreements II, "Expropriation: A sequel" Chapter 1: Categories of Expropriation, Requisite Elements and Conditions of Lawfulness, p. 8, Legal Authority RL-78.

owner, in whole or significant part, of the use or reasonably to be expected economic benefit of property even if not necessarily to the obvious benefit of the host State."[240]

199. Claimants conclude that these definitions describe the gradual erosion or deprivation of their legal rights and the losses suffered. [241] The fact that there was not an actual "seizure", and that the investment was not transferred to the State but to a third party, is irrelevant.[242] Contrary to what Respondent argues, Claimants' claims are not simply about a dispute between private parties, because the loss of Claimants' investment would have not occurred without Respondent's acts and omissions, which have thus caused the loss or contributed to it.[243]

ii. Section 25(1)(b) of the NIPC Act

200. Section 25(1)(b) of the NIPC Act provides that "no person who owns, whether wholly or in part, the capital of any enterprise shall be compelled by law to surrender his interest in the capital to any other person."[244] According to Claimants, this provision encompasses "judicial expropriation", and would therefore be triggered by the 2005 and 2006 decisions of the Federal High Court of Abuja.[245]

201. Claimants, relying on *Rumeli v. Kazakhstan*, argue that a court decision may amount to expropriation attributable to the State, and that "it is a characteristic of judicial expropriation that it is usually instigated by a private party for his own benefit, and not that of the State […]."[246] According to Claimants, "it is irrelevant that the State itself in the 2005 case did not actually take possession of Pan Ocean or the Claimants' interests in it or otherwise benefit from the taking. It lent itself to the taking by providing an unlawful and perverse mechanism

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[240] Claimants' Reply ¶ 104, citing *Metalclad Corporation v. The United Mexican States,* ICSID Case No. ARB(AF)97/1, Award, 30 August 2000, ¶ 103, Legal Authority RL-58.

[241] Claimants' Post-Hearing Brief ¶ 13.

[242] *Id.*

[243] *Id.*

[244] Nigerian Investment Promotion Commission Act, Cap 117 LFN 1995, Section 25(1)(b), Legal Authority CL-1.

[245] Claimants' Post-Hearing Brief ¶ 14.

[246] Claimants' Reply ¶¶ 105-106, citing *Rumeli Telekom AS and Telsim Mobil Telekomuikasyon Hizmetieri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 2008 July 29, ¶¶ 702, 704, submitted with Claimants' Reply Post-Hearing Brief, 11 February 2019, with no exhibit number; *Oil Field Texas Inc. v. The Government of the Islamic Republic of Iran*, Iran-US Claims Tribunal, Award in Case No. 43 (258-43-1) of October 8, 1986, Yearbook of Commercial Arbitration, Vol XII (1987), at pp. 287-29.

by which those interests were taken thereby depriving the Claimants of their investment as if by decree. Consequently, this action by the Respondent qualifies as expropriation contrary to section 25 of NIPC Act."[247]

202. Claimants also contend that, once judicial expropriation is proven in circumstances such as the one at issue, it is not necessary to establish that it amounts to a "denial of justice."[248] This would also entail that "exhaustion of local remedies does not constitute a substantive requirement for a finding of expropriation by a court."[249] In any event, Claimants suggest that the requirement of exhaustion of local remedies is not a rigid rule, and has been interpreted as including balancing considerations as to whether the local remedy is reasonably incapable to produce satisfactory reparation.[250] They also allege that there was no other realistic remedy for them under Nigerian law.[251]

203. Claimants further submit that, without prejudice to their primary contention that judicial expropriation does not need to be accompanied by denial of justice, the present case would satisfy the latter test as well.[252] Denial of justice would include "a denial, unwarranted delay or obstruction of access to courts, gross deficiency in the administration of judicial or remedial process, failure to provide those guarantees which are generally considered indispensable in the proper administration of justice, or a manifestly unjust judgment."[253]

204. Claimants argue that the circumstances in which the issuance of shares was validated show that the decision of Respondent's court was "seriously defective procedurally and in breach of the most basic tenets of fairness and natural justice."[254] According to Claimants, "[t]he court could and should have protected the Claimants[']' investment by taking the simple step of

[247] Claimants' Reply ¶ 109.

[248] Claimants' Reply ¶ 111.

[249] Claimants' Reply ¶ 111, citing *Sapiem S.p.A v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/7, Award dated 30 June 200, ¶ 181.

[250] Claimants' Reply ¶¶ 112, 124.

[251] Claimants' Reply ¶¶ 125-126.

[252] Claimants' Reply ¶¶ 113-114.

[253] Claimants' Reply ¶ 120, citing Draft Convention on the Law of the Responsibility of States for Damages Done in their Territory to the Person or Property of Foreigners (1929), Article 9, in Jan Paulsson "Denial of Justice in International Law", Cambridge University Press, p. 96, original Exhibit C-167, renumbered Legal Authority CL-71.

[254] Claimants' Reply ¶¶ 116-118.

ensuring that they were on notice of the hearing and represented, or by insisting on the participation of the CAC at any point in the process. It ought to have picked up the serious defect in the procedure, namely that the Applicant who sought to have the shares allotment validated, was also running the company on his own."[255]

iii. Section 24 of the NIPC Act

205. Claimants argue that the deprivation of their rights also constitutes, *a fortiori*, a violation of Section 24 of the NIPC Act, which provides for the unconditional transferability of funds, including dividends or profits attributable to the investment.[256] According to Claimants, the expropriation of their investment "has led directly to the inability to receive any dividends, profits or other proceeds from their asset."[257]

b. Respondent's Position

206. Respondent argues that, even assuming that the Tribunal had jurisdiction over the expropriation claim, Claimants failed to establish that Respondent expropriated Claimants' investment, either directly or indirectly.[258]

207. To establish a violation of Section 25 of the NIPC Act, Claimants should prove that Respondent: (i) "nationalised or expropriated Pan Ocean", as required by Section 25(1)(a) of the Act; or (ii) "compelled [the Claimants] by law to surrender [their] interest in [Pan Ocean] to any another person", as required by Section 25(1)(b) of the Act.[259]

i. Section 25(1)(a) of the NIPC Act

208. Respondent argues that Pan Ocean was neither nationalized nor expropriated. First, Respondent's alleged conduct clearly do not amount to nationalization, which can be defined as "large-scale takings of private property in all economic sectors, in an industry or on a sector-specific basis" generally motivated by policy considerations, nor did Claimants attempt to

[255] Claimants' Reply ¶ 119.

[256] Claimants' Post-Hearing Brief ¶ 17, citing Nigerian Investment Promotion Commission Act, Cap 117 LFN 1995, Section 24, Legal Authority CL-1.

[257] *Id.*

[258] Respondent's Counter-Memorial ¶¶ 347, 349.

[259] Respondent's Counter-Memorial ¶ 349.

suggest that.[260] Second, Respondent states that expropriations, as "property-specific or enterprise-specific takings", can be divided in two categories: direct and indirect.[261]

209. As mentioned above, Respondent argues that only direct expropriation is covered by the NIPC Act.[262] However, Respondent submits that, in any event, Claimants' claims based on either direct or indirect expropriation, as well as their arguments on "judicial expropriation", are meritless.[263]

210. With respect to direct expropriation, Respondent argues that it is well established in the jurisprudence of international arbitration tribunals that direct expropriation requires "mandatory legal transfer of the title to the property or its outright physical seizure by the State itself or by a State entity."[264] Respondent contends that it is undisputed that it has not legally or physically seized Claimants' investment, as it did not take possession of Pan Ocean.[265] Moreover, it states that Claimants: (i) did not lose legal title of their investment, as they still own the shares in Pan Ocean; (ii) did not hold a direct interest in the Joint Venture or its assets; and (iii) cannot claim that they were deprived of a right to 100% of Pan Ocean's participating interest because "they never assumed more than 25% of the exposure or financial risk in Pan Ocean."[266]

211. Respondent stresses that Claimants themselves and their expert admitted that Respondent's alleged acts and omissions cannot constitute direct expropriation.[267] Although the Reply seemed to suggest the contrary, they did not provide any decision or legal authority supporting their contention.[268]

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[260] Respondent's Counter-Memorial ¶ 352.

[261] Respondent's Counter-Memorial ¶ 353.

[262] *Id.*

[263] Respondent's Rejoinder ¶¶ 243-245.

[264] Respondent's Counter-Memorial ¶¶ 353-354; Rejoinder ¶ 270, citing *LG&E Energy Corp. et al. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, ¶ 187, Legal Authority RL-59; *Ronald S. Lauder v. Czech Republic,* UNCITRAL, Final Award, 3 September 2001, ¶ 200, Legal Authority RL-79.

[265] Respondent's Rejoinder ¶ 271.

[266] Respondent's Rejoinder ¶ 272.

[267] Respondent's Counter-Memorial ¶¶ 355-356; Respondent's Rejoinder ¶¶ 267, 271.

[268] Respondent's Rejoinder ¶¶ 268-269.

212. Regarding indirect expropriation, Respondent argues that Claimants failed to establish how the alleged measures would constitute indirect expropriation and to provide a rigorous analysis on the applicable legal standards.[269]

213. Indirect expropriation can be defined as "a measure or series of measures taken by a State that have an effect equivalent to direct expropriation without formal transfer of title or outright seizure."[270] The guiding factors for determining its existence include the degree of interference with the property right, the purpose and the context of the governmental measure, and its interference with reasonable and investment-backed expectations.[271] According to Respondent, this confirms that an essential feature of indirect expropriation is that it also requires a substantial deprivation attributable to the State.[272]

214. Respondent argues that the general interpretation is that "only acts attributable to the host State acting in its sovereign capacity can amount to indirect expropriation",[273] and that "claimants bear the burden of proving that there is a direct causal link between the State measures complained of and the damages allegedly suffered."[274] According to Respondent, Claimants failed to prove these elements.

215. Respondent stresses that Claimants mostly complain about the conduct of Dr. Fadeyi, a private actor whose actions are not attributable to Respondent.[275] Respondent further contends that Claimants failed to establish a causal link between the alleged acts and omissions of Respondent and Claimants' alleged loss.[276]

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[269] Respondent's Counter-Memorial ¶¶ 357-358; Respondent's Rejoinder ¶ 273.

[270] Respondent's Rejoinder ¶ 274, citing *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, ¶¶ 102-103, Legal Authority RL-58.

[271] Respondent's Rejoinder ¶ 274, citing OECD (2004), "'Indirect Expropriation' and the 'Right to Regulate' in International Investment Law", OECD Working Papers on International Investment, 2004/04, OECD Publishing, p. 10, Legal Authority RL-131.

[272] Respondent's Rejoinder ¶¶ 274, 275.

[273] Respondent's Counter-Memorial ¶¶ 360-363.

[274] Respondent's Counter-Memorial ¶ 364.

[275] See *supra* paragraphs 166-171; Respondent's Counter-Memorial ¶ 365; Respondent's Rejoinder ¶ 276.

[276] Respondent's Counter-Memorial ¶ 365; Respondent's Rejoinder ¶ 277.

216. First, Respondent rejects Claimants' contention that Respondent or the NNPC had a duty to protect them, and argues that, even if such a duty was affirmed, the State's failure to protect from the behavior of a private party would not amount to indirect expropriation.[277]

217. Second, Respondent submits that Claimants did not provide any evidence of the alleged conspiracy between Dr. Fadeyi and Respondent.[278]

218. Third, Respondent denies that its liability for expropriation can be engaged because the NNPC continued to deal with Dr. Fadeyi.[279] According to Respondent, the NNPC "was [only] fulfilling its contractual obligations under the joint venture."[280] Moreover, Respondent's expert Professor Atsegbua argues that: (i) nothing in the JOA imposed a duty or obligation on the NNPC to make inquiries into Pan Ocean, (ii) "the NNPC was entitled under Nigerian law to assume that Dr. Fadeyi was Pan Ocean's legitimate representative", and (iii) it would have been inappropriate for the Nigerian government and the NNPC to intervene into a private dispute that was pending before Nigerian courts or to meet Claimants' demands.[281] Furthermore, Respondent contends that, even assuming that the NNPC breached its obligations by dealing with Dr. Fadeyi, "it is well established in investment treaty jurisprudence that violations of contractual rights by a State or a State agency do not constitute an indirect expropriation unless procured by sovereign conduct."[282] Claimants failed to argue and prove that, in dealing with Pan Ocean, the NNPC was ever exercising sovereign authority, rather than acting as a mere contractual party.[283]

219. Finally, Respondent argues that Claimants failed to point to any action of Respondent that would amount to a "substantial deprivation" of their investment (nor could the notion of "creeping expropriation" assist them).[284] According to Respondent, neither the Government

[277] Respondent's Counter-Memorial ¶ 366, citing *European Media Ventures S.A. v. Czech Republic* (UNCITRAL), Partial Award on Liability, 8 July 2009, ¶ 82, Legal Authority RL-83; Respondent's Rejoinder ¶ 278.

[278] Respondent's Counter-Memorial ¶¶ 367, 368.

[279] Respondent's Counter-Memorial ¶ 369; Respondent's Rejoinder ¶ 279.

[280] Respondent's Counter-Memorial ¶ 370.

[281] Respondent's Counter-Memorial ¶¶ 370, 371, citing Expert Report of Professor Lawrence Atsegbua ¶¶ 16-17 and 72.

[282] Respondent's Counter-Memorial ¶¶ 372-376.

[283] Respondent's Counter-Memorial ¶¶ 372, 377.

[284] Respondent's Counter-Memorial ¶ 378; Respondent's Rejoinder ¶¶ 281-284.

nor the other entities involved had the power or the right to intervene in a private dispute or to set aside the court decisions on the matter. Moreover, Respondent argues that Claimants were simply unable to defend their claims in a private dispute, but did not provide evidence of any measure that would amount to an indirect "taking" of their rights, for the purpose of establishing indirect expropriation.[285]

220. Regarding the allegations of "judicial expropriation", Respondent contends that, since Claimants were unable to substantiate their claims based on the notion of indirect expropriation, they relied on the "unsound notion" of "judicial expropriation."[286]

221. Respondent argues that, under both domestic law and international law, decisions of domestic courts on allocation of rights cannot qualify as "takings" amounting to expropriation.[287] At the international level, a sanction against a domestic judicial decision could only be obtained if it amounts to a "denial of justice", i.e. to a "[m]anifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial propriety."[288] Otherwise, international tribunals would become courts of appeal for domestic decisions that claimants disagree with.[289]

222. According to Respondent, Claimants themselves acknowledged that the notion of "judicial expropriation" is controversial. Respondent suggests that they relied on this theory because they did not exhaust local remedies, which is required to establish a claim of denial of justice, and because the NIPC Act only provides for protection against direct expropriation and free transfer of capital, and does not extend to violations of customary international law, including "denial of justice."[290]

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[285] *Id.*

[286] Respondent's Rejoinder ¶¶ 285-287.

[287] Respondent's Rejoinder ¶ 288, citing *Robert Azinian et al. v. The United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award, 1 November 1999, ¶¶ 96-97, Legal Authority RL-107; Zachary Douglas, "International Responsibility for Domestic Adjudication: Denial of Justice Deconstructed" (2014) 63 *International and Comparative Law Quarterly* 867, p. 870, Legal Authority RL-132.

[288] Respondent's Rejoinder ¶¶ 288-289, citing *inter alia The Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award, 26 June 2003, ¶ 132, Legal Authority RL-108.

[289] Respondent's Rejoinder ¶ 289.

[290] Respondent's Rejoinder ¶¶ 290-292.

223. Respondent argues that the court's decisions in 2005 and 2006, which authorized Pan Ocean's board meeting and the subsequent allotment of shares, were "procedurally just and reasonable in the circumstances" and that, in any event, Claimants failed to pursue the available judicial recourses to challenge them.[291] Moreover, it stresses that those decisions did not extinguish any of their rights.[292]

224. Finally, Respondent argues that Claimants relied on *Saipem* and other decisions that can be characterized as "disguised denial of justice decisions."[293] Moreover, according to Respondent, some of the decisions mentioned by Claimants, such as *Rumeli v. Kazakhstan* and *Sistem v. Kyrgyz Republic*, should be distinguished from the present case because they "involved seriously egregious conduct on the part of the State that manifested itself in a Court decision. In this sense, they are less about expropriation by the judiciary than expropriation by the executive."[294] Respondent contends that there is no evidence of such "egregious conduct" by the executive, as the court's decisions were independent and taken in good faith, and Respondent did not even play a part in bringing the matter before the court.[295]

ii. Section 25(1)(b) of the NIPC Act

225. Respondent contends that it did not operate any transfer of shares within the meaning of Section 25(1)(b) of the NIPC Act, nor did it acquiesce or participate in the alleged dilution of shares or surrender of interest operated by Dr. Fadeyi, a private individual.[296]

226. Moreover, Respondent argues that it cannot be held responsible for Claimants' lack of success in this dispute, which has been litigated for over a decade before Nigerian courts, given that Respondent was never a party to the proceedings (except for the incidental naming of the CAC), and it would have been inappropriate for it to interfere with those proceedings.[297]

[291] Respondent's Rejoinder ¶¶ 294-295.
[292] Respondent's Rejoinder ¶ 296.
[293] Respondent's Rejoinder ¶¶ 288, 289, 304.
[294] Respondent's Rejoinder ¶¶ 301-302.
[295] Respondent's Rejoinder ¶ 303.
[296] Respondent's Counter-Memorial ¶¶ 379-382.
[297] Respondent's Counter-Memorial ¶¶ 382-383.

Finally, according to Respondent, Claimants failed to prove that they were treated unfairly by Nigerian courts.[298]

227. Respondent concludes that Claimants failed to establish any violation of Section 25 of the NIPC Act.[299] Furthermore, if they wanted to establish their expropriation claim, Claimants would have also had to prove that the alleged measures failed to comply with Section 25(2) of the NIPC Act, which provides for rights to adequate compensation and access to courts in case of expropriation for national interest or for a public purpose.[300] However, Claimants did not present arguments on this point.[301]

228. Respondent rejects Claimants' argument that the decisions of the Federal High Court of Abuja in the "2005 Board Meeting Case" would also constitute a denial of justice. According to Respondent, this claim should be dismissed because: (i) Claimants failed to "demonstrate that the decisions they complain of were criticisable either from a procedural or a substantive point of view, let alone that they amount to an outrage, bad faith or wilful neglect of duty", thus failing to meet the threshold for a finding of denial of justice; and (ii) Claimants failed to exhaust local remedies in Nigeria.[302]

229. First, Respondent contends that the standard of proof to establish a denial of justice is high. Respondent refers to different case-law definitions according to which a finding of denial of justice requires evidence of an act of the judiciary "bereft of a basis in law", or amounting to "an outrage, bad faith, wilful neglect of duty, or insufficiency of actions apparent to any unbiased man", or to a "[m]anifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial propriety."[303] Moreover, Respondent states that the possibility that courts of another jurisdiction would have held otherwise is irrelevant to this

[298] Respondent's Counter-Memorial ¶ 383.

[299] Respondent's Counter-Memorial ¶ 384.

[300] Respondent's Counter-Memorial ¶¶ 350, 351.

[301] *Id.*

[302] Respondent's Rejoinder ¶ 311.

[303] Respondent's Rejoinder ¶ 312, citing *inter alia The Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award, 26 June 2003, ¶ 132, Legal Authority RL-108; *B.E. Chattin (United States v. United Mexican States)*, General Claims Commission, Decision, IV R.I.A.A. 312, 23 July 1927, ¶ 10, Legal Authority RL-135; *Robert Azinian et al. v. The United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award, 1 November 1999, ¶ 105, Legal Authority RL-107; and ¶ 314.

kind of claim.[304] Respondent stresses that, as Claimants seem to be aware of, "a finding of denial of justice can only be established once the judicial system as a whole has been provided the opportunity to correct any deficiencies but has failed to do so."[305]

230. Claimants' arguments on denial of justice were not substantiated by evidence. On the contrary, the decisions at issue were procedurally fair and constituted reasonable applications of Nigerian law, which is also confirmed by Respondent's expert Justice Ayoola.[306] Claimants thus failed to meet the high threshold for a finding of denial of justice, as they did not show evidence that Nigerian courts breached any specific law nor that the decisions at issue would amount to "outrage, bad faith or wilful neglect of duty."[307]

231. Second, Claimants did not exhaust local remedies in relation to the decisions they complain of, which is a prerequisite to a finding of denial of justice.[308] According to Respondent, "over the course of the domestic proceedings, they repeatedly abandoned proceedings, failed to take advantage of available remedies or failed to pursue avenues of appeal."[309] In particular, there were multiple avenues available to attempt to reverse the decisions at issue, but Claimants failed to pursue some of these avenues and, in the others, failed to comply with the applicable procedural requirements.[310]

232. Furthermore, Respondent contends that Claimants failed to submit evidence to support their argument that it would have been futile to pursue the remedies available to them.[311] Claimants' expert Professor Oditah suggested that Claimants could not pursue certain remedies because they did not comply with some procedural requirements, though "it should have been open to

[304] Respondent's Rejoinder ¶ 313, citing *Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2013, ¶ 453, original Exhibit C-160, renumbered Legal Authority CL-69: "(not finding a denial of justice, although 'that the first decision of the Economic Circuit Court was extremely short and did barely go beyond the – correct – quotation of procedural norms on which it was based', *see* ¶ 447)."

[305] Respondent's Rejoinder ¶¶ 315, 323.

[306] Respondent's Rejoinder ¶¶ 316-319.

[307] Respondent's Post-Hearing Brief ¶ 61.

[308] Respondent's Rejoinder ¶ 320; Respondent's Post-Hearing Brief ¶ 62.

[309] Respondent's Rejoinder ¶ 320.

[310] Respondent's Post-Hearing Brief ¶ 62.

[311] Respondent's Post-Hearing Brief ¶ 63.

a Court of Appeal to … to waive the procedural defects."[312] However, according to Respondent, Professor Oditah did not point to provisions or judicial precedents that would have allowed Nigerian courts to do so.[313] Moreover, it stresses that these procedural rules are "essential to the adequate functioning of any judicial system", and reflect important due process guarantees.[314] Respondent insists that, even if Nigerian courts were particularly formalistic, this would not amount to a denial of justice.[315] Finally, Respondent argues that, as affirmed in *Limited Liability Company Amto*: "[t]he investor that fails to exercise his rights within a legal system, or exercises its rights unwisely, cannot pass his own responsibility for the outcome to the administration of justice, and from there to the host State in international law."[316]

iii. Section 24 of the NIPC Act

233. Respondent rejects Claimants' interpretation of Section 24 of the NIPC Act. Based on Section 24 of the NIPC Act and on the definition of "authorized dealer" in Section 41 of the Act, it is clear that Section 24 of the Act only provides for protection against eventual capital control measures Respondent may impose, by guaranteeing "unconditional transferability of funds through an authorised dealer."[317]

234. Respondent submits that Claimants' argument that Respondent was under an obligation to guarantee the payment of "profits and dividends" by Pan Ocean is a misconstruction of Section 24 of the NIPC Act, which cannot be used to intervene in payment disputes between two private parties.[318]

[312] Respondent's Post-Hearing Brief ¶ 63, citing Continued Hearing Transcript Day 1, 256:8-13.

[313] Respondent's Post-Hearing Brief ¶ 64.

[314] *Id.*

[315] Respondent's Post-Hearing Brief ¶ 64, relying on *Franck Charles Arif v. Republic of Moldova*, Award, 8 April 2013, ¶ 453, original Exhibit C-160, renumbered Legal Authority CL-69.

[316] Respondent's Post-Hearing Brief ¶ 65, citing *Limited Liability Company Amto v. Ukraine*, Award, 26 March 2008, ¶ 76, Legal Authority RL-142.

[317] Respondent's Counter-Memorial ¶¶ 385-389.

[318] Respondent's Counter-Memorial ¶¶ 389-390.

(3) The Tribunal's Analysis

235. Claimants' case is not that Respondent itself seized their investment. Rather, Claimants contend "that acts or omissions attributable to [Respondent] have led to a state of affairs tantamount to expropriation" and that this was in breach of the guarantee enshrined in Section 25 (1)(a) of the NIPC Act.[319] Respondent denies that there was any conspiracy and that it played any role in the activities of Dr. Fadeyi designed to wrongly deprive Claimants of the benefits of its ownership and to wrest control of Pan Ocean from Claimants. In the absence of complicity by Respondent in the actions of Dr. Fadeyi or anyone else in any plan to deprive the Fabbri family of its investment in Pan Ocean, this Tribunal cannot find Respondent liable for an expropriation in violation of Section 25 of the NIPC Act.

236. Below, the Tribunal explains why the events giving rise to Claimants' claims do not constitute a violation of Section 24 or 25 of the NIPC Act and, accordingly, do not constitute direct or indirect expropriations. The Tribunal considers allegations of violations of customary international law separately, as necessary.

C. ***Events Giving Rise to Claim***

237. In this section, the Tribunal summarizes the respective positions of the Parties as to the events that led to this claim and, where in dispute, whether these events or activities are attributable to Respondent and whether they amount to a violation of Respondent's obligations. The Tribunal's findings as they relate to the arguments submitted and the claims raised, are presented within the Tribunal's analysis.

(1) The Parties' Positions

a. Claimants' Position

238. Claimants allege that several acts and omissions attributable to Respondent have caused or have contributed to cause the "creeping expropriation" of their investment.[320] This conduct is summarized as follows.

[319] Claimants' Post-Hearing Brief ¶ 19.

[320] Claimants' Post-Hearing Brief ¶¶ 19 et seq.

i. Alleged Arrest and Unlawful Detention of Claimants' Representative

239. In 1987, Dr. Fabbri gave special powers of attorney to Mr. Rooks to review Pan Ocean's affairs and remove Dr. Fadeyi.[321] However, when Mr. Rooks went to Nigeria in 1987, he and his two bodyguards were arrested by Nigerian State Security operatives and detained for at least 103 days or as much as five months.[322] Charges were never filed and these individuals were never informed of the reasons of their detention.[323] Mr. Rooks never again returned to Nigeria, though he was a Director of Pan Ocean. Dr. Fabbri and his son also refrained to go back, because Dr. Fadeyi convinced them that they would have been arrested too, while Dr. Fadeyi himself never faced the same issues.[324]

240. This unlawful detention was "oppressive, arbitrary and a serious breach of the most basic of human rights",[325] and constituted a violation of Respondent's duty to provide full protection and security to foreign investors and their employees.[326] This intervention by Respondent supported Dr. Fadeyi's gradual gain of control over Pan Ocean.[327]

ii. NNPC's Alleged Failure to Assist Claimants or Investigate

241. Claimants allege that their representatives made several attempts, most of which without success, to contact the NNPC and receive guidance in relation to the change in Pan Ocean's beneficial ownership.[328] At first, their inquiries were triggered by Dr. Fadeyi's claim that they had to seek the NNPC's approval for the transfer of the beneficial ownership in Pan Ocean to Mrs. Timolini.[329] Claimants finally received a short answer from the NNPC (signed by Chief Sena Anthony), affirming that they did not need NNPC's consent, but advising that they seek the consent of the Government and of the other shareholders.[330] This is how Claimants

[321] Claimants' Post-Hearing Brief ¶¶ 19-20.
[322] *Id.*; Claimants' Reply ¶ 134(v).
[323] Claimants' Post-Hearing Brief ¶ 20.
[324] Claimants' Post-Hearing Brief ¶¶ 21-22.
[325] Claimants' Post-Hearing Brief ¶ 20.
[326] Claimants' Reply ¶ 134(v).
[327] Claimants' Post-Hearing Brief ¶ 22.
[328] Claimants' Reply ¶¶ 79, 83-84; Claimants' Post-Hearing Brief ¶ 23.
[329] Claimants' Post-Hearing Brief ¶ 24.
[330] *Id*., citing Letter from Chief Sena Anthony to Mr. Jacques Jones, 30 March 2000, original Exhibit C-36, renumbered Exhibit C-42.

discovered the first irregular issuance of shares by Dr. Fadeyi to a third person, Mr. Tomisin.[331] Further, in 2004, Mrs. Timolini and her son travelled to Nigeria to meet the Managing Director of the NNPC, but the meeting never took place.[332]

242. Given the issues Claimants were raising, "it would have been obvious to the NNPC that there was the real possibility that either it was dealing with the wrong people altogether, or at the very least it was not dealing with everyone it ought to be in relation to the company", with potentially serious implications for both Claimants and the NNPC;[333] and yet, "Respondent produced no notes, memoranda, minutes, report, or record of enquiry showing that NNPC has discussed, considered, or at least even enquired into this important issue […]."[334]

243. Claimants' expert Professor Omorogbe asserts that the correct approach by the NNPC would have been to initiate an independent investigation.[335] The NNPC should have at least searched the company at the CAC. In March 2000, this search would have shown the irregular distribution of shares to Mr. Tomisin and removal of Mr. Rooks as Director, and, in 2005, "the fraud at the heart of the company, (including the forgery of [Mr.] Rooks's signature)."[336]

iii. Respondent's Renewal of the Joint Operating Agreement ("JOA")

244. Claimants allege that "notwithstanding the continuing enquiry and protestations on behalf of the Claimants, in June 2002, the Respondent, (via NNPC), concluded a debt repayment agreement with Dr Fadeyi without the consent of .Timolini or the Claimants, and on 28th May 2003 renewed the JOA with Pan Ocean."[337] The agreement, concluded without Claimants' knowledge or consent, "imposed an obligation on the Claimants to pay the sum of US$ 497,694,921 to the Respondent."[338]

[331] *Id*., citing Statement of Jacques Jones dated 29/05/2015 ¶¶ 36-37.
[332] Claimants' Post-Hearing Brief ¶ 25.
[333] Claimants' Post-Hearing Brief ¶ 24.
[334] *Id.*
[335] Claimants' Post-Hearing Brief ¶ 24, citing Expert Report of Professor Yinka Omorogbe ¶¶ 65-66.
[336] Claimants' Post-Hearing Brief ¶ 31.
[337] Claimants' Post-Hearing Brief ¶ 28.
[338] Claimants' Memorial ¶ 1.7.

245. Claimants point to the witness statement of Mr. John Brunner, who declared that one of NNPC's legal officers told him that he had recommended that the NNPC not sign the JOA because Dr. Fadeyi had not furnished a valid Pan Ocean's board resolution authorizing him to execute the agreement.[339] This shows "internal tensions and precariousness of the NNPC's own position even whilst it was executing acts which directly interfered with and undermined the rights of the true owners of Pan Ocean and 40% in OML98."[340]

iv. Respondent's Alleged Failure to Scrutinize Pan Ocean Change of Control

246. Claimants submit that the new issuance and allotment of shares in 2005/06 by Dr. Fadeyi required both ministerial and the NNPC's consent.[341]

247. First, they contend that the requirement of the Minister's consent is imposed by paragraph 14 of the First Schedule of the Petroleum Act, stating that "[w]ithout the prior written consent of the Minister, the holder of an Oil Prospecting License shall not assign his license or lease or any right power or interest therein or thereunder."[342] Respondent's expert's contention that the requirement did not apply to the allotment of shares at issue is incorrect.[343] The provision includes changes of control in the company that holds the license or lease, and this has always been the common interpretation and practice.[344] This is confirmed by the broad wording of paragraph 14, by the policy rationale behind it (i.e. to allow the government to know and approve its joint venture partners), and by paragraph 16 of the First Schedule of the Petroleum Act, which sets out acceptability criteria for the potential assignees and gives the Minister wide discretion in this regard.[345] Moreover, the "Guidelines and Procedure for obtaining Minister's Consent" confirm that the term "assignment" includes "any transaction that may alter the

[339] Claimants' Post-Hearing Brief ¶ 28.

[340] *Id.*

[341] Claimants' Reply ¶ 81; Claimants' Post-Hearing Brief ¶ 31.

[342] Claimants' Post-Hearing Brief ¶ 29, citing First Schedule of the Petroleum Act, ¶ 14, original Exhibit C-11, renumbered Legal Authority CL-37.

[343] Claimants' Post-Hearing Brief ¶ 29.

[344] Claimants' Post-Hearing Brief ¶¶ 29-31.

[345] Claimants' Post-Hearing Brief ¶¶ 29-30.

ownership, equity rights or interest of the assigning company in question."[346] The requirement of the government's consent was also mentioned in the letter from Chief Sena Anthony of the NNPC.[347]

248. As confirmed by a decision of the Federal High Court in the case *Moni Pulo v. Brass Exploration Nigeria Unlimited*, the "statutory requirement makes any alienation of such right or interest without the Minister's consent void."[348] According to Claimants, Respondent "ought to have known that the purported alienation of a portion of the Claimants' 40% participating interest in OML 98 was unlawful and ought not to have been recognised."[349]

249. Second, Claimants contend that the NNPC's consent was also required, given the formulation of section 19.1.1. of the JOA between NNPC and Pan Ocean, which mirrors the requirement of ministerial consent and states that: "no Party may assign or transfer its Participating Interests or any part thereof or any right, power or interest therein or thereunder without the prior written consent and approval of the other Party […]."[350] According to Claimants, if the NNPC had scrutinized Pan Ocean's situation, it would have denied its consent.[351]

v. Federal High Court of Abuja 2005 and 2006 Decisions

250. Claimants contend that wrongful decisions of Respondent's courts allowed Dr. Fadeyi to gain control over Pan Ocean through an irregular issuance of shares and the consequent dilution of the shares of Claimants.[352]

251. On 24 November 2005, the Federal High Court of Abuja granted Dr. Fadeyi's request (presented on 21 November 2005) to hold a Board Meeting of Pan Ocean.[353] Dr. Fadeyi's

[346] Claimants' Post-Hearing Brief ¶ 30, citing Guidelines and Procedure for obtaining Minister's Consent to assignment of oil and gas assets or interest under the Petroleum Act and the Oil Pipelines Act (2014), ¶ 3.1, Legal Authority CL-104.

[347] Claimants' Reply ¶ 82.

[348] Claimants' Memorial ¶¶ 9.5.4, 12.2, referring to *Moni Pulo v. Brass Exploration Nigeria Unlimited* (2012) 6 CLRN 153, original Exhibit C-159, renumbered Legal Authority CL-68.

[349] *Id.*

[350] Claimants' Post-Hearing Brief ¶ 29, citing Joint Operating Agreement between NNPC and Pan Ocean Oil Corporation, 28 May 2003, original Exhibit C-39, renumbered Exhibit C-45.

[351] Claimants' Post-Hearing Brief ¶ 31.

[352] Claimants' Reply ¶¶ 10, 87.

[353] Claimants' Reply ¶¶ 88, 92.

affidavit in support of the application stated that he remained the only Director given the unavailability of Mr. Rooks, but failed to mention that the latter had left Nigeria after having been freed from detention (in the circumstances described *supra*).[354] Claimants submit that the only parties to the application were Dr. Fadeyi and Pan Ocean, also represented by Dr. Fadeyi.[355] The interests of the shareholders were thus not represented, nor did they receive notification of the application (which was, therefore, made *ex parte*).[356] The CAC, which months before had issued a report finding irregularities in Pan Ocean's management, was not joined as a party nor notified of the application.[357]

252. Claimants allege that the Board Meeting was held on 29 November 2005 and Dr. Fadeyi passed resolutions "allotting the remaining 7,500 unissued shared of Pan Ocean to himself and his associates."[358] The shareholders were not present at the meeting, and there is no evidence they were notified.[359] According to Claimants, this allotment of shares was invalid.[360] On 19 January 2006, Dr. Fadeyi passed an ordinary resolution ratifying the share allocation and appointing his associates, Justice Duro Adebiyi and Alhaji Muhammed Dikko Yusuf, as Directors.[361] Dr. Fadeyi claimed that he attempted to serve notice of the meeting to Claimants, while in fact he only sent those notices to the Swiss address of Panoco SA, a Swiss subsidiary of Pan Ocean that was liquidated in 1995. He did not attempt to serve them to the registered offices of Claimants or their counsel's address, both known to him from other litigations.[362]

253. Claimants argue that the decision of 8 February 2006 of the Federal High Court of Abuja, which validated the resolutions passed by Dr. Fadeyi, "endorsed a fraudulent usurpation of shareholders' authority by the complete misapplication of section 123 of CAMA."[363] Claimants reject Respondent's expert's contention that the Court could rely on Section 123 to

[354] Claimants' Reply ¶¶ 88, 90, 91.
[355] Claimants' Reply ¶ 89.
[356] *Id.*
[357] *Id.*
[358] Claimants' Reply ¶ 92.
[359] *Id.*
[360] Claimants' Reply ¶ 93.
[361] Claimants' Reply ¶ 96.
[362] Claimants' Reply ¶¶ 93-95.
[363] Claimants' Post-Hearing Brief ¶ 32.

validate improperly issued shares and that the Court did not have a duty to "dig deep for facts."[364] According to Claimants' expert, Professor Oditah, Section 123 of the CAMA is only meant to remedy procedural defects, such as failure to give notice to a shareholder, but "does not enable a court to override substantive provisions such as division of powers between the board and shareholders as reflected in section 124 of the same Act."[365]

254. Claimants rely on Professor Oditah's conclusion that "[i]t is difficult to see how the Judge could have been 'satisfied that in all the circumstances it is just and equitable' to deprive the Claimants of their ownership of Pan Ocean and turn them into a 25% minority on an application of Dr Fadeyi, an employee of Pan Ocean, and to do so without asking for the CAC to be joined as a Respondent and for the Claimants to be put on notice. The court in effect made sections 223 and 123 of CAMA substantive expropriatory provisions rather than purely procedural provisions."[366] According to Professor Oditah, "the decision in the 2005 Case is neither procedurally fair, nor a reasonable application of Nigerian law", and "falls far short of what can be regarded, under any circumstances, as an acceptable standard of civil justice administration."[367]

vi. Failure to Act Upon CAC Findings or Investigate Alleged Criminal Acts Within Pan Ocean

255. Claimants submit that Respondent is responsible for the acts and omission of the CAC, which is a State organ and statutory agency for regulating and administering companies.[368] According to Claimants, the CAC acted in an inconsistent, arbitrary, and non-transparent manner.[369] The CAC did not follow-up on its report that contained serious findings about Pan Ocean's management, nor did it impose penalties.[370] Moreover, despite its findings, the CAC registered Pan Ocean's new issue of shares to Dr. Fadeyi and his associates.[371]

[364] Claimants' Reply ¶ 98; Claimants' Post-Hearing Brief ¶ 32.
[365] Claimants' Reply ¶¶ 99-100.
[366] Claimants' Reply ¶ 101, citing Expert Report of Professor Fidelis Oditah ¶ 19.
[367] Claimants' Reply ¶ 102, citing Expert Report of Professor Fidelis Oditah ¶ 32.
[368] Claimants' Reply ¶ 134(x); Claimants' Post-Hearing Brief ¶ 35.
[369] Claimants' Reply ¶ 134(x).
[370] Claimants' Post-Hearing Brief ¶ 35.
[371] Claimants' Memorial ¶ 9.4; Claimants' Reply ¶ 129(vii).

256. Despite Claimants' repeated grievances and the CAC's serious findings, no criminal investigation into Dr. Fadeyi's conduct was ever initiated.[372] Claimants reject Respondent's argument that it was prevented from investigating because there were pending court proceedings on the matter.[373]

vii. Respondent's Alleged Inaction or Facilitation of Dr. Fadeyi's Actions

257. First, the fact that the numerous letters sent by Claimants to Respondent's instrumentalities remained unanswered and/or went missing, suggests a "deliberate and systematic cover-up" that benefitted Dr. Fadeyi.[374] In particular, Claimants draw the Tribunal's attention to the letter they received from the NIPC on 26 September 2016[375] regarding Pan Ocean's registration status, and which acknowledges the receipt of two letters, three and four years prior.[376] Claimants also argue that the cross-examination of Mr. Khalid "exposed the fact that NNPC's register of correspondence received was not especially reliable […]", notably because it did not include a letter Chief Sena Anthony admitted she received.[377]

258. Second, Claimants allege that Dr. Fadeyi continued to present himself as representative of Claimants in the operating committee of the Pan Ocean/NNPC Joint Venture and, despite their numerous requests, Respondent did not desist from dealing with Dr. Fadeyi.[378]

259. Finally, Claimants submit that: "[a]s the Respondent is 60% joint venture partners and host-economy operators, it remains within the Respondents' exclusive preserve to give effect to and restore the Claimants' access to and control of such information that is necessary to enjoy the transfer of the proceeds of their investments. Since 1998 and to date, the Claimants have continuously been denied information about or access to joint venture meetings or joint operating committee deliberations and the accounting, financial, and business affairs or production status of the joint venture operations; all of which constitute prerequisites of any

[372] Claimants' Post-Hearing Brief ¶ 36.
[373] Claimants' Post-Hearing Brief ¶ 37.
[374] Claimants' Post-Hearing Brief ¶ 34.
[375] See *supra* 148.
[376] Claimants' Post-Hearing Brief ¶ 34.
[377] *Id.*
[378] Claimants' Memorial ¶ 6.4; Claimants' Reply ¶ 134(vii).

foreign investment decision to be made by the Claimants. No revenue, income, proceeds, or profits whatsoever have been paid to the Claimants for their investments as a result of the Respondent's conduct from September 1998 and on-going to date."[379]

260. As mentioned above, Claimants argue that, as Dr. Fadeyi represented Pan Ocean, which is the "Operator" of OML 98, he also acted as a representative of the NNPC/POOC joint venture.[380] Consequently, some of his conduct would be attributable to Respondent and engage its responsibility.[381] In particular, according to Claimants, "[…] Fadeyi's refusal to respond to the Claimants' demands to restore control of the operator company; to provide joint operation financial information to Claimants was an act attributable to the state."[382]

b. Respondent's Position

261. Respondent rejects the characterization of the facts put forward by Claimants. As a preliminary remark, Respondent states that: "The Claimants filed this case on the basis of an alleged collusion or conspiracy between the Respondent and Dr. Fadeyi to deprive the Claimants of control over their investment. Having failed to obtain any evidence to support their false accusation of collusion, the Claimants have presented an entirely new case in their Reply."[383] Respondent also insists that Claimants' dispute was always with Dr. Fadeyi, a private individual, and that this was confirmed by Claimants' witnesses at the hearing.[384] In particular, Respondent notes that the accusations presented at the hearing focused on Dr. Fadeyi gaining control of the company and subsequently obstructing, retaining information and fraudulently issuing shares; the "2004 Meeting" concerned Dr. Fadeyi's actions, and not Respondent; and "the Respondent never instituted an action against the Claimants."[385]

262. Respondent contends that it "did not have any responsibility under domestic or international law to intervene in Pan Ocean's internal dispute for control", even more so because the same

[379] Claimants' Memorial ¶ 9.6.1.
[380] Claimants' Reply ¶¶ 137-139.
[381] Claimants' Reply ¶ 137.
[382] Claimants' Reply ¶ 142.
[383] Respondent's Rejoinder ¶ 241.
[384] Respondent's Post-Hearing Brief ¶ 25.
[385] *Id*.

dispute was still being litigated before Nigerian courts.[386] The main arguments in relation to the conduct allegedly attributable to Respondent can be summarized as follows.

i. Alleged Arrest and Unlawful Detention of Claimants' Representative

263. Claimants "failed to present any reliable evidence to support their accusations of unlawful detention."[387] According to Respondent, they solely rely on a self-serving affidavit of Mr. Rooks, which has limited probative value because Respondent did not have the opportunity to cross-examine him.[388]

264. Claimants failed to demonstrate any causal link between Mr. Rooks's alleged unlawful detention and Claimants' loss of control over their investment (or their alleged damages).[389] Respondent stresses that, according to the affidavit of Mr. Rooks, he worked for the PANOCO Group from 1985 to 1993 and, during the time of his employment, Dr. Fadeyi would regularly meet with Mr. Fabbri in Switzerland to discuss Pan Ocean's business affairs. The correspondence between Dr. Fadeyi and representatives of the Fabbri family submitted by Claimants would confirm that that family was in contact (and on apparent good terms) with Dr. Fadeyi long after 1987, which means that Dr. Fabbri and/or Claimants' representatives "could have relieved Dr Fadeyi of his functions, either in person or through correspondence, long after Mr Rooks's alleged detention."[390]

ii. NNPC's Alleged Failure to Assist Claimants or Investigate

265. Respondent submits that the communications sent to the NNPC on behalf of Mrs. Timolini were only aimed at obtaining an acknowledgment or confirmation of her asserted beneficial ownership of Pan Ocean.[391] Chief Sena Anthony replied and confirmed that the NNPC's

[386] Respondent's Counter-Memorial ¶ 414.

[387] Respondent's Rejoinder ¶ 353.

[388] *Id.*

[389] Respondent's Rejoinder ¶ 354.

[390] Respondent's Rejoinder ¶¶ 354-355, referring to Affidavit of Herbert Rooks, 26 August 2003, ¶¶ 4, 12 and 13, original Exhibit C-50, renumbered Exhibit C-55; Letters of invitation from Dr. Fadeyi to Mr. Evans and Mr. Brunner, 9 October 1998, original Exhibit C-18, renumbered Exhibit C-24.

[391] Respondent's Counter-Memorial ¶¶ 39-41.

consent was not required in case of change of Pan Ocean's ultimate beneficial ownership.[392] Moreover, according to Respondent, the NNPC was "under no obligation to acknowledge Ms Timolini's ownership", as this recognition would have only served private purposes.[393] As affirmed in his witness statement by Mr. Khalid, Deputy Manager of the NNPC's Legal Division, "the NNPC could not and would not interfere in a private dispute over control of Pan Ocean since it has no power to do so under the JOA."[394]

266. The fact that the NNPC continued to deal with the acknowledged representative of Pan Ocean's is not evidence of a "conspiracy."[395] To the contrary, "these continuing interactions between the NNPC and existing Pan Ocean representatives were consistent with Nigerian law and the NNPC's general practice."[396] According to Respondent, this was also confirmed by Claimants' expert, Professor Omorogbe.[397]

267. Under Nigerian company law, shareholders cannot purport to represent a company unless specifically designated to do so. If issues arise in relation to the appointment of representatives, the shareholders can exercise their powers under the company memorandum and articles of association or, if they suspect improprieties, bring the dispute before domestic courts.[398] Third parties to a company, such as the NNPC in relation to Pan Ocean, can only validly interact with the appointed representatives.[399] Moreover, they are entitled to assume that the memorandum and articles of the company have been complied with, and that the company representatives have been duly appointed and have the authority to perform their duties.[400] As a practical matter, it is common practice for the NNPC to engage with the same people

[392] Respondent's Counter-Memorial ¶ 41, citing Letter from Chief Stena Anthony (Group General Manager, NNPC) to Mr. Jacques Jones, dated 30 March 2000, original Exhibit C-36, renumbered Exhibit C-42.

[393] Respondent's Counter-Memorial ¶ 43.

[394] Respondent's Counter-Memorial ¶ 42, citing Witness Statement of Ahmad Khalid ¶ 24.

[395] Respondent's Counter-Memorial ¶ 44.

[396] Respondent's Counter-Memorial ¶ 45.

[397] Respondent's Counter-Memorial ¶¶ 45-47.

[398] Respondent's Counter-Memorial ¶ 48, citing the Companies and Allied Matters Act, Cap 59 LFN 1990, Section 279(3), as well as Sections 39(4), 41(1) and 299 to 309, Legal Authority RL-20.

[399] Respondent's Counter-Memorial ¶ 48, citing the Companies and Allied Matters Act, Cap 59 LFN 1990, Sections 244(1) and 276(3), Legal Authority RL-20.

[400] Respondent's Counter-Memorial ¶¶ 48, 49, citing the Companies and Allied Matters Act, Cap 59 LFN 1990, Section 69, Legal Authority RL-20, and Expert Report of Professor Lawrence Atsegbua ¶ 73.

representing its joint venture's partners on a regular basis. The NNPC thus continued to deal with Dr. Fadeyi in good faith and in accordance with this practice because, to its knowledge and absent a court decision to the contrary, he was Pan Ocean's legitimate representative.[401]

iii. Respondent's Renewal of the Joint Operating Agreement ("JOA")

268. Respondent rejects Claimants' contention that it was inappropriate for the NNPC to negotiate with Dr. Fadeyi the agreement for the joint venture's renewal.[402] On the contrary, the NNPC concluded the 2002 JOA with Pan Ocean's designated representative.[403]

269. The division of roles contained in the 2002 JOA confirms that the NNPC should not be considered as an agent of Respondent.[404] The JOA provides that Pan Ocean would represent the joint venture in its relations with the government.[405] This would not have been necessary if the NNPC had been acting on behalf of the government.[406]

270. Finally, Respondent rejects Claimants' argument that the clause of the JOA regarding repayment of Pan Ocean's debt would be evidence of either NNPC's "self-dealing" or its collusion with Dr. Fadeyi. As even Claimants have acknowledged in these proceedings,[407] the sum at issue reflected Pan Ocean's outstanding debt arising out of the dispute over the 1984 Crude Oil Sales Contract and represents the initial principal amount and the interest agreed upon in the 1989 Settlement Agreement.[408]

iv. Respondent's Alleged Failure to Scrutinize Pan Ocean Change of Control

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[401] Respondent's Counter-Memorial ¶ 50, citing Witness Statement of Ahmad Khalid ¶ 11; Companies and Allied Matters Act, Cap 59 LFN, Legal Authority RL-20.

[402] Respondent's Counter-Memorial ¶ 51.

[403] *Id.*

[404] Respondent's Counter-Memorial ¶ 52.

[405] *Id.*, citing Joint Operating Agreement between Pan Ocean Oil Corporation (Nigeria) and the NNPC, dated 28 May 2002, Article 9.1, p. 48, original Exhibit C-39, renumbered Exhibit C-45.

[406] *Id.*

[407] Counter-Memorial ¶¶ 55, 56, referring to Letter from Messrs. Patrizio Fabbri and Riccardo Fabbri to Mr. Ibrahim Lamorde (Executive Chairman of the Economic and Social Crime Commission), 26 April 2012, p. 2, original Exhibit C-74, renumbered Exhibit C-79; Claimants' Memorial ¶ 4.3.

[408] Respondent's Counter-Memorial ¶¶ 53, 54. See also Letter from Dr. Vittorio Fabbri to the NNPC Managing Director, 17 June 1998, Exhibit R-28, where Dr. Fabbri acknowledges the debt and agrees to pay an amount on 17 June 1998, before his death.

271. Contrary to Claimants' contentions, neither the Ministry of Petroleum Resources nor the NNPC had the statutory mandate to intervene in the matter of the allotment of Pan Ocean's shares made in November 2005, or more generally in the private dispute around Pan Ocean.[409]

272. With regard to the alleged role of the Ministry, Claimants' arguments should fail because: (i) the Minister had no regulatory basis for intervening in a private dispute that was being litigated before Nigerian courts; (ii) the Ministry's consent was not required; and (iii) in any event, the Ministry had no reason to cease its interactions with Pan Ocean's management.[410]

273. First, relying on the expert reports of Justice Ayoola, the Petroleum Act only attributes to the Ministry general supervisory powers over the operations carried out under oil mining licenses, and does not give the Ministry any power or authority to intervene in a private dispute regarding control of a company.[411] A Minister's intervention would have been inappropriate because the dispute over shareholding in Pan Ocean was litigated before Nigerian courts, and the Ministry ought to respect the constitutional principle of independence of the judiciary.[412]

274. Second, Claimants failed to establish that the Minister's consent was required to give effect to the 29 November 2005 allotment of shares.[413] As of 2005, "it was unsettled in Nigerian law whether an allotment of shares in a company holding rights in an oil mining lease was to be regarded as an 'assignment' of a participating interest in the underlying oil mining lease, requiring the consent of the Minister for Petroleum Resources under paragraph 14 of the First Schedule to the Petroleum Act 1979."[414] Moreover, at that time, there were no judicial precedents confirming that an allotment of shares could be regarded as an "assignment."[415] The case on which Claimants' expert Professor Omorogbe relied (*Moni Pulo v. Brass*) does not solve the issue because (i) the case was only decided in 2012 and is currently under appeal and (ii) it concerned a transfer of shares. It did not address the key issue of what amounts to

[409] Respondent's Rejoinder ¶¶ 88, 89, 95.
[410] Respondent's Rejoinder ¶¶ 96 et seq.
[411] Respondent's Rejoinder ¶ 97, citing First Expert Report of Justice Emmanuel Ayoola ¶ 14.
[412] Respondent's Rejoinder ¶ 98, citing First Expert Report of Justice Emmanuel Ayoola ¶¶ 16-17.
[413] Respondent's Rejoinder ¶ 99.
[414] Respondent's Rejoinder ¶ 100.
[415] Respondent's Rejoinder ¶ 101.

an "assignment."[416] The 2012-2014 Department of Petroleum Resources amendments to the legislative framework, such that they expressly include "allotments", confirms the absence of a clear rule prior to those amendments.[417]

275. There is no evidence that the Minister was aware of the allotment or that Claimants raised the issue following the 2005 Board Meeting Case, which also means that the Minister was in no position to grant or refuse its consent.[418]

276. Finally, "[t]he Minister would have had no basis for unilaterally ceasing to regard the long-time Managing Director as the legitimate representative of Pan Ocean."[419] As acknowledged by Claimants' expert Professor Omorogbe, Dr. Fadeyi is his capacity as Managing Director has been "the face of Pan Ocean for several decades."[420]

277. With regard to the alleged role of the NNPC, Respondent submits that Claimants' experts failed to identify "a credible statutory or contractual basis on which the NNPC could or should have intervened."[421] Respondent argues that the NNPC can only exercise powers that are expressly conferred on it by the NNPC Act and nothing in this Act suggests that the NNPC could interfere in an internal dispute over shareholding of a private company.[422] In particular, contrary to Claimants' suggestion, "Section 5(1)(h) of the NNPC Act in no way allows the NNPC validly to interfere in the internal management of a Joint Venture Partner."[423] Moreover, Respondent submits that such a duty to intervene could not be based on the 2002 JOA either: under the 2002 JOA, the NNPC is a mere contracting party in the joint venture, which would not be required to conduct enquiries into (or interfere with) the other party's internal disputes over

[416] Respondent's Rejoinder ¶ 102, referring to the Second Expert Report of Professor Yinka Omorogbe, 30 March 2016, Annex 1.

[417] Respondent's Rejoinder ¶ 103.

[418] Respondent's Rejoinder ¶ 104.

[419] Respondent's Rejoinder ¶ 106.

[420] *Id.*, quoting Second Expert Report of Professor Yinka Omorogbe p. 16.

[421] Respondent's Rejoinder ¶ 108.

[422] *Id.*

[423] *Id.*

shareholding.[424] Respondent argues that it would have been even less appropriate for the NNPC to intervene since the matter was pending before Nigerian courts.[425]

278. The Tribunal should reject Claimants' argument that the allotment of shares amounted to a transfer of their interest in OML 98 and OPL 275, and would have thus required the NNPC's consent in accordance with Article 19.1.1 of the 2002 JOA.[426] Respondent's expert Professor Atsegbua argues that this provision did not apply in the present case: since Pan Ocean (corporate entity with separate legal personality) held the same participating interest in the joint venture and remained the operator of OML 98, an allotment of shares in the upstream companies, even if it led to a change of control in Pan Ocean, did not amount to a transfer of the participating interest requiring NNPC's consent.[427] Moreover, even if Article 19.1.1 of the 2002 JOA applied to the transfer of shares, "it would have been up to Pan Ocean to seek the consent of the NNPC under the clause."[428] However, Respondent alleges that nothing on the record suggests that either Pan Ocean or Claimants attempted to raise the issue of consent with the NNPC in relation to the 2005 allotment of shares.[429]

279. Finally, absent a court decision to the contrary, the NNPC was entitled to assume that Dr. Fadeyi was the legitimate representative of Pan Ocean.[430] Moreover, "the NNPC would not have been in a position to take account of any alleged notices of a change in the ownership and management of Pan Ocean."[431]

v. Federal High Court of Abuja 2005 and 2006 Decisions

[424] Respondent's Rejoinder ¶¶ 109-110.
[425] Respondent's Rejoinder ¶ 111.
[426] Respondent's Rejoinder ¶¶ 112-113.
[427] Respondent's Rejoinder ¶¶ 114-115, citing Second Expert Report of Professor Lawrence Atsegbua ¶¶ 42-43.
[428] Respondent's Rejoinder ¶ 116.
[429] *Id.*
[430] Respondent's Rejoinder ¶ 118.
[431] Respondent's Rejoinder ¶ 119.

280. Contrary to Claimants' submissions, the decisions rendered by the Federal High Court of Abuja in November 2005 and February 2006 were a reasonable and procedurally fair application of Nigerian law.[432]

281. With regard to the 2005 decision, Respondent submits that, first, Dr. Fadeyi's application was based on Sections 223(1) and 223(2) of the CAMA. These provisions have a pragmatic purpose: they can be used to validate a general meeting or a meeting of the board of the company that would normally be invalid under Section 221(1) of the CAMA because it was not notified to those entitled to receive notification. "As the sole active and Managing Director of Pan Ocean, Dr Fadeyi was eligible to make the application to the court to derogate from the quorum requirement."[433]

282. The broad formulation used in Section 223 of the CAMA suggests that courts should be provided some discretion when they establish whether it was indeed "impracticable" to call or conduct a meeting following the ordinary procedures.[434]

283. It was not unreasonable for the Federal High Court of Abuja to find that the requirements under Section 223 of the CAMA were met, based on, *inter alia*, the affidavit provided by Dr. Fadeyi with the application.[435] Dr. Fadeyi alleged that it had become impracticable to manage the affairs of Pan Ocean, because the company's quorum required two directors. He alleged that he was unable to locate Mr. Rooks and that, after the death of Dr. Fabbri, he needed to be able to appoint new directors to make sure that the company was not paralyzed. He stated that Pan Ocean was a "going concern with several duties, obligations and liabilities", and filed an "Affidavit of Urgency", claiming that it was also impossible to comply with the statutory required filing of documentation.[436]

284. Finally, Claimants' criticism of the Court's decision should be rejected. In particular, (i) the Court had no reason to doubt that Dr. Fadeyi was unable to locate Mr. Rooks who, as of

[432] Respondent's Rejoinder ¶ 46.

[433] Respondent's Rejoinder ¶¶ 47-49.

[434] Respondent's Rejoinder ¶ 55.

[435] Respondent's Rejoinder ¶ 64.

[436] Respondent's Rejoinder ¶¶ 50-57, citing *inter alia* Second Expert Report of Justice Emmanuel Ayoola, 20 July 2016, ¶¶ 103-109.

November 2005, was deceased;[437] (ii) the Court had no reason to require the presence of Claimants at the hearing, because Dr. Fadeyi was not seeking an order against them, nor were they entitled to receive notice of the Board of Directors meetings;[438] (iii) the fact that the court addressed the application as a matter of urgency is not surprising, given the uncontested nature of the application and the evidence before the court;[439] and (iv) the decision merely authorized the holding of a meeting without getting involved in the content.[440]

285. The 2006 decision validated the allotment of shares decided by the Board of Directors of Pan Ocean on 29 November 2005. Dr. Fadeyi requested that the Court validate the allotment of unissued shares on the basis of Section 123 of the CAMA. This provision gives some discretion to courts to decide whether validation would be "just and equitable" in the circumstances.[441] Contrary to Claimants' suggestion that the decision was incompatible with the division of roles enshrined in Section 124 of the CAMA, Section 123 of the CAMA expressly grants the authority to validate decisions that would have been otherwise regarded as invalid.[442]

286. Second, Claimants allege that Dr. Fadeyi served the notices to the wrong addresses on purpose. Even if this were the case, Respondent could not be held responsible for Dr. Fadeyi's actions, and the court was entitled to rely on Dr. Fadeyi's statement that the notices were returned. Moreover, the address of the notice was the same address of Claimants as listed in the annual returns of Pan Ocean, attached to the CAC Report of April 2005.[443]

287. Third, the evidence before the Court suggested that Claimants could not be contacted. Thus, it would have been contrary to the purpose of Section 123 of the CAMA to require their presence at the hearing, since the provision allows courts to validate directors' decisions precisely under

[437] Respondent's Rejoinder ¶¶ 58-59.

[438] Respondent's Rejoinder ¶¶ 60-61.

[439] Respondent's Rejoinder ¶ 62.

[440] Respondent's Rejoinder ¶ 63.

[441] Respondent's Rejoinder ¶¶ 69-70.

[442] Respondent's Rejoinder ¶¶ 82-83.

[443] Respondent's Rejoinder ¶¶ 76, 77, citing Report of the Corporate Affairs Commission on the Investigation into the Affairs of Pan Ocean Oil Corporation (Nigeria) Unlimited, dated April 2005, attachment K, original Exhibit C-45, renumbered Exhibit C-51.

such circumstances.[444] Moreover, Claimants do not explain in what capacity the CAC could have taken part in proceedings concerning the allotment of shares of a private company.[445]

288. Finally, the evidence before the Court suggested that the issuance of shares was necessary, because of Pan Ocean's financial needs. The decision relied on the affidavit of a Mr. Wole Aladedoye, who submitted that Pan Ocean had substantial debt. The allotment of shares was motivated by the need to raise capital to continue its operations. Respondent also notes that the quantum expert reports submitted by both Parties confirm that in 2006, Pan Ocean was undergoing financial difficulties.[446]

289. Respondent concludes that "the court's finding was reasonable, based on the evidence before it." Moreover, it argues, Claimants did not point to any "red flag" that could have led the Court to depart from the ordinary principles for evaluation of evidence. Respondent further submits that, if Claimants were convinced that the evidence before the Court was factually incorrect or misleading, they could have filed an appeal, but "they failed to do so within the time allowed and effectively mismanaged their right to seek redress of the court's decision."[447]

vi. Failure to Act Upon CAC Findings or Investigate Alleged Criminal Acts Within Pan Ocean

290. Respondent rejects Claimants' contention the CAC acted in an "inconsistent and arbitrary manner."[448] First, Respondent agrees that the "CAC Report" of April 2005 was in favor of Claimants: it confirmed that Claimants were the only two shareholders of Pan Ocean, and that Dr. Fadeyi had committed two irregularities in 1998, when he attempted to issue shares to a Mr. Tomisin and to appoint other two directors without the quorum.[449] However, Respondent also stresses that the CAC is a statutory body established by the CAMA, which has the authority to investigate the affairs of companies and to report on the results of its investigations,

[444] Respondent's Rejoinder ¶ 78.
[445] Respondent's Rejoinder ¶ 79.
[446] Respondent's Rejoinder ¶¶ 80-81.
[447] Respondent's Rejoinder ¶¶ 84-88.
[448] Respondent's Rejoinder ¶ 91.
[449] Respondent's Counter-Memorial ¶¶ 79-82.

but is "not empowered to order companies to undertake certain actions following from its report."[450]

291. Second, when the CAC later registered the allotment of shares made on 29 November 2005, it was merely following the order of the Federal High Court of Abuja of 8 February 2006, which validated the allotment.[451] According to Respondent, Claimants' expert Professor Oditah confirmed that the CAC did not have the authority to override the decision of the Court and, in any event, there were no sufficient reasons for it to conclude that the allotment was irregular or that the decision of the Court was unsound.[452]

292. Claimants' vilification of Respondent's law enforcement agencies is unwarranted. According to Respondent, "the fact that the Respondent's Police or the [Economic and Financial Crimes Commission] did not act as the Claimants would have wished does not mean that there was no investigation or that they did not fulfil their duties."[453] Moreover, Claimants themselves had initiated judicial proceedings on the same issues. Contrary to Claimants' argument that the principle of *sub-judice* does not apply to crimes, "it would have been impossible for law enforcement to secure a conviction of Dr Fadeyi when the main act being denounced as a crime had been validated by a court order and was subject to appeal or set-aside proceedings in other civil suits."[454]

vii. Respondent's Alleged Inaction or Facilitation of Dr. Fadeyi's Actions

293. Respondent categorically rejects Claimants' argument that Respondent, through its entities "should have intervened, either *sua sponte* or prompted by the Claimants, to protect them from the actions of private parties that, according to the Claimants, sought to sever them from their interest in and control over Pan Ocean."[455] According to Respondent, the NNPC, the Ministry of Petroleum Resources, and the CAC did not have "a statutory mandate to intervene in a

[450] Respondent's Counter-Memorial ¶¶ 74-76.
[451] Respondent's Rejoinder ¶ 92.
[452] Respondent's Rejoinder ¶¶ 92-93, citing Second Expert Report of Professor Fidelis Oditah ¶ 7.
[453] Respondent's Post-Hearing Brief ¶ 42.
[454] Respondent's Post-Hearing Brief ¶¶ 42-43.
[455] Respondent's Rejoinder ¶ 89.

private shareholding dispute, even if relating to a partner in a Joint Venture. Nor could they second-guess the outcome of proceedings before the Nigerian courts."[456]

(2) The Tribunal's Analysis

i. Alleged Arrest and Unlawful Detention of Claimants' Representative

294. Although this has been presented in an inconsistent manner, the Tribunal accepts that, in 1987, Respondent detained Mr. Rooks. This Tribunal, however, has been unable to find any relationship between this detention and Claimants' claim for expropriation.

295. The Tribunal notes that even if the purpose of Mr. Rooks's 1987 trip to Nigeria had been to terminate Dr. Fadeyi, Claimants have not shown that there was any connection between Dr. Fadeyi and his potential concerns about his termination and Respondent's detention of Mr. Rooks. Claimants have stated that this detention was "in connection with a disagreement over termination of a crude oil lifting contract and to enforce its [Respondent's] rights as a joint venture partner."[457] Claimants have not proven Dr. Fadeyi's knowledge of Mr. Rooks's intention to terminate Dr. Fadeyi's employment. Nor have they demonstrated that if such knowledge existed, it caused Dr. Fadeyi to engineer the arrest and detention of Mr. Rooks, which could have been entirely independent of Dr. Fadeyi's concerns, if such concerns existed.

296. Nor do further actions alleged by Claimants, as related to Dr. Fadeyi, show a concerted effort by Respondent to destroy Claimants' investment in Nigeria. No evidence demonstrates attribution to Respondent of any actions that might have been taken by Dr. Fadeyi to reduce Dr. Fabbri's salary, or to authorize cash calls Dr. Fadeyi made on NNPC on behalf of Pan Ocean.

ii. NNPC's Alleged Failure to Provide Guidance and Investigate Claims

297. Claimants argue that the (in)actions of the NNPC are imputable to Respondent, as Respondent's national oil company. They claim that the NNPC's failure to investigate their claims to be shareholders in 2000 and 2005 is further evidence of a creeping expropriation.

[456] Respondent's Rejoinder ¶ 90.

[457] Claimants' Memorial ¶ 4.3.

Respondent's and its agencies' failures to intervene in the events involving Pan Ocean, however, do not lead directly to culpability on the part of Respondent. In principle, State-controlled entities are considered as separate from the State, unless they exercise elements of governmental authority within the meaning of ILC Article 5.[458] The NNPC's operation and its role and powers as described in the Nigerian legislation confirm that the NNPC is a commercial entity that only engages in "private or commercial" activities.[459] The alleged violations of Claimants' rights by the NNPC would, therefore, not be attributable to Respondent.[460]

298. While it was perhaps rude for Respondent or NNPC to fail to respond to correspondence from Claimants in 2000, the Tribunal is 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. There is no statutory, contractual or regulatory basis on which consent is required from the NNPC or the Minister for the allotment of shares in a private company, like Pan Ocean.

299. The NNPC's regulatory mandate is set out in the NNPC Act.[461] The NNPC cannot directly or indirectly exercise any power not expressly conferred upon it by the Act, and nothing in its mandate allows it to interfere in the internal shareholding disputes of a private company.[462] Further, should a duty have existed, Claimants have not met their burden of proving that what the NNPC did was orchestrated for or on behalf of Respondent with the ultimate intent of depriving Claimants of their investment in Nigeria. Even if Respondent had had the authority to intervene, in 2005 Claimants' shareholding was a matter pending before Nigerian Courts and the NNPC does not have the power to doubt the decisions of the Nigerian courts.

300. In this context, it must be recalled that Mrs. Timolini's standing in Pan Ocean could have been questioned and was finally abandoned in 2010 when, for reasons that have not been disclosed to the Tribunal, Mrs. Timolini yielded her interest in Impex to Dr. Fabbri's estate.[463]

[458] Respondent's Counter-Memorial ¶¶ 338-339.

[459] Respondent's Counter-Memorial ¶¶ 340-344.

[460] Respondent's Counter-Memorial ¶ 344.

[461] Nigerian National Petroleum Corporation Act, Cap N123 LFN, Legal Authority RL-21.

[462] Second Expert Report of Justice Emmanuel Ayoola ¶ 71.

[463] Deed of Surrender by Mrs. Anabella Timolini, Original Exhibit C-16, renumbered Exhibit C-22; Respondent's Appendix A.

301. Against this context, it is understandable that the NNPC would have hesitated to communicate with the alleged representatives of Claimants. While Respondent has not offered an adequate explanation for the failure to answer and deal with correspondence or to meet and speak with these individuals, the Tribunal is not persuaded that the NNPC's inaction was orchestrated for or on behalf of Respondent, or with the ultimate goal of depriving Claimants of their investment in Nigeria.

302. Claimants also allege that Respondent's failure to respond to their correspondence is further indication of the creeping expropriation. The issue for the Tribunal is whether Respondent's failure to address Claimants' correspondence, whether through incompetence or malevolence, was intended to deprive Claimants of their investment in Nigeria. The effect of not responding to the correspondence allowed the situation to further develop, resulting in this arbitration. There is, however, no indication that Dr. Fadeyi interfered with any of the correspondence received or sent by the Ministry or the NNPC or that there was a concerted effort to remove Claimants as shareholders. Even if Respondent was aware that there was a dispute between Claimants and Dr. Fadeyi, as indicated above, neither NNPC or Respondent had a duty to intervene.

iii. Respondent's Renewal of the Joint Operating Agreement ("JOA")

303. While Claimants characterize the extension of the JOA as self-dealing and a breach of Respondent's and NNPC's responsibilities to ensure that NNPC was participating with the proper partner, the context is key. In 2002, the JOA was due for renewal and was expressly anticipated and welcomed in the debt repayment plan penned by Dr. Fabbri on 17 June 1998, prior to his death.[464] Pursuant to that letter, repayment would begin in 2002 and would last seven years.[465] Extending the JOA was important. It was a valuable asset for NNPC and Respondent, and for Pan Ocean. It was only natural that the JOA would be negotiated through Pan Ocean's representative at the time, Dr. Fadeyi. The Tribunal cannot see a link between the extension of the JOA and the debt repayment agreement on the one hand, and NNPC allegedly

[464] Letter from Dr. Vittorio Fabbri to the NNPC Managing Director, 17 June 1998, Exhibit R-28 ("We look forward to executing a Joint Operating Agreement with NNPC which shall incorporate the fore-going terms and conditions"), making no mention of a change in ownership.

[465] *Id.*

working towards or engineering that Claimants would lose the beneficial ownership and control of Pan Ocean, on the other.

304. The JOA did not give the NNPC authority to intervene in the internal disputes of Pan Ocean's shareholders.[466] The JOA set out the NNPC's mandate and role within the Joint Venture,[467] which is contractual in nature. No evidence demonstrates that such a regulatory agency has a right to intervene in internal disputes among shareholders.[468]

305. Finally, no evidence demonstrates that the NNPC had a duty to verify Dr. Fadeyi's authority to enter into the JOA. Given the inconsistencies involved with respect to Mrs. Timolini's position and participation in the company, it may have been reasonable to believe that he was fully authorized to engage in an anticipated renewal transaction. Accordingly, the Tribunal finds no breach with respect to the renewal of the JOA.

iv. Respondent's Failure to Scrutinize the Change of Control

306. Here, the Tribunal is again tasked to examine whether, in the context of change in control of Pan Ocean, NNPC's inaction can be attributed to Respondent or whether this inaction was wrongful under Nigerian law. The Tribunal recalls its decision, above, regarding the attributability of the NNPC's actions to Respondent.

307. The regulatory mandate of the NNPC derives from the enabling statute, the NNPC Act.[469] The NNPC cannot directly or indirectly exercise any power not expressly conferred on it by that Act. Nothing in the NNPC's regulatory mandate allows the NNPC to interfere in internal shareholding disputes of a private company.[470] NNPC's general power to regulate companies does not "translate into a general power to intervene in the private disputes of Joint Venture partners."[471] As indicated above, this was not changed through the JOA, which sets out the

[466] Respondent's Rejoinder ¶ 109, citing Second Expert Report of Professor Lawrence Atsegbua ¶¶ 50-55; See also First Expert Report of Professor Lawrence Atsegbua ¶¶ 16 and 72.

[467] Joint Operating Agreement between Pan Ocean Oil Corporation and the NNPC, dated 28 May 2002, Exhibits R-11(1) and R-11(1)PLUS.

[468] Respondent's Rejoinder ¶ 109, citing Second Expert Report of Professor Lawrence Atsegbua ¶¶ 50-55; see also First Expert Report of Professor Lawrence Atsegbua ¶¶ 16 and 72.

[469] Nigerian National Petroleum Corporation Act Cap N123 LFN 2004, Legal Authority RL-21.

[470] Second Expert Report of Justice Emmanuel Ayoola ¶ 71.

[471] Respondent's Rejoinder ¶ 108.

NNPC's contractual mandate and role within the Joint Venture.[472] As noted elsewhere in this Award, no evidence demonstrates that the NNPC as regulatory agency has received power to intervene in an internal dispute among Pan Ocean's shareholders.[473]

308. Even if NNPC had had authority to intervene, it simply could not have done so because the dispute was a pending matter before the Nigerian courts. The NNPC does not have the power to doubt the decisions of the Nigerian Courts,[474] nor would it have been appropriate for any Minister to intervene while the matter was pending. Of course, this is independent of the fact that, even if Dr. Fadeyi was able to manipulate or direct the NNPC to ignore or overlook his abuses or fraudulent actions, that would not be attributable to Respondent. If the NNPC misused its authority and power, the remedy would be through the Nigerian Courts – at least at first instance. Accordingly, the Tribunal finds no treaty breach in any alleged failure of Respondent to scrutinize change of control in Pan Ocean.

309. Claimants argue that the deprivation of their rights also constitutes, *a fortiori*, a violation of Section 24 of the NIPC Act, which provides for the unconditional transferability of funds, including dividends or profits attributable to the investment.[475] According to Claimants, the expropriation of their investment "has led directly to the inability to receive any dividends, profits or other proceeds from their asset."[476] The Tribunal agrees with Respondent's position that Section 24 of the NIPC Act cannot be used to enable or require Respondent intervene into payment disputes between two private parties.[477] Thus, Claimants have not suffered a violation of Section 24 of the NIPC Act.

v. Decisions of the Federal High Court of Abuja in 2005 and 2006

[472] Joint Operating Agreement between Pan Ocean Oil Corporation and the NNPC, 28 May 2002, Exhibits R-11(1) and R-11(1)PLUS.

[473] Respondent's Rejoinder ¶ 109, citing Second Expert Report of Professor Lawrence Atsegbua ¶¶ 50-55; see also First Expert Report of Professor Lawrence Atsegbua ¶¶ 16 and 72.

[474] Respondent's Rejoinder ¶ 110.

[475] Claimants' Post-Hearing Brief ¶ 17, citing Nigerian Investment Promotion Commission Act, Cap 117 LFN 1995, Section 24, Legal Authority CL-1.

[476] *Id.*

[477] Respondent's Counter-Memorial ¶¶ 389-390.

310. While Respondent's actions and the actions of their courts are attributable to Respondent, Claimants have again not met their burden of proving that Respondent had any involvement in Dr. Fadeyi's actions. Dr. Fadeyi's failure to notify Claimants is, therefore, not attributable to Respondent. The court did not breach its obligations in relying on Dr. Fadeyi's statement that the notices were returned, as the address of the notice was the same address of Claimants as listed in the annual returns of Pan Ocean, attached to the CAC Report of April 2005.[478]

311. The circumstances leading to the 2005 and 2006 decisions are largely undisputed, leaving it for the Tribunal to determine whether these cases were (part of) a judicial expropriation of Claimants' asset or, alternatively, whether the cases were legally incorrect and a miscarriage of justice.

312. While the 2005 Board Meeting Case appears to have been legally wrong and unjust, it was not a judicial expropriation. The Tribunal is not persuaded that Respondent was responsible for the 2005 Board Meeting Case Decision, or for the Courts' actions that enabled Dr. Fadeyi to take over Pan Ocean and deprive Claimants of their ownership thereof. Rather, that case appears to have been a miscarriage of justice. Claimants' remedy would have been to challenge it in courts, before the Nigerian Court of Appeal. Rather than do so and exhaust their domestic remedies, however, Claimants abandoned proceedings.

313. The following actions resulted in the 2005 Board Meeting Case. On 21 November 2005, Dr. Fadeyi applied to the Federal Court of Abuja for leave to hold a Board Meeting of Pan Ocean, attaching an affidavit in support of his application which, among other things, stated that Mr. Rooks "departed Nigeria and had since never returned to the country" and "his efforts to locate him had proven abortive."[479] Three days later, the Federal Court of Abuja granted Dr. Fadeyi's application. Shortly thereafter the Board Meeting took place during which resolutions were passed allotting the remaining 7,500 unissued shares of Pan Ocean to Dr. Fadeyi and his

[478] Respondent's Rejoinder ¶¶ 76-77, citing Report of the Corporate Affairs Commission on the Investigation into the Affairs of Pan Ocean Oil Corporation (Nigeria) Unlimited, dated April 2005, attachment K, original Exhibit C-45, renumbered Exhibit C-51.

[479] Claimants' Reply ¶ 88 (i) and (vi).

associates.[480] Claimants submit that no shareholders were present at that meeting and that "there is no evidence that they were even notified of it."[481]

314. In order to validate the allotment of those shares, Dr. Fadeyi had to hold an Extraordinary General Meeting of Pan Ocean shareholders; at that same meeting he would also seek to appoint Justice Duro Adebiyi and Alhaji Muhammed Dikko Yusuf as Directors of the company.[482] On 19 January 2006, again in the absence of the shareholders of Pan Ocean, an ordinary resolution was passed through which Dr. Fadeyi appointed his associates Justice Duro Adebiyi and Alhaji Muhammed Dikko Yusuf as Directors and the share allocation was effected.[483] Claimants allege that the 8 February 2006 decision of the Federal High Court of Abuja, which validated the resolutions passed by Dr. Fadeyi, qualifies as an expropriation under Section 25 of the NIPC Act or a denial of justice.[484]

315. As indicated in the previous section, the JOA did not give the NNPC the authority to intervene in the internal disputes of Pan Ocean's shareholders. In this case, Claimants' remedy would have been to challenge the decision in the courts. Initially, this is what happened. It is, however, unclear why the case was withdrawn and did not go on appeal. In principle, this case and its merits could have been presented before the Nigerian Court of Appeal. Even if Dr. Fadeyi and NNPC raised procedural issues such that the case could never proceed, as alleged, the Tribunal is not persuaded that Respondent was responsible for any action that was taken in the courts as part of an alleged intention to enable Dr. Fadeyi to take over Pan Ocean and deprive Claimants of their ownership of Pan Ocean.

vi. Failure to Act on CAC Findings or Investigate Alleged Crimes

[480] Return of Allotment of Shares and Notice of Ordinary Resolution of the Company, Exhibit R-47.
[481] Claimants' Reply ¶ 92.
[482] Return of Allotment of Shares and Notice of Ordinary Resolution of the Company, Exhibit R-47.
[483] Claimants' Reply ¶ 96.
[484] Claimants' Reply ¶¶ 111, 114.

316. This issue concerns whether the alleged actions or omissions of the CAC, which Claimants submit is a State organ and statutory agency regulating and administering companies, are treaty breaches that are attributable to Respondent.[485]

317. The CAC investigation occurred while the proceedings in the 2004 Fraud Case were pending before the Federal High Court of Lagos, when Claimants asked the CAC to conduct a separate investigation of Pan Ocean, in parallel with that Court proceeding.[486]

318. The CAC found, in April 2005, that (i) the only two shareholders of Pan Ocean were Claimants, (ii) Mrs. Timolini owned beneficial stocks in Claimants and the ownership of Pan Ocean was, therefore, vested in her, (iii) the affairs of Pan Ocean were conducted in a manner prejudicial to the interests of the shareholders, and (iv) that the shareholders had been excluded from running the affairs of Pan Ocean since 1 September 1998. The CAC Report blamed irregularities on Dr. Fadeyi's having acted without sufficient quorum.

319. The Court in concluding the 2004 Fraud Case on 10 November 2005, however, found the CAC Report to be inadmissible hearsay information, and did not allow it to be submitted as evidence. As a result, and given the findings of the 2004 Fraud Case, no government institution could have relied on that report.

320. CAC looked at the bigger picture and expressed serious concerns about Pan Ocean. The fact that it was disregarded by a court for procedural irregularity does not mean that the various findings of the CAC report had no merit. As these issues were in the air, one would have expected at least some investigation or enquiry into Pan Ocean, its shareholders, and management. Respondent's failure to investigate the Pan Ocean situation further may have been due to incompetence or irresponsibility, or as suggested by Claimants, greater intrigue. Either way, there was a failure on the part of Respondent to act prudently when looking at the relationship of Pan Ocean with NNPC and the Ministry of Petroleum.

321. As indicated above, the NNPC would not have had a duty or authority to intervene. Even if Respondent and its agencies failed to intervene when they could have, this alone does not

[485] Claimants' Reply ¶ 134(x); Claimants' Post-Hearing Brief ¶ 35.

[486] Respondent's Counter-Memorial ¶ 78.

directly lead to culpability on the part of Respondent. Granted, if Respondent had nonetheless conducted a further investigation into the matter, it may have determined that Dr. Fadeyi did not have proper authority for his actions on behalf of Pan Ocean and/or that he was exceeding his authority. Respondent argues that it did not have the authority to "secure a conviction of Dr Fadeyi when the main act being denounced as a crime had been validated by a court order and was subject to appeal or set-aside proceedings in other civil suits."[487]

322. The question here is whether Respondent appreciated, or should have appreciated, that the likely effect of the management of Pan Ocean by Dr. Fadeyi and Respondent's non-intervention into the case, would be to deprive Claimants of their investment in Nigeria. Respondent's inaction could be indicative of wrongdoing, but the Tribunal is not persuaded that Respondent could have anticipated that the combined effect of Dr. Fadeyi's management of Pan Ocean and Respondent's non-intervention would deprive Claimants of their investment. The Tribunal is not persuaded that Respondent was the complicit or driving force in Dr. Fadeyi's plan. Given the facts as they were at the time, Claimants have not established that Respondent was privy to or had reason to question the purpose and intent of Dr. Fadeyi's plans. The Tribunal, therefore, finds no breach of Respondent's obligations.

vii. Respondent's inaction, lack of cooperation, and facilitation of Dr. Fadeyi's actions

323. Consistent with the decisions above, the Tribunal does not find that Dr. Fadeyi, while acting as a representative of the NNPC/POOC joint venture was also engaging in conduct attributable to Respondent and thus, engaging its responsibility. [488] Claimants' contention that Dr. Fadeyi's "refusal to respond to the Claimants' demands to restore control of the operator company; to provide joint operation financial information to Claimants was an act attributable to the state" is rejected.[489]

[487] Respondent's Post-Hearing Brief ¶ 43.

[488] Claimants' Reply ¶ 137.

[489] Claimants' Reply ¶ 142.

324. The Tribunal considers the allegations related to (i) the failure of Respondent to investigate criminal acts within Pan Ocean and (ii) the fallacy of Respondent's excuses for action, together.

325. Claimants contend that there was no basis for Respondent's failure to investigate the criminal acts within Pan Ocean uncovered in the CAC report, "The inescapable conclusion point to collusion and cover-up."[490] Claimants reject Respondent's "afterthought" explanation that it could not intervene because issues were *sub judice*.[491] Respondent's further explanations also do not justify or support its inaction because the complaints began well before any court action, investigation of Claimants' grievances were not prevented by court action, and there was no contemporaneous correspondence giving such explanations.

326. Respondent denies Claimants' assertions that its law enforcement agencies did not do anything. Respondent explains that the Police and the Economic and Financial Crimes Commission simply do not have the power to "secure a conviction of Dr. Fadeyi when the main act being denounced as a crime had been validated by a court order and was subject to appeal or set-aside proceedings in other civil suits." [492]

327. Furthermore, Respondent asserts that Mrs. Timolini's standing in Pan Ocean had been called into question by the decision in the 2004 Fraud Case. All of the petitions that Claimants accuse Respondent's law enforcement of neglecting to investigate were signed solely, jointly or on behalf of Mrs. Timolini.[493]

328. With respect to the NNPC and the Minister of Petroleum's alleged failure to act as argued by Claimants, as explained above, Respondent submits that the NNPC does not have the authority to intervene in shareholding disputes of its JV partners. In support of its assertion, Respondent

[490] Claimants' Post-Hearing Brief ¶ 36.
[491] Claimants' Post-Hearing Brief ¶ 37.
[492] Respondent's Post-Hearing Brief ¶ 43.
[493] See e.g. Exhibits C-78, C-81 and C-82.

refers to Mr. Jones's words at the hearing where he admitted that he had not seen any precedent for such intervention in other instances.[494] This was also confirmed by Professor Omorogbe.[495]

329. Lastly, Respondent argues the fact that Claimants have litigated the dispute and activated *sub-judice* principles has prevented the NNPC and the Minister from acting as Claimants wished. Professor Omorogbe recognized that court actions could bar executive intervention and that out-of-court intervention "depends on the facts." [496]

330. With regard to the judicial system of Nigeria and the national courts' actions, Respondent argues that (i) there is no evidence of a pattern of scandalous decisions against Claimants, (ii) the very first decision (2002 Ownership case) was decided in favour of Claimants, (iii) Claimants did not lose at every turn and not all decisions against them have been condemned by their experts.[497] In fact, Respondent argues that Claimants themselves "prevented their cases from going ahead, including by discontinuing one, withdrawing an appeal, serially amending filings and making an incompetent application."[498]

331. This behavior of Respondent may give rise to suspicions that there was something more than incompetence or bad practice. Following the CAC Report, Respondent might have launched an investigation to determine whether Dr. Fadeyi had proper authority for his actions on behalf of Pan Ocean, or was exceeding his role at Pan Ocean. Respondent might have investigated whether concerns expressed by Claimants and the Fabbri family had any merit.

332. Respondent took no action and did not get involved. Nonetheless, the 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.

[494] Hearing Transcript Day 2, 55:8-9 and 93:8-9.
[495] Continued Hearing Transcript Day 1, 289:6-9.
[496] Continued Hearing Transcript Day 1, 301:19-22.
[497] Respondent's Post-Hearing Brief ¶¶ 48-49.
[498] Respondent's Post-Hearing Brief ¶ 49.

## D. *Legal Foundations for Claims under Customary International Law*

### (1) Statutory Provisions

333. Above, the Tribunal found that the following broadly drafted language of Section 26 of the NIPC Act includes claims under customary international law, incorporated into Nigerian Law through Article 32 of the Interpretation Act (1964).[499]

> "26. Dispute settlement procedures
>
> (1) Where a dispute arises between an investor an 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."

334. Article 32 of the Interpretation Act states as follows in relevant part:

[499] Interpretation Act 1964, Legal Authority CL-92.

> "32. Law in force with respect to Federal matters
>
> Subject to the provisions of this section and except in so far as other provision is made by any Federal law, the common law of England and the doctrines of equity, together with the statutes of general application that were in force in England on the 1st day of January, 1900, shall, in so far as they relate to any matter within the legislative competence of the Federal legislature, be in force in Nigeria."
>
> […]

(2) The Parties' Positions

a. Claimants' Position

335. Claimants contend that the alleged acts and omissions summarized above also constitute violations of Respondent's duties and obligations under customary international law, including "a responsibility to ensure that (i) the treatment of a foreign investor does not fall below recognized international minimum standards, and/or (ii) that the foreign investor receives fair and equitable treatment, and/or (iii) is not subject to arbitrary, unreasonable and/or unfair treatment which has the effect of failing to protect his economic rights, interests and/or security."[500]

336. According to Claimants, Article 42(1) of the ICSID Convention allows the Tribunal to apply "such rules of international law as may be applicable", which includes customary international law.[501] Moreover, Claimants argue that the rules of customary international law are integrated into Nigerian law because they are part of the common law of England and Wales, which was received into the Nigerian legal system according to Section 32(1) of the Interpretation Act of 1964.[502] Claimants reject Respondent's expert Justice Ayoola's suggestion that only the Supreme Court of Nigeria can establish whether customary international law applies, because that would mean that parties should wait until the case goes to the Supreme Court to have a decision on this point.[503]

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[500] Claimants' Memorial ¶ 9.2.

[501] Claimants' Post-Hearing Brief ¶ 6.

[502] *Id.*

[503] *Id.*, citing Second Expert Report of Justice Emmanuel Ayoola ¶¶ 150-156.

i. Minimum Standard

337. First, Claimants state that under customary international law, Respondent has the duty to respect a minimum standard of treatment, as established in *Neer v. Mexico*.[504] For this standard to be violated, "[…] an act must be sufficiently egregious and shocking – gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons."[505] Claimants argue that "if a reasonable observer was apprised of the totality of the acts or omissions of the Respondent in its treatment of the Claimants, over this period of time, he would readily conclude that it was 'blatantly unfair', 'manifestly arbitrary', 'evidently discriminatory' and 'shocking.'"[506] In particular, Claimants allege that the decision of the Federal High Court in the 2005 case was a "gross miscarriage of justice" and constituted a clear violation of the minimum standard of treatment of foreign investors.[507]

ii. Fair and Equitable Treatment and Full Protection and Security

338. Second, Claimants argue that the Fair and Equitable Treatment is a standalone standard in international customary law.[508] According to Claimants, this is confirmed by the "plethora of BITs which contain FET clauses", which evidence the "level of acceptance amongst States" as to FET's status as customary principle.[509]

339. According to Claimants, "the Respondent has violated the basic standards of transparency, good faith, fairness, procedural proprietary and due process which ought to have been accorded a foreign investor."[510] In particular, Claimants mention Respondent's failure to address the several investor-related grievances presented by Claimants, to deal with them fairly and to provide information in a transparent way, as well as its failure to protect (and refusal to give

[504] Claimants' Post-Hearing Brief ¶ 6, citing *L.F.H. Neer and Pauline Neer (USA v. Mexico)*, General Claims Commission, Decision, IV R.I.A.A. 60, 15 October 1926; pp. 60-66, ¶ 4, Legal Authority RL-93.

[505] Claimants' Post-Hearing Brief ¶ 7, citing *Glamis Gold Ltd v. United States (NAFTA/UNCITRAL)* Award, 8 June 2009, ¶ 22, Legal Authority RL-92.

[506] Claimants' Post-Hearing Brief ¶ 8.

[507] Claimants' Post-Hearing Brief ¶ 16.

[508] Claimants' Reply ¶ 143.

[509] *Id.*

[510] Claimants' Reply ¶ 146.

effect to) Claimants' enjoyment of their rights and the benefits deriving from their investment.[511]

340. In the alternative, Claimants argue that, even if the Tribunal accepts Respondent's argument that only the minimum standard is a principle of customary international law, the alleged actions and omissions by Respondent's instrumentalities also constitute a violation of the standard as formulated in *Waste Management*, which refers to a state behavior that is "arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety."[512]

341. Finally, Claimants argue that Respondent has not accorded Claimants full protection and security in Nigeria, stating that "[i]nstead, its Directors and representatives have been unlawfully detained and refused access to government instrumentalities or entry into Nigeria."[513]

b. Respondent's Position

342. Without prejudice to its objections to jurisdiction (summarized *supra*), Respondent contends that Claimants failed to meet their burden of proof as to the existence of the alleged rules of customary international law and their binding effect, which would require evidence of both a consistent State practice and of the *opinio iuris*.[514] As a consequence, it concludes that "[i]n the absence of any proven rule of customary international law beyond this, the Respondent's obligations under international law are limited to the customary international law minimum standard of protection."[515]

343. According to Respondent, "Claimants have failed both to: (i) rebut the Respondent's arguments regarding the applicable legal standard; and (ii) discharge their burden of proving

[511] Claimants' Memorial ¶ 11; Claimants' Reply ¶ 134.
[512] Claimants' Reply ¶¶ 144-145; Claimants' Post-Hearing Brief ¶ 18.
[513] Claimants' Memorial ¶ 11(v).
[514] Respondent's Counter-Memorial ¶¶ 393-397.
[515] Respondent's Counter-Memorial ¶ 398.

that any of the Respondent's actions constitutes a violation of the international minimum standard."[516]

i. International Minimum Standard

344. Respondent states that international tribunals' interpretation of the minimum standard has not departed significantly from the high threshold established in *Neer v. Mexico* (which was very close to concepts of denial of justice, due process and physical protection), and that the customary minimum standard of treatment of investors "continues to be limited to the 'gross denial of justice', 'manifest arbitrariness' or a 'complete lack of due process', and similarly 'egregious and shocking' treatment."[517] Moreover, claims in relation to arbitrary and unreasonable measures are also subsumed under this customary standard, and are thus limited to "a wilful disregard of due process of law" or "an act which shocks […] a sense of juridical propriety."[518]

345. According to Respondent, none of the acts and omissions alleged by Claimants amounts to a violation of the customary minimum standard.[519] First, since they developed their argument in the alternative, Claimants failed to point to specific measures that would constitute violations of the minimum standard.[520] Second, Claimants' allegations, based on a series of supposed acts and omissions by Respondent, are misleading because, as a matter of both domestic and international law, Respondent's executive branch could not intervene in a dispute between private parties or interfere with management of a private entity.[521] Finally, even if these allegations were substantiated, the high threshold for finding violations of the minimum standard was not reached. Indeed, Claimants did not even allege that Respondent's acts and

[516] Respondent's Post-Hearing Brief ¶ 67.

[517] Respondent's Counter-Memorial ¶¶ 399-407, citing *inter alia L.F.H. Neer and Pauline Neer (USA v. Mexico)*, General Claims Commission, Decision, IV R.I.A.A. 60, 15 October 1926, pp. 60-66, ¶ 4, Legal Authority RL-93; M. Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (Oxford University Press, 2013), p. 50, Legal Authority RL-94; *Waste Management, Inc. v. United Mexican States,* ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, ¶ 98, Legal Authority RL-101; *Glamis Gold, Ltd. v. United States* (NAFTA/UNCITRAL), Award, 8 June 2009, ¶ 22, Legal Authority RL-92.

[518] Respondent's Counter-Memorial ¶¶ 408, 409, citing *Case Concerning Elettronica Sicula S.P.A. (ELSI) (United States of America/ Italy)*, Judgment, 20 July 1989, I.C.J. 15, ¶ 128, Legal Authority RL-104.

[519] Respondent's Counter-Memorial ¶ 410.

[520] Respondent's Counter-Memorial ¶¶ 411-413.

[521] Respondent's Counter-Memorial ¶ 414.

omissions would constitute a violation of domestic law.[522] Moreover, to the extent that Claimants allege that Respondent is responsible for arbitrary and unreasonable measures, they also failed to meet the required standard of "manifest arbitrariness."[523]

346. Respondent stresses that, by not interfering in a private dispute, the various state entities allegedly involved acted within their constitutional roles and limitations.[524] Moreover, according to Respondent, international tribunals cannot act as courts of appeal: the mere fact that national decisions contain mistakes of fact or of law (or *a fortiori*, that a party is not satisfied about the outcome) will not attract international liability unless the claimant shows a gross "denial of justice" or "manifest arbitrariness."[525] Respondent highlights that its expert, former Supreme Court Justice Ayoola, confirmed that the decisions in question were taken after fair hearings, where parties where duly heard, there were no allegations of bias, and the court considered all the issues and addressed all the submissions.[526] According to Respondent, Claimants had an opportunity to be heard and present evidence before national courts, which normally excludes a violations of the minimum standard.[527] Moreover, Respondent contends that Claimants failed to exhaust the available local remedies, which is required to prove denial of justice claims, since they discontinued a suit and failed to appeal the other, while another appeal is still pending.[528]

ii. Fair and Equitable Treatment and Full Protection and Security

347. Respondent contends that the "fair and equitable treatment standard is not a standalone protection under customary international law."[529] Respondent's arguments can be summarized as follows: (i) Claimants failed to point to decisions, commentaries or legal authorities supporting their position;[530] (ii) the mere fact that the fair and equitable treatment is a common

[522] Respondent's Counter-Memorial ¶¶ 415-418.
[523] Respondent's Counter-Memorial ¶¶ 428-430.
[524] Respondent's Counter-Memorial ¶ 419.
[525] Respondent's Counter-Memorial ¶¶ 420-422.
[526] Respondent's Counter-Memorial ¶ 423.
[527] Respondent's Counter-Memorial ¶¶ 424-425.
[528] Respondent's Counter-Memorial ¶¶ 425-427.
[529] Respondent's Counter-Memorial ¶ 432.
[530] Respondent's Counter-Memorial ¶ 431.

provision in carefully negotiated BITs and other investment treaties (which are "compromises between investment protection and sovereign control over foreign investment") does not amount to the required State practice and *opinio iuris*, and is therefore not sufficient to establish the existence of a rule of customary international law;[531] (iii) "where tribunals have adopted a more expansive interpretation of the obligation to provide fair and equitable treatment, they have done so explicitly on the basis that they are interpreting an autonomous treaty standard, as opposed to the minimum standard of treatment under customary international law", and thus the decisions interpreting these treaty provisions are of no assistance in the present case;[532] (iv) "to the extent that some tribunals have suggested that there is no difference between the interpretation of fair and equitable treatment in accordance with the VCLT and the minimum standard of treatment under customary international law, such tribunals have done so without reference to evidence of State practice or *opinio juris*;"[533] and (v) arbitral decisions may assist in summarizing the content of customary international law, if they do so expressly, but do not constitute state practice themselves, and cannot create or prove customary international law.[534]

348. Respondent further argues that "it is one thing for tribunals to 'read down' the term of 'fair and equitable treatment' to ensure that it conforms to the minimum standard of treatment at customary international law", but quite another to spontaneously "ascribe content to a customary international law standard, without any evidence that States have agreed to this."[535] Respondent concludes that it "cannot be held to a standard of protection that it has purposefully not agreed to by refraining from entering into a BIT with the United States."[536]

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[531] Respondent's Counter-Memorial ¶ 432, citing M. Sornarajah, *The International Law on Foreign Investment* (Cambridge University Press, 2010), p. 136, Legal Authority RL-109; *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea/Democratic Republic of the Congo)*, Preliminary Objections, Judgment, 24 May 2007, I.C.J. 582, p. 582, Legal Authority RL-110; Respondent's Rejoinder ¶¶ 334-335, citing *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB (AF)/05/2, Award, 18 September 2009, ¶ 276, Legal Authority RL-144.

[532] Respondent's Counter-Memorial ¶ 433, citing as example *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, ¶ 155, Legal Authority RL-52.

[533] Respondent's Counter-Memorial ¶ 434, citing as example *Saluka Investments BV (The Netherlands) v. The Czech Republic* (UNCITRAL), Partial Award, 17 March 2006, ¶ 294, Legal Authority RL-111.

[534] Respondent's Counter-Memorial ¶¶ 435, 436, citing *Glamis Gold, Ltd. v. United States* (NAFTA/UNCITRAL), Award, 8 June 2009, ¶ 605, Legal Authority RL-92.

[535] Respondent's Counter-Memorial ¶ 437.

[536] Respondent's Counter-Memorial ¶ 438.

349. According to Respondent "to the extent that a fair and equitable treatment standard exists under customary international law in relation to foreign investments, it is limited to those protections provided by the minimum standard of treatment."[537] Moreover, Respondent contends that the threshold for finding a violation of the fair and equitable treatment as customary minimum standard is high, and limited to the "most egregious offences",[538] including "… acts showing a wilful neglect of duty, an insufficiency of action falling far below international standards, or even subjective bad faith."[539]

350. Respondent concludes that none of its alleged acts and omissions would meet the threshold for finding violations of any reading of the fair and equitable treatment standard.[540] As mentioned above, Respondent stresses that: (i) Respondent and its agencies had no right or obligation to intervene in Pan Ocean's internal dispute; (ii) Claimants failed to show that they were treated unfairly by Nigerian courts; (iii) the CAC merely recognized the issuance of shares further to an order of a Nigerian court on the same matter; (iv) Respondent only engaged with Dr. Fadeyi through the NNPC, in the context of its contractual relationship with Pan Ocean, and it was entitled to assume that Dr. Fadeyi was the company's legitimate representative; and (v) even if Respondent had gotten the ability to meet with Claimants and respond to their letters and requests, the alleged failure to do so could not possibly constitute a violation of the fair and equitable treatment standard, either under customary international law or under any treaty-based interpretation of the standard.[541]

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[537] Respondent's Counter-Memorial ¶¶ 439-443, citing *inter alia* OECD (1962), "Draft Convention on the Protection of Foreign Property and Resolution of the Council of the OECD on the draft Convention", OECD Publications, p. 9, Legal Authority RL-113; NAFTA Free Trade Commission, *North American Free Trade Agreement Notes of Interpretation of Certain Chapter 11 Provisions*, 31 July 2001, Section B(2), Legal Authority RL-100, *The Loewen Group, Inc. and Raymond L. Loewen v. United States of Americ*a, ICSID Case No. ARB(AF)/98/3, Award, 26 June 2003, ¶ 128, Legal Authority RL-108; Respondent's Rejoinder ¶ 336, citing *Saluka Investments BV (The Netherlands) v. The Czech Republic* (UNCITRAL), Partial Award, 17 March 2006, ¶ 292, Legal Authority RL-111.

[538] Respondent's Counter-Memorial ¶¶ 444-448, citing *inter alia Waste Management, Inc. v. United Mexican States,* ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, ¶ 98, Legal Authority RL-101; Respondent's Rejoinder ¶ 337.

[539] Respondent's Counter-Memorial ¶ 449, citing *Alex Genin et al. v. The Republic of Estonia*, ICSID Case No. ARB/99/2, Award, 25 June 2001, ¶ 367 (internal citation and emphasis omitted), Legal Authority RL-117.

[540] Respondent's Counter-Memorial ¶ 451; Respondent's Rejoinder ¶ 339.

[541] Respondent's Counter-Memorial ¶ 451; Respondent's Rejoinder ¶¶ 339-347.

351. Respondent submits that Claimants did not provide sufficient explanations as to the alleged violation of an obligation to provide full protection and security, nor did they request "that the Tribunal declare that the Respondent has failed to provide full protection and security to the Claimants' [investments]."[542] However, it argues that, "to the extent that the Claimants are making a claim pursuant to full protection and security under customary international law, [that claim] must also be dismissed."[543]

352. According to Respondent, the obligation to provide full protection and security under customary international law is subsumed within the international minimum standard of treatment and is limited to serious threats to physical security.[544] Without prejudice to its jurisdictional objections, Respondent further contends that, although Claimants seem to allege that the 1987 detention of their representative amounts to such a violation, they "do not clarify why this event is relevant to the present claim, do not present any evidence of this detention and there is no record of the Claimants or Mr Rooks ever pursuing any remedy in relation to these alleged events."[545]

(3) The Tribunal's Analysis

353. Above, the Tribunal found that Claimants' claims under international law are properly before this Tribunal. Having found above that Claimants have not suffered an expropriation, the Tribunal now amplifies its views on the alleged violation of key legal standards, including (i) the minimum standard of treatment, and (ii) the fair and equitable treatment standard (including the full protection and security standard). The Tribunal declines to evaluate whether the actions alleged could constitute a denial of justice – a term used by each Party in its pleadings. Initially, Claimants argued extensively on whether Respondent's alleged actions constituted a "denial of justice" in the sense of a judicial expropriation and in the sense of a violation of customary international law. In their post-hearing submission, however, Claimants expressly indicated that they are not advancing their case under that theory, but rather on the theory of

[542] Respondent's Rejoinder ¶¶ 348-351.

[543] Respondent's Counter-Memorial ¶ 452; Respondent's Rejoinder ¶ 352.

[544] Respondent's Counter-Memorial ¶¶ 453-460, citing *inter alia* M. Sornarajah, *The International Law on Foreign Investment* (Cambridge University Press, 2010), p. 205, Legal Authority RL-109.

[545] Respondent's Counter-Memorial ¶ 461.

indirect expropriation.[546] The Tribunal, therefore, refers to its conclusions regarding acts allegedly constituting an indirect expropriation, above, and ends its discussion of "denial of justice."

354. Claimants invite the Tribunal to assess this case pursuant to the minimum standard of treatment established in the *Neer v. Mexico* case. Under those criteria, action violates international law when it is "[…] sufficiently egregious and shocking – gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons."[547]

355. Even if the Tribunal were to accept Claimants' position regarding the international minimum standard and its applicability, however, the Tribunal has concluded that Dr. Fadeyi's actions are not attributable to Respondent.[548] Moreover, the Tribunal has concluded that neither the NNPC nor Respondent have breached their duties toward Claimants with respect to the alleged failures to investigate. The Tribunal has also found that the decisions of the Federal High Court of Abuja from 2005 and 2006 do not create liability for Respondent. Thus, accepting this standard and in light of the above, the Tribunal would need only consider whether the detention of Mr. Rooks violated the minimum standard of treatment or the fair and equitable treatment and full protection and security standards.

356. Here, Claimants have not presented arguments or evidence to support their claim that the detention of Mr. Rooks was a violation, separate from their allegation that this 1987 arrest set into motion a chain of events that led to Claimants ultimately losing control of their company. Above, Claimants did not establish the relevance of the detention of Mr. Rooks, which pre-date the enactment of the NIPC Act, to their expropriation claim. Contrary to their submission that their "Directors and representatives have been unlawfully detained and refused access to government instrumentalities or entry into Nigeria",[549] Claimants have not established the unlawfulness of the detention of Mr. Rooks. Likewise, Claimants have not shown that this "set into motion a chain of events", as they have not shown that they were denied entry into

[546] Claimants' Post-Hearing Brief ¶¶ 33, 45.

[547] Claimants' Post-Hearing Brief ¶¶ 6-7..

[548] *Supra* section B.

[549] Claimants' Memorial ¶ 11(v).

Nigeria or that they were refused access to government instrumentalities. Instead, the record demonstrates that in 2004, Mrs. Timolini and her son travelled to Nigeria to meet the Managing Director of the NNPC. No reason is given for why, between 1998 and 2004, there was no travel to Nigeria.[550] As Claimants have not established the key elements for a claim under the international minimum standard, the Tribunal cannot find a violation of the minimum standard of treatment.

357. The Tribunal, likewise, cannot find a violation of the fair and equitable treatment standard, including a duty to provide full protection and security. Claimants have not shown that there was any connection between Respondent's detention of Mr. Rooks (which Claimants have also stated was "in connection with a disagreement over termination of a crude oil lifting contract and to enforce its rights as a joint venture partner"[551]) and Dr. Fadeyi or his potential concerns of termination. Claimants have likewise not met their burden of establishing the elements of a fair and equitable treatment or full protection and security claim.

### E. *Damages*

358. The Tribunal cannot find that Respondent has any responsibility for losses suffered by Claimants as alleged in these proceedings.

359. Having found no liability on the part of Respondent, the Tribunal need not proceed to discuss damages other than in relation to costs, as set forth below.

## VI. Costs

### A. *The Parties' Positions*

#### (1) Claimants' Position

360. In their Post-Hearing Brief, , Claimants request that the Tribunal order Respondent to pay the costs associated with the present proceedings, including professional fees and disbursements,

[550] Claimants' Post-Hearing Brief ¶ 25.

[551] Claimants' Memorial ¶ 4.3.

"on a full indemnity basis."[552] According to Claimants, the Tribunal is empowered by ICSID Rule 28(1)(b), and the principle that succumbing parties pay should apply in international arbitration. Claimants contend that their request is in line with the principle of full compensation.[553]

361. In their Observations on allocation of costs, Claimants invoke four principles established by ICSID tribunals that ought to guide the present Tribunal: (i) tribunals have broad discretion to allocate costs; (ii) the "costs follow the event" principle is almost universally accepted and may be viewed as a general principle of international law; (iii) the conduct of the parties during the proceeding may be taken into consideration in the costs allocation; and (iv) the costs must be considered reasonable.[554]

362. Claimants also submit that the Respondent's conduct caused the proceeding to be lengthy, which further justifies an order by the Tribunal that Respondent should bear the Claimants' reasonable costs.[555]

363. Claimants further contend that their costs – i.e. legal fees, arbitration costs, and expenses– are reasonable and justified.[556]

364. Lastly, Claimants explain that Respondent is not entitled to recover its costs since the representation of the Republic of Nigeria was offered "at no cost to Respondent" by its counsel.[557]

365. In their Statement of Costs, Claimants submitted the following costs:

[552] Claimants' Annex to the Post-Hearing Brief ¶ 56.
[553] Claimants' Annex to the Post-Hearing Brief p. 15.
[554] Claimants' Observations on allocation of costs, ¶¶. 9-14
[555] Claimants' Observations on allocation of costs, ¶¶. 15-18.
[556] Claimants' Observations on allocation of costs, ¶¶. 19-24.
[557] Claimants' Observations on allocation of costs, ¶¶. 25-27.

Arbitration costs, expenses and disbursements:

| Claim for Indemnity for Costs in relation to ICSID Arbitration | | USD | USD | USD |
|---|---|---|---|---|
| I. | ICSID Calls for Funds | | | |
| | Filing request for arbitration | | | 25,000.00 |
| | Tribunal's calls for Funds | | | 675,000.00 |
| II. | Hearings disbursements | | | |
| | Group booking of hotel accomodation and travel | | | 3,224.89 |
| III. | Expert Witnesses Costs for : | | | |
| A. | Fees for expert opinions preparations and attendance at hearings | | | |
| | 1) Prof. Omorogbe | 140,000.00 | | |
| | 2) Fidelis Oditah,Q.C. | 290,460.47 | | |
| | 3) Geoff Barker of RISC | 191,842.03 | | |
| | 4) Ronald Scipio Q.C. and Eustella Fontaine | 17,410.80 | | |
| | 5) Dr. Tun de Ogowewo | 2,308.80 | | |
| | | | 642,022.10 | |
| B. | Travel and lodging for hearings | | | |
| | 1) Prof. Omorogbe | 20,962.49 | | |
| | 2) Fidelis Oditah,Q.C. | 20,201.84 | | |
| | 3) Geoff Barker of RISC | 11,191.01 | | |
| | | | 52,355.34 | |
| | | | | 694,377.45 |
| IV. | Other Witnesses' expenses | | | |
| A. | Jacques Jones: | | | |
| | Fees witness statement preparation and attendance at hearing | | 26,000.00 | |
| B. | Travel and lodging for hearings: | | | |
| | John Brunner and Jacques Jones | | 3,439.37 | |
| | | | | 29,439.37 |
| V. | Expenses of Interocean Counsel : | | | |
| A. | Travel & lodging for preparation meetings and hearings | | 144,478.49 | |
| B. | Conference room rentals and conference calls | | 8,342.01 | |
| | | | | 152,820.50 |
| VI. | Adminstrative expenses | | | |
| | Filings of briefs | | | |
| | Couriers, mailing, photocopying, printing, binding of briefs and exhibits | | | 39,300.30 |
| | | | | $ 1,619,162.51 |

Legal Fees of ALP

| | Between March 2013 and June 2020 | |
|---|---|---|
| **Name AND STATUS OF COUNSEL** | 1] Olasupo Shasore, SAN (SS)<br>2] M. Bello Salihu (MBS)<br>3] Fadesike A. Salu (FAS)<br>4] AAA Associate till 2017 | Senior Partner<br>Partner<br>Senior Associate<br>Associate |
| **BILLING RATES** | 1] Senior Partner -<br>2] Partner -<br>3] Associates (SNR incl.)- | $1000 per hour<br>$650 per hour<br>$450 per hour |
| **NO. OF HOURS** | 1] SS – 1,690.5 @ $1000 per hr –<br>2] MBS – 2,669.5hrs @650 per hr -<br>3] AAA – 2,093hrs @ 450 per hr-<br>4] FAS – 377hrs @ 450 per hr - | **$1, 690, 500**<br>**$1,735,175**<br>**$941,850**<br>**$169,650** |
| **VAT@7.5%** | | **$340,288.12** |
| **GRAND TOTAL** | | **$4,877,463.12** |

Legal Fees of Oba Nsugbe QC

| | | |
|---|---|---|
| **Total** | | 5,106 hrs |
| | | 2,000 hrs @ £750 p/h = 1,500,000 |
| | | 3,106 hrs @ £950 p/h = 2,950,700 |
| | | **£4,450,700.00.** |

Legal Fees of Adebimpe Nkontchou

| Counsel | Number of Hours | USD Rate | Amount |
|---|---|---|---|
| **BN** | **680.5** | **750** | **USD 510,375.00** |

(2) Respondent's position

366. Respondent submits in its Post-Hearing Brief that the Tribunal should reject Claimants' claims and order that they bear the entirety of the costs incurred in the present arbitration.[558]

[558] Respondent's Post-Hearing Brief ¶ 9.

367. In its Observations on Costs Allocation, Respondent submits that, should it prevail, it is entitled to receive reimbursement of its expenses and costs on a full indemnity basis.[559]

368. Respondent explains that tribunals consider a number of factors when exercising their discretion to allocate costs, such as the relative success of the parties, the quality of the claims, the complexity of the issues, the reasonableness of the parties' expenses, and the parties' conduct during the proceeding. Respondent adds that "[a]*ll of these factors support an award to the Respondent of all of its costs in this arbitration because the Federal Republic of Nigeria has been forced to go through the arbitral proceedings in order to achieve success, and should not be penalized by having to pay for the process itself*."[560]

369. Respondent further contends that not only should Claimants' claims fail, whether for want of jurisdiction or on the merits, but they should never have been brought before ICSID and have been registered by the Centre on the basis of Claimants' misrepresentation with respect to the registration of their investment under the NIPC Act.[561]

370. Respondent also submits that Claimants' misconduct throughout the proceeding warrant an allocation of costs in favour of Respondent, including because such conduct increased the costs of the arbitration.[562]

371. Respondent then explains that it is entitled to recover all of its costs notwithstanding the fact that it has been represented by the law firm Afe Babalola & Co at no cost throughout the proceeding.[563]

372. Respondent submits that its costs, comprised of arbitration costs, legal costs, witness costs, travelling and accommodation expenses, and disbursements, are entirely reasonable, and that,

[559] Respondent's Observations on Costs Allocation, ¶¶ 3-5.
[560] Respondent's Observations on Costs Allocation, ¶ 6.
[561] Respondent's Observations on Costs Allocation, ¶¶ 7-9.
[562] Respondent's Observations on Costs Allocation, ¶¶ 10-11.
[563] Respondent's Observations on Costs Allocation, ¶¶ 12-14.

in the event the Tribunal finds for Claimants, their costs are not reasonable and Respondent should not be ordered to reimburse them.[564]

373. In its Statement of Costs, Respondent submitted the following costs:

**A. Arbitration Cost**

| Payments made to the ICSID Secretariat | | |
|---|---|---|
| S/N | Date | Amount |
| 1. | Request made via letter dated 12th December, 2013. Payment confirmed by letter dated 2nd January, 2014. | $100,000.00 |
| 2. | Request made via letter dated 2nd June 2014. Payment confirmed by letter dated 20th June 2014 | $100,000.00 |
| 3. | Request made via letter dated 21st January 2015. Payment confirmed by letter dated 20th February, 2015. | $125,000.00 |
| 4. | Request made via letter dated 2nd May, 2016. Payment confirmed by letter dated 3rd June 2016 | $100,000.00 |
| 5. | Request made via letter dated 31st May, 2017. Payment confirmed by letter dated 11th July, 2017 | $100,000.00 |
| 6. | Request made via letter dated 13th August 2018. | $150,000.00 |
| **7.** | **Sub-Total** | **$675,000.00** |

**B. Legal cost**

| Legal Cost | | |
|---|---|---|
| S/N | Law Firm | Amount |
| 1. | Afe Babalola & Co. | NIL |
| 2. | Volterra Fietta | $1,000,000.00 |
| 3. | Rose Rameau | $150,000.00 |
| **4.** | **Sub Total** | **$1,150,000.00** |

**C. Witness costs**

| Expenses incurred in securing the attendance of Witnesses | | |
|---|---|---|
| 1. | Ahmad Rufai Khalid | NIL |
| 2. | Bala Mohammed Yusuf | NIL |
| 3. | Justice Ayoola, JSC (Rtd.), | $101,973.18 |
| 4. | Prof. Atsegbua, SAN, Engr. | $50,986.59 |
| 5. | Engr. Bello M.,FNSE | $50,986.59 |
| 6. | Daniel Harris | $400,000.00 |
| **7.** | **Sub-Total** | **$603,946.36** |

[564] Respondent's Observations on Costs Allocation, ¶¶ 11-35. The Tribunal notes that the numbering of paragraphs in the Respondent's Observations on Costs Allocation restarts at 11 after paragraph 14, on page 7.

**D. Travelling and Accommodation Expenses**

| S/N | Description | Amount |
|---|---|---|
| 1. | Travelling and Accommodation of Respondent's Representatives for initial procedural meeting in Paris: 13th February, 2014 | $150,000.00 |
| 2. | Travelling and Accommodation of Respondent's Representatives for hearing on Jurisdiction in London: 26th June, 2014 | $120,000.00 |
| 3. | Travelling and Accommodation of Respondent's Representatives for the first hearing on the merit in London: 2nd, 3rd and 4th August 2016 | $500,000.00 |
| 4. | Travelling and Accommodation of Respondent's Representatives for the 2nd hearing on the merit in London: 19th, 20th, 21st, July 2017 | $500,000.00 |
| **5.** | **Sub-Total** | **$1,270,000.00** |

**E. Disbursements**

| S/N | Descriptions | Amount |
|---|---|---|
| 1. | Printing of several memorials, factual and legal exhibits, witness bundles and several written submissions. | $15,000.00 |
| 2. | Photocopy of several memorials, factual and legal exhibits, witness bundles and several written submissions. | $20,000.00 |
| 3. | Courier of several memorials, factual and legal exhibits, witness bundles and several written submissions. | $3000.00 |
| 4. | Hyperlink of processes and documents | $30,000.00 |
| 5. | Materials and supplies | $500.00 |
| **6.** | **Sub-Total** | **$68,500.00** |

**Grand Total**

| S/N | Sub-Head | |
|---|---|---|
| 1. | Payments made to the ICSID Secretariat | $675,000.00 |
| 2. | Legal Cost | $1,150,000.00 |
| 3. | Witness Cost | $603,946.36 |
| 4. | Travelling and Accommodation Expenses | $1,270,000.00 |
| 5. | Disbursements | $68,500.00 |
| **6.** | **TOTAL** | **$3,767,446.36** |

B. ***The Tribunal's Decision on Costs***

374. Article 61(2) of the ICSID Convention provides:

> "In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those

> expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award."

375. This provision gives the Tribunal discretion to allocate all costs of the arbitration, including attorney's fees and other costs, such as arbitration costs, expenses and disbursements, between the Parties as it deems appropriate.

376. The Tribunal has carefully considered the Parties' respective submissions, filed by both sides first on 8 June 2020 and then again by both sides on 30 June 2020. The Tribunal will first address legal costs, and then all other costs.

377. The Tribunal accepts that Respondent has prevailed, and that a "costs follow the event" principle might normally lead to recuperation of legal fees.

378. Under the circumstances of this case, however, no legal costs have been incurred by Respondent. Thus no legal costs can be awarded to Respondent.

379. Respondent was represented *pro bono* by Aare Afe Babalola & Co, which confirmed having served in this matter without compensation. The firm of Volterra Fietta, and Ms. Rose Rameau, were supporting counsel in the legal team lead by Afe Babalola & Co.[565]

380. This *pro bono* representation has been acknowledged by the Respondent and its counsel, as has the supporting role of Volterra Fietta and Ms. Rose Rameau. In this connection, the Tribunal notes communications received by Mr. Garel at ICSID, sent by the Nigerian Attorney-General on 27 October 2016 and by the Afe Babalola & Co firm on 29 October 2016.

381. The Attorney General on 27 October 2016 confirmed that "*Afe Babalola & Co offered their services to the Respondent in relation to this present proceedings at no cost for the Respondent. […] As earlier stated in my letter of 4 August 2016, in proffering a robust defence to the Respondent, Are Afe Babalola of Afe Babalola & Co has also engaged the firm of Volterra Fietta and Ms. Rameau at no cost to the Respondent*."

[565]Hearing Transcript, Day 1, 21:10 to 23:4, and Hearing Transcript, Day 2, 3:6-17. See also Procedural Order No. 5, ¶¶ 49-65.

382. Two days later, Afe Babalola & Co. stated as follows: "*As confirmed in the letter of the Attorney General of 27th October, 2016 my firm's representation of the Federal Republic of Nigeria in these proceedings is at absolutely no cost to the government.*"

383. On this basis, the Tribunal cannot but acknowledge that the Republic of Nigeria, Respondent in these proceedings, has not incurred any legal costs, and, consequently, cannot order the reimbursement to the Respondent of legal costs that it has not incurred.

384. With respect to all other costs, the Tribunal considers, in principle, that the "costs follow the event" approach applies and that, consequently, Claimants would have to reimburse to Respondent all other costs it incurred in defending Claimants' claims. However, the amounts claimed by the Respondent under the Witness Costs, Travelling and Accommodations Expenses, and Disbursements categories have given rise to much doubt among the Tribunal members about their genuineness and accuracy, as explained below. The Tribunal finds itself therefore unable to order the reimbursement of these costs by Claimants to Respondent.

385. The Tribunal finds the amount claimed under the Travelling and Accommodations Expenses category, i.e. USD 1,270,000.00, to be unreasonably high. The Tribunal understands that a Nigerian delegation had to travel to and stay in London on four different occasions, and that the resulting costs would necessarily be higher than that of Claimants, but the amount claimed is over 10 times higher than Claimants' and seems to reflect opulent, if not sumptuous choices made by Respondent. The Tribunal considers that it would be unfair to order Claimants to bear the financial consequences of the travelling and accommodation choices made by Respondent when such choices have driven the costs to over a million dollars.

386. The Tribunal finds the amounts claimed under the Witness Costs category to be odd. Not only are the costs claimed for Engr. Bello and Prof. Atsegbua identical, i.e. USD 50,986.59 each, which seems highly unlikely, but they each are exactly half of the costs claimed with respect to Justice Ayoola, i.e. USD 101,973.18. It is as if the Respondent has divided by two the costs of Justice Ayoola to establish and claim the costs of Engr. Bello and Prof. Atsegbua. In addition, the fact that the costs claimed with respect to Daniel Harris is a round figure of USD 400,000 seems artificial and therefore unlikely to reflect reality. The Tribunal is unable to order the reimbursement of these costs when the amounts claimed are so obviously odd.

387. The Tribunal also finds the amounts claimed under the Disbursements category to be odd. First, they all are round figures, which seems artificial and therefore unlikely to reflect reality. Second, the amount claimed as "Hyperlink of processes and documents", i.e. USD 30,000 seems greatly exaggerated, especially when it does not appear than any of the Respondent's submissions or even lists of supporting documents were hyperlinked at all. The Tribunal is unable to order the reimbursement of these costs when the amounts claimed are so obviously odd.

388. The Tribunal will apply the "costs follows the event" principle to the arbitration costs. The costs of the arbitration, including the fees and expenses of the Tribunal ICSID's administrative fees and direct expenses, amount to (in USD):

| | |
|---|---|
| Arbitrators' fees and expenses | |
| Professor William W. Park | USD 369,949.75 |
| Professor Julian D.M. Lew | USD 122,379.18 |
| Justice Edward Torgbor | USD 443,062.37 |
| ICSID's administrative fees | USD 254,000.00 |
| Direct expenses | USD 130,868.44 |
| **Total** | **USD 1,320,259.74** |

389. The above costs have been paid out of the advances made by the Parties in equal parts.[566] As a result, each Party's share of the costs of arbitration amounts to USD 660,129.87. Claimants shall therefore reimburse USD 660,129.87 to Respondent with respect to costs of the arbitration.

[566] The remaining balance will be reimbursed to each side in proportion to payments advanced to ICSID.

## VII. Award

390. For the reasons set forth above, the Tribunal decides as follows:

(1) Jurisdiction

391. The Tribunal confirms its 29 October 2014 Decision on Preliminary Objections, deciding at paragraph 147 that Objection No. 1 related to Consent would be rejected insofar as it calls into question whether Section 26 of the NIPC Act constitutes a standing offer to arbitrate. The Tribunal found that Section 26 did indeed constitute such a standing offer.

392. The Tribunal also confirms its Decision to reject Objections No. 2 (Role of the ICSID Rules), No. 4 (Proper Party) and No. 5 (Time Bars).

393. With respect to the other jurisdictional objections, the Tribunal in this Award rejects the Objection related to the adequacy of the Claimants' acceptance of that offer to arbitrate and the existence of a dispute.

394. The Tribunal also rejects Objections No. 3 (Registration) and No. 6 (Premature Filing).

(2) Liability

395. The Tribunal finds no liability on the part of Respondent in connection with Claimants' loss of control over their investment, Pan Ocean.

396. The Tribunal finds that Respondent has not breached its obligations toward Claimants under Nigerian law or under international law.

397. The Tribunal hereby dismisses Claimants' claims for damages and for restitution.

398. The Tribunal hereby dismisses Claimants' claim to be reinstated as the beneficial owner of the 40% participating interest in OML 98.

399. The Tribunal hereby orders Claimants to pay USD 660,129.87 to Respondent as reimbursement of its share of the arbitration costs incurred in these proceedings.

400. All other claims are dismissed.

[Signed]

Professor Julian D.M. Lew
Arbitrator

Date: 2. x. 2020

Hon. Justice Edward Torgbor
Arbitrator

Date:

Professor William W. Park
President of the Tribunal

Date:

[Signed]

Professor Julian D.M. Lew
Arbitrator

Date:

Hon. Justice Edward Torgbor
Arbitrator

Date: 5. 10. 2020

Professor William W. Park
President of the Tribunal

Date:

Professor Julian D.M. Lew
Arbitrator

Date:

Hon. Justice Edward Torgbor
Arbitrator

Date:

[Signed]

Professor William W. Park
President of the Tribunal

Date: 2 October 2020