Developing Economies, International Investment and Investor-State Arbitration: Recognition and Enforcement of Foreign Arbitration Awards in Nigeria

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ABSTRACT

The purpose of this paper is to determine the extent to which Economic Development Agreements are amenable to arbitration as an instrumentality for the settlement of disputes arising between State Parties and private entities such as Transnational Oil Corporations (TNOC).

Findings show that Economic Development Agreements are inabitrable and when awards are made, they lack finality because ownership of the subject-matter of such agreements inheres in the sovereign party and so within the public domain. Petroleum International Agreements (PIA) as a genre of Economic Development Agreements are ill-adapted to the Private Contract Model. The study also found that the principle pacta sunt servanda cannot apply absolutely under Petroleum International Agreements because supervening circumstances which render performance impossible may compel the review of the terms and conditions of the contracts in accordance with overriding public interest clausula rebus sic stantibus.

Keywords: Arbitration, Clausula Rebus Sic Stantibus, Economic Development Agreements, Pacta Sunt Servanda, Petroleum International Agreements, Private Contract Model, Supervening Circumstances.

INTRODUCTION

This study argues that transnational investments involving state entities by their nature are inarbitrable. The view is, however, rife among certain scholars that private entities, such as transnational petroleum corporations have international legal capacity to bring actions for claims against a sovereign state when it breaches its contractual obligation to the private entity. Article 42(1) of the ICSID Convention 1965, for example, attempts to create the capacity for direct action of investors against host states. According to this Article,

The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties, "But," in the absence of such agreement, the Tribunal shall apply the law of the contracting State party to the dispute (including its rule on the conflict of laws) national law as may be applicable.

That position was underscored in *Amco v Indonesia, Resubmitted* Case[1] and also the highly controversial use made by the ICSID Tribunal in *SPP (me) v Arab Republic of Egypt* Case.[2] In that case, President of the ICSID Tribunal, Rosalyn Higgins, in her analysis of the meaning of Article 42 (1) of the Washington (ICSID) Convention of 1965, stated thus:

Thus international law is fully applicable and to classify its role as only supplemental and corrective seems a distinction without a difference. In any event, the Tribunal believes that its task is to test every claim of law in this case first Indonesian law and then against international law.

The persistent attempt in certain quarters "to make the world safe for capital" is not without precedents. Kelsen emphasises in the Pure Theory of Law, that: the tendency of [contemporary] international law to lay-

down direct rules of obligation and authorization of individuals must necessarily be reinforced to the same degree as it increasingly extends to subjects of areas that were previously governed by State law alone.

In writing these lines, Kelsen was probably not thinking of international investment law, but there is no escaping the fact that his thought applies perfectly to the development of this law. Under this schema, it is argued that it is possible to consider as subject of international law any person capable of entering into disputes directly with another subject of international law as such and, possibly, of bringing that subject before an international court (provided consent is given in one form or another). Nothing can be farther from the truth than the foregoing; strictly speaking, private entities such as transnational petroleum corporations have no legal capacity at international law. The provisions for "international arbitration" in a petroleum international agreement by no means confer international status on the agreement. On the same footing, inclusion of an "internationalisation clause" in no way brings the agreement under the purview of international law.[3]

Within the realm of trans-national investment involving state entities and transnational oil corporations, the principle pacta sunt servanda cannot operate in an absolute sense, not only because it is not applied absolutely in international law, but also because most investment contracts operate in a field which falls within the domestic sovereignty of the state. As a result, there exists greater scope for applying the doctrine of changed circumstances, clausula rebus sic stantibus in state contracts, particularly where economic conditions change and welfare of the state requires that the contract be rescinded or changed. Within the context of Petroleum International Agreements (PIAs), this argument is especially relevant when one considers that under international law, states are recognised to have a certain degree of sovereignty over their natural resources and that a public emergency may require them to take unilateral action which is likely to affect the rights of foreign investors parties to a PIA. The notion that state entities and foreign private trans-national oil corporations act essentially as equals in their capacity as parties to a private contract is also part of the paradigm in certain quarters and their arbiters in international commercial arbitration proceedings. Contractual equality is hinged on the public/private distinction that the state as a private actor is different from the state as a public actor because, in some state contracts, the state will expressly waive its right to amend laws or regulations that would affect the rights and obligations of the parties. The logical implication of contractual equality is that an attempt by the state to take unilateral action to amend contractual obligations will be considered to be unlawful within certain perception of international contract law. We submit contrary to the foregoing that contracts with state entities should be analysed under an administrative or public contracts doctrine which is generally acknowledged in the Continental and Anglo-American legal systems. It effectively skirts the rigid boundaries of private law in the face of public regulatory interventions. The administrative contract doctrine assumes an essential unequal relationship between the parties, in which the state may exercise its coercive power to take unilateral action in amending its legal obligations. The state, in this case, is guided in such actions by the dictates of public interests. In the context of Petroleum International Agreement in Nigeria, this doctrine of the administrative contract is highly relevant considering the public importance of oil resources to the economic survival of the Nigerian state.[4]

INTRENATIONAL DEVELOPMENT AGREEMENTS AND ICSIDARBITRATIONS

ICSID arbitrations have no finality; one of the most persistent problems in international arbitration has been the difficulty of ensuring the finality of arbitral awards. Although there has been a marked trend in recent years recognising the autonomy of arbitration in international cases, national courts continue to review awards under a variety of standards. In the celebrated *Pyramid Resort* Case**,** *Arab Republic of Egypt v Southern Pacific Properties (Middle East)* Cour d' appel, Paris Judgment July 12, 1984,[5] in its decision, which was confirmed by the French Cour de Cessation on January 6, 1987, the Paris Cour d'appel ruled that

the Egyptian state was not a party to the arbitration agreement between the investor and the Egyptian General Organisation for Tourism and Hotels, in that case, a French court set aside an ICC award on the same day that leave to enforce the award was granted by a court in the Netherlands, in *Southern Pacific Properties (Middle East) Ltd v Arab Republic of Egypt*, District Court, Amsterdam, Judgment of July 12, 1984[6] In *Klockner Industrie-Anlagen Gmbh, Klockner Belge, S.A.* and *Klockner Handelsmaatschappij BV v United Republic of Cameroon* and *Societe Camerounaise des Engrais*[7] and *Amco Asia Corp Pan American Development Ltd And PT Amco Indonesia v Republic of Indonesia,*[8] the awards were annulled by an ad hoc committee organised under Article 52 of the Convention on the Settlement of Investment Disputes (ICSID).

In each case, after extensive briefing and hearings, the committee concluded that the arbitrators had exceeded their powers by failing to apply the proper law and had failed to state sufficient reasons to justify their legal conclusions. There is no appeal from the decision of an ad hoc committee annulling an award. Under the ICSID system, the only option is to resubmit the case for arbitration de novo by a new tribunal. The losing party in that proceeding will be entitled in its turn to request annulment of the award by a new ad hoc committee and so forth ad infinitum.[9] The foregoing demonstrates the inarbitrability of disputes in state contracts with private entities.

THE ARBITRATION AGREEMENT

The fundamental requirement of an arbitration agreement under the Arbitration and Conciliation Act (ACA) [10] is that an arbitration agreement must be in writing or must be contained in a written document duly signed by the parties.[11] There is a general assumption that arbitration must be consensually submitted to by the parties, as provided either in an express clause in contract under which parties agree to refer disputes to arbitration or by way of a submission agreement, in which parties consensually agree to submit disputes emanating from their contractual relationship to arbitration.

Sections 48(b)(i) and 52 (b)(i) of the ACA provides that the arbitration agreement must be in respect of a dispute capable of settlement by arbitration under the laws of Nigeria; Sections 48(a)(i) and Sections 52(2)(a)(i) of the ACA provides that the parties to the arbitration agreement must have legal capacity under an applicable law.

Section 48(a)(ii) and 52(a)(ii) provides that the arbitration agreement must be valid under the law to which the parties have subjected it or under the law of the Federal Republic of Nigeria. For the agreement to be operative and capable of being performed and enforceable against the parties it must be validly made in accordance with such laws.

The forum and language of arbitration, number of arbitrators, the proper law of arbitration and so forth must also be provided under the arbitration agreement for better control and the avoidance of disruption in the expectations of parties. Where there is no express provision as to the number of arbitrators, section 6 of the ACA provides for a default number of three arbitrators.

The general attitude of Nigerian Courts is to view arbitration as a veritable and valid alternative dispute resolution mechanism. In the case *CN Onuselogu Ent Ltd v Afribank (Nig) Ltd* [12] the court evinced the foregoing attitude by holding that arbitral proceedings are a recognised means of resolving commercial disputes and must be accorded that significance by both parties to the dispute and their respective counsel. Such arbitration agreement according to the court must however be consensually and voluntarily submitted to.

Sections 4 and 5 of the ACA compels a court before whom there is a contract which is the subject matter of

a proceeding before it to refer the parties to arbitration where any of the parties invokes an arbitration clause incorporated in the contract. In a similar vein, section 6(3) and 21 of the Lagos law empowers the Court to grant interim orders or reliefs to preserve the res or rights of parties pending arbitration.

In contrast, whilst section 13 of the ACA invests the arbitral tribunal with the power to make interim orders pursuant to preservation of inherent rights and res before or during the pendency of arbitral proceedings, it is however bereft of an express provision investing the court with the power of making preservation orders. The power of the court to make preservation orders is further circumscribed by section 34 of the ACA, which limits the power of the courts to intervene in arbitration strictly to those powers conferred on it by the Act. That granted, recourse could be had to the inherent jurisdiction of the court to grant interim orders, in seeking preservation orders.

Thus in *Afribank Nigeria Plc v Haco*[13] the court exercised its inherent power and jurisdiction by granting interim relief and directing the parties to submit to arbitration under the provisions of the ACA. At the conclusion of the arbitration process and publication of the award, the parties sought the order of the court for its enforcement, that process renders the enforcement of the award a judgment of the court.

In *Minaj systems Ltd v Global Plus Communication Systems Ltd. & 5 Ors*[14] the claimant instituted an action for the breach of the arbitration agreement in the principal contract, on the defendant's application; the court granted an order staying proceedings for 30 days pending the arbitration of the matter.

In *Niger Progress Ltd v NEI Corp*[15] the Supreme Court had recourse to section 5 of the ACA which vests the court with powers and jurisdiction to stay proceedings where there is an arbitration agreement.

In the case *MV Lupex v NOC*[16] the Supreme Court held that it was an abuse of the Court process for the respondent to institute a fresh suit in Nigeria against the appellant for the same dispute which is the subject-matter of an arbitration proceeding in London.

Without prejudice to the provision of section 34 of the ACA which provides that a court shall not intervene in any matter governed by this Act except where so provided in this Act. The jurisdiction of the arbitral tribunal could be challenged where an aggrieved party proves lack of impartiality or independence on the part of the tribunal by contesting the tribunal's holding on the basis of section 8(3)(a) of the ACA which provides inter alia: an arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to his impartiality or independence.

However, section 9(3) of the ACA requires that the aggrieved party exhaust all remedies provided by the arbitration mechanism, failing which he may seek remedies of the court.

(a) Recognition and Enforcement of Foreign Arbitration Awards in Nigeria

Contract law is the only province of the law where parties to a contract have the latitudes to determine the rules which govern the relationship between them inter se; hence parties in an international transaction may consensually incorporate a dispute resolution clause, which provides for mechanism for resolution of disputes emanating from their contractual relationship.

Commercial arbitration is one of such dispute resolution mechanisms to which recourse is often made in both domestic transactions and international transactions. The critical issue however is the enforceability of arbitral awards in view of the consideration that the forum of award may be different from the locale of performance of the contract; thereby engendering problems of enforceability or execution of such awards in the jurisdiction where the contract is to be performed. Thus, the successful party is required to duly and properly enforce the award against the party adverse to him by fulfilling certain statutory requirements in

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the jurisdiction where the award is to be enforced.

Our preoccupation, in this regard is to highlight the attitudes of Nigerian courts regarding the enforcement of foreign arbitral awards; underscore some of the constraints in the procedure of enforcement. Consequently, for our purpose we have elected to dwell on the following procedure for the enforcement of arbitral awards in Nigeria:

(i) By Institution of an Action for the Enforcement of the Award

The Nigerian Supreme Court held in the case, *Toepher Inc of New York v Edokpolor* (trading as John Edokpolor & Sons)[17] that a foreign arbitral award could be enforced in Nigeria by an action instituted in Nigeria by the successful party for the enforcement of the award. The awardee can seek this remedy regardless of whether there exists a reciprocal treatment in the jurisdiction where the award was obtained. The success of the action is however dependent on the proof by the plaintiff of the existence of the arbitration agreement; that the arbitration was duly and properly conducted in accordance with the arbitration agreement; that the award was validly made.

The award may be challenged by the defendant pursuant to resisting its enforcement by faulting the conduct of the arbitration and or challenging the jurisdiction of the arbitral tribunal. The only caveat is that the defendant cannot enter a plea of misconduct or impartiality of the arbitral tribunal to set the award aside. Such a prayer is not tenable in an action to seek enforcement of judgment. It is however tenable in an application to set aside the award.

(ii) Registration Under the Foreign Judgment (Reciprocal Enforcement) Act 1990

To be enforceable in Nigeria the judgment or award must be registered in a Nigerian court which has a coordinate jurisdiction to hear the dispute in accordance with the Foreign Judgment (Reciprocal Enforcement) Act 1990. Under the Act a judgment or award obtained in a foreign country may be enforced in Nigeria within six years of the judgment or award. To be enforceable, the judgment must be final and conclusive as between the parties; a sum of money must be payable under the award, which is not payable in respect of other penalty or fine.

To be registrable and enforceable under the Act, the award must have been made in a jurisdiction which accords reciprocally to Nigeria similar treatment.

Section 6 of the Act provides conditions precedent to setting aside the judgment or award on the application of the defendant. They include the following: where the Act has not been complied with; or the original court had no jurisdiction; or the judgment was obtained by fraud; or that the enforcement would be contrary to public policy; or on grounds of res judicata; or that the rights under the judgment are not vested in the person by whom the application for registration was made.

In addition, the application must meet the requirement that the award must be for the payment of a sum of money and the judgment must have become enforceable as judgment of a court as prescribed by the law of the forum in which the award was made.

(iii) On the Basis of the Arbitration and Conciliation Act 1990

An awardee may proceed to seek the enforcement of an arbitral award or judgment by recourse to provisions of Section 51 of the Arbitration and Conciliation Act, 1990 which provides inter alia:

- An arbitral award shall, irrespective of the country in which it is made be recognised as binding and subject to this section and section 32 of this Act, shall, upon application in writing to the court be

enforced by the court.

- The party relying on an award or applying for its enforcement shall supply
- the duly authenticated original award or a duly certified copy thereof;
- the original arbitration agreement or a duly certified copy thereof.
- Where the award or arbitration agreement is not made in the English language a duly certified transaction thereof into the English language.

Section 52 provides grounds for refusal of recognition and or enforcement, and for setting aside the award which are similar to grounds for setting aside of judgments enumerated above.

Nigeria is one of the high contracting parties of the ICSID Convention that did not reserve arbitration as an option to settle disputes arising from development agreements between TNOCs and sovereign State party. Section 26 of the Nigeria Investment Promotion Commission Act[18] provides for arbitration.

In the same vein, Section 11 (1) and (2) of the Petroleum Act[19] provides that: (1) Where by any provision of this Act or any regulations made there under a question or dispute is to be settled by arbitration, the question or dispute shall be settled in accordance with the law relating to arbitration in the appropriate state and the provision shall be treated as a submission to arbitration for the purposes of the law. (2) In this section "the appropriate state" means the state agreed by all parties to a question or disputes to be appropriate in the circumstances or, if there is no such agreement, the Federal Capital Territory, Abuja.

The Nigeria Oil Pipeline Act[20] also provides that: Every license shall be deemed to include a provision that any question of dispute arising between the President or the Minister and the holder of the license or any matter connected therewith shall if it cannot be resolved by agreement be referred to arbitration. The Arbitration and Conciliation Act 2004[21] has been considered as one of the applicable laws of oil and gas agreements in Nigeria. This Act represent the national arbitration law of Nigeria, in fulfilment of its treaty obligations under the United Nations Convention on International Trade Law (UNCITRAL) and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the Arbitration and Conciliation Act (ACA) incorporated Nigeria's obligations under the convention. Nigeria also signed other regional conventions such as Economic Community of West Africa States Energy Protocol which provides that disputes between the host state and transnational corporations should be referred to the International Centre for Settlement of Investment Disputes (ICSID) provided that the host state and the country of origin of transnational corporation are parties to the ICSID Conventions.

The ACA is however the only legislation in Nigeria which governs both national and international arbitration. Section 48 of the Act provide that the arbitration agreement must relate to a dispute capable of settlement by arbitration under laws of Nigeria. This provision makes it clear that the arbitration agreement must be valid and enforceable under the law to which both parties have chosen. Otherwise, the court may set aside an arbitral award by virtue of Section 48 (a) (ii) of ACA. In addition, ACA provisions exclude certain categories of disputes, for example domestic disputes, anti-trust disputes, nullification of patent rights and competition disputes, all of which are not arbitrable. Therefore, only disputes arising from business activities may be referred to arbitration and they are clearly stated in the definition of commercial disputes and arbitration. In view of the foregoing, it suffices to review some landmark judicial decisions of Nigerian courts relating to arbitration.

The federal high court of Nigeria held in *Federal Inland Revenue Service v Nigeria National Petroleum Corporation & 2 ors*[22] that an arbitral award under a joint operating agreement between the host state (Nigeria) and transnational corporations was voidable on the ground that the main disputes of arbitration which include application and interpretation of Company Income Tax Act, Petroleum Profit Tax Act, Education Tax Act and Deep Offshore Act are not arbitrable and held that it was a tax dispute and that the arbitral tribunal had no jurisdiction to rule on the case. The court then declared that a tax dispute was

government's function which must be executed exclusively by the Federal Inland Revenue Service. The decision which emanated from this case indicated that tax related disputes are not arbitrable under ACA. In contradistinction to the holding in that case, the courts in *Esso Petroleum and Production Nigeria Limited & Anor v NNPC*[23] and *Shell Nigeria Exploration and Production &Ors v FIRS & Anor*[24] held that disputes arising out of the parties' rights and contractual obligations were contractual disputes not tax related disputes, therefore arbitrable.

The Esso case involved Production Sharing Agreement (PSA) concluded between the transnational corporations (Esso Exploration and Production Limited, Shell Exploration and Production Limited) and the host state through its national oil company (Nigeria National Petroleum Corporation) to explore oil from an oilfield. The PSA stipulated how the petroleum produced from the oil field was to be allocated. It further stated that oil tax and royalty tax was to be lifted by the host state and by virtue of the contract, transnational corporation was to lift the cost oil and both parties were responsible for the lifting of profit oil according to the lifting allocation unilaterally prepared by the transnational corporations within the contract.

In addition, the transnational corporation also had the exclusive right under the PSA to prepare tax return and pass it on to the host state for submission to the Federal Inland Revenue Service. But despite the provision under the PSC, the host state was lifting unilaterally more tranches of oil and tax oil than it was allocated by the transnational corporation in the contract. The act was considered to be a fundamental breach of contract and transnational corporation took the matter to arbitration for declaratory order that there had been a breach. They sought an order to stop the host state from further unlawful over-lifting of oil cargoes and from submitting further tax returns which are made-up and contradicted the one that was prepared by the transnational corporation. In addition, they further demanded that the host state should be ordered to refund the over lifted crude oil. The Federal Inland Revenue Service (FIRS) challenged the jurisdiction of arbitration and argued that the case was tax related matters which were within the Nigerian court's jurisdiction. FIRS further applied for court declaration that a judgment of the award by the arbitral tribunal would have negative impact on its ability to collect tax and therefore sought an order to exclude tax related issues from arbitration agreement.

The transnational corporations however argued that the Federal Inland Revenue Service was not a party to the underlined exploration agreement and that the arbitration action was initiated against the transnational corporation not against FIRS and therefore had no right or capacity to intervene in the matter (locus standi). The trial court, the Nigerian federal high court decided the case in favour of FIRS concluding that the case was a tax related matter therefore was not arbitrable. But the transnational corporations appealed against the decision. At the court of appeal, they argued that the judge had erred and contended that the arbitration claim was a contractual matter not a tax related case. They pointed out that the PSA stipulated how produced oil was to be shared between the parties and that the arbitration was initiated against the host state because of its breach of PSA, by unilaterally lifting extra cargoes of produced oil than it was supposed to lift under the initial lifting allocation prepared by the transnational corporations. The host state argued that it was a tax related matter.

The filing of Petroleum Profit Tax returns (PPT) which was required under the Nigeria Petroleum Profit Tax Act 1990 Section 3 (1) (a) provides that: "… the due administration of this Act and the tax shall be under the care and management of the board which may do all such as may be deemed necessary and expedient for the assessment and collection of the tax and shall account for all amounts so collected in a manner to be prescribed by the Minister." It was further submitted that the transnational corporations' claim against the host state was mere argument that they have been over taxed in relation to royalty and tax oil which was a statutory duty and if the case is decided in their favour, it would affect the host state's statutory duty and contractual obligation under the PSA to file correct Petroleum Profit Tax returns as required by law. The court of appeal held that the dispute in this case involved contractual obligations of the parties and

the court noted that there had been a breach of contract. Additionally, the host state through its representative, NNPC had violated the agreement provisions by unilaterally preparing the Petroleum Profit Tax returns contrary to the provision of PSA, so it cannot be argued that the dispute was only a tax dispute. Therefore, the primary issue before the arbitral tribunal was to establish the breach of the host state's obligations under PSA.

The court also pointed out that some of the disputes referred to arbitral tribunal for reliefs relate to tax disputes and therefore upheld the decision in *ESSO* above that some of the claims raised tax issues and therefore, were not arbitrable. The court further explained that the transnational corporations sought an order that would debar the host state from making tax returns and such relief engages the rights and discretionary power of Federal Inland Revenue Service to fulfil its duties and obligations vested by the country's Petroleum Profit Tax Act stated above. The court in that holding made a distinction without a difference between tax related matters and contractual obligations and ruling that matters relating to contractual obligations were arbitrable. That distinction of course flounders in view of the fact that tax obligations of the TNOC are also contractual and deemed inarbitrable under the act. It is therefore axiomatic as held by the court that disputes arising out of petroleum exploration agreements such as PSA in this case can be referred to arbitration, a position which in fact the court in *Esso v NNPC and SNEPCO v FIRS*[25] did not dispute, and where the court ruled that the disputes were tax related matters and were not arbitrable. Besides it was made known from this case that tax disputes are not arbitrable albeit that the present case was not entirely a tax dispute, it involved contractual obligations under the contract, as a result, the court was able to distinguish it but it does not distract from the statutory requirement that tax related disputes were not arbitrable. In *Statoil (Nig) Ltd v Nigerian Petroleum Corporation*,[26] the court of Appeal ruled that jurisdiction of arbitration depends on the provision under the underlining agreement between the parties and their consent.

The court highlighted in this case that it does not matter if disputes are related to tax matters, as far as the parties agreed to refer the case to arbitration the parties' wishes should be honoured and respected. The position of the court in that case was also upheld in *Nigeria Agip Exploration Ltd v NNPC & Anor*.[27] In this case the appellant (Agip) and respondents are parties to an exploration contract, Production Sharing Agreement 1993. The agreement contained an oil sharing formula and further provided that disputes relating to the interpretation or performance of the contracts should be referred to arbitration according to the provision of ACA.

Subsequently when disputes arose, the arbitration clause under the agreement was invoked with the arbitral tribunal asked to interpret the performance under the PSC and accordingly, the arbitral tribunal ruled in favour of the appellant and issued partial award on the issue of liability. On the issue of monetary reliefs, the arbitral tribunal requested for an updated and revised damages in order to issue final award. However, the respondent was not pleased with the partial award and was concerned about the likely subsequent final award. The respondent tried to block the award and applied for an injunction to stay further proceedings in relation to the arbitration and an order that will stop arbitral tribunal from taking any steps or obtaining information that will enable them to issue final award. However, the court declined to grant an injunction relying on the provisions of section 34 of the Arbitration and Conciliation Act and argued that proceedings of arbitral tribunal should not be blocked by a court order.

That holding actually lack sagacity and fails to acknowledge that the state party in that contract, that is Nigeria has the leeway to revise and intervene in the contract when the terms are not favourable to its cooperate existence as a Sovereign and so can use its coercive powers clausula rebus sic stantibus to revise the contract in part or outright abrogation. PIAs as earlier adumbrated are not assimilated to the run of the mill contract where parties relate at parity, as a genre of Economic Development Agreements, the state party to a Petroleum International Agreement towers above the private entity, that is the TNOC. Furthermore,

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pacta sunct servanda upon which the court seems to have based its holding does not apply absolutely in international law. It is in fact doubtful whether PIA related dispute can be referred to arbitration, in view of the fact that they are Public Contracts in contradistinction to Private Contracts.

Thus the Nigerian court of appeal held in *Statoil (Nigeria) Limited & Anor v Federal Inland Revenue Service & Anor*[28] that a third party had right to challenge an arbitration award. It is obvious that FIRS was not a party to the exploration agreement which contained arbitration clauses but successfully frustrated arbitration proceedings. This case concerned dispute over tax payment concerning oil lifted under the exploration agreement (Production Sharing Agreement 1993). NNPC was initially granted an injunction against the arbitration proceedings since tax disputes cannot be referred to arbitration under Nigeria law. However, the injunction was overturned by the appeal court in Lagos State. But the Federal Inland Revenue Service ('FIRS') was not happy with the court of appeal decision and decided to challenge the validity of arbitration agreement between the NNPC, Texaco and Statoil. In addition, FIRS was not a party to the arbitration agreement but claimed that the arbitration was initiated to avoid the proper calculation of taxes accruable to its account.

The court of appeal in Abuja accepted FIRS argument and recognised that FIRS had right (locus standi) to challenge the arbitration agreement. The court argued further that if the transnational corporations were successful with arbitration proceedings, the FIRS would be affected and lose income with the arbitral award. The foregoing holding of the Nigerian court of appeal Abuja is the locus classicus regarding the amplitude and very wide latitude of the coercive powers of the state under PIAs and thus quixotic for TNOCs to challenge it by means of arbitration. The inconsistencies in the jurisprudence evinced in some of the holdings betrays the tendency of the courts in Nigeria to cross the line between their constitutional role of applying the law and legislating the law, which is without their competence to so do. The power to make laws reside in the legislature and those holdings contrary to the holding in the *Statoil* are clear judicial usurpation of legislative powers. No sovereign will concede its statutory and constitutional powers to collect tax within its territorial sovereignty to a private entity, it is a derogation of sovereignty.

(iv) Enforcement under the New York Convention 1958

As a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Award, 1958, and on account of its domestication by virtue of Section 54 of the Arbitration and Conciliation Act 1990; foreign judgments and or arbitral awards are enforceable in Nigeria. Consequently, an awardee seeking the enforcement of an arbitral award may have recourse to the Act pursuant to the enforcement of the award.

To be recognised and enforceable under the convention and the reception act, the award must have been made in a jurisdiction which reciprocally recognises and enforces awards made by Nigerian tribunals.

(v) Enforcement under the International Centre for Settlement of Investment Disputes (ICSID)

The ICSID convention was ratified by Nigeria on 23 August, 1965. The convention was subsequently received and domesticated as the International Centre for Settlement of Investment Dispute (Enforcement of Awards) Act. [29]

The Act provides amongst other things that an ICSID award shall be enforceable in Nigeria as if it were an award contained in a final judgment of the supreme court of the federation of Nigeria, provided that a copy of the award duly certified by the Secretary- General of the centre is duly filed in the supreme court by the party seeking its recognition and enforcement.

MUNICIPAL LAW OF THE CONTRACTING STATE AND ARBITRATION

That granted, the fact that certain laws other than the laws of the contracting state and the rules of private international law may impinge considerably on the PIA does not detract from the consideration that the law of the contracting state is, in principle, the governing law of contracts which performance is envisaged to occur in the sphere of operation of its laws that is, its territory. As a matter of fact, it is the national law, which provides the rules that animates the contract and enforces the rights and duties provided therein.

State practice in the Middle East and Nigeria requires that a law approve the grant of a concession for the exploitation of natural resources or a contract for a public loan. That policy is rationalised by the consideration that the subject-matter of the contract is an inalienable resource of the state, which expropriation can only be at its behest. It stipulates the validity of the contract in form and substance, what it leaves to the design of the other party are the conditions which are incidental to the contracts, albeit to be negotiated and secured consensually by the parties. The national law also regulates those domestic relations, which are crucial to the performance of the contract, labour relationship, safety, environment, custom formalities, currency regulation, repatriation of profits and so forth.

Article 43 of the Iranian offshore concessions 1965 provides:

The provisions of the Mining Act of 1957 shall not be applicable to this agreement, and any other laws and regulations which may be wholly or partly inconsistent with the provisions of this agreement shall to the extent of any such inconsistency be of no effect in respect of the provisions of this agreement.

In the same vein, Article 37(1) of the concession granted by the U.A.R. to Phillips (1963) stipulates inter alia that:

The EGPC and Phillips shall be bound by law No. 66 of 1953, as amended by law No. 86 of 1956, and by the executive regulations thereof to the extent that said law and regulations are not contrary to or inconsistent with the provisions of this agreement.

The U.A.R. concessions of 1963 and 1964 granted to Pan American also embodied such reservations regarding the applicability of the national law. The foregoing consideration pertains to conflicts of the conditions of the agreement with a historical legislation, in which case the terms of the agreement takes precedence over and above the legislation. That practice most probably is founded on the principle, lex posterior derogat legi apriori, the latter legislation takes precedence over a prior legislation. The foregoing may present no problem. The crucial issue will however, arise where the reservation envisages the ouster of a prospective legislation as distinguished from an enacted legislation. The reservations in such cases are anticipatory and are fraught with the possibility of being superfluous, for international law is amenable to the consideration that the State can elect to repudiate the contract, where the circumstances have changed considerably as to make the terms of the contract onerous and disparaging of the public interest.[30]

The lex contractus belongs in a pristine world order wherein the European powers engaged their vassals in an unequal relationship, which cannot be said to be contractual. In the strict sense, such relations lacked fundamental elements of validity. The so-called “possessions” lacked legal capacity to contract, because they were still at their most rudimentary pedestal of evolution when these contracts were concluded. These early concessions were nothing but contracts of subjugation, which provided that the government shall not modify or abrogate the concession and that no alteration shall be made therein except by mutual consent of the parties. These contracts were void ab initio. Such stipulations were embodied in AIOC’s concession of 1933; KOCs concession of 1934; the consortium’s agreement of 1954, Iran’s offshore agreement of 1965 and Kuwait’s concession to Arabian Oil Company of 1958. The Libyan Petroleum Law among other things

stipulates in Article 24 that no regulation issued for the implementation of the law shall be contrary to, or inconsistent with, the provisions of this law or adversely affect the contractual rights expressly granted under any permit or concession.

Article 16 of the Libyan concessions also stipulates that the contractual rights expressly created by the concession shall not be altered except by mutual consent of the parties thereto.

The foregoing stabilisation clauses and statutes are aimed at stabilising expectations. They have, as experience show, not provided adequate insulation against supervening legislation, which is the exercise of the sovereign will of the sovereign state. The foregoing brings us to the grey zone of the law of nations. What international law seeks to do in such circumstances is to steer a course between the straits.

On the one hand, it recognises the sovereignty of the state over the natural resources within its territory on the other it acknowledges the need to allow equity come to play in such a way as to attenuate the untoward incidence of the legislation on the private entity and or corporation.

A review of cases pertaining to conflict between legislation and terms of prior concession in the Middle East will suffice. Consequent upon its disillusionment with the fiscal package of the AIOC concession of 1933, Iran promulgated the Oil Nationalisation Act of 1951, which effectively led to the expropriation of AIOC's assets and installations, thus abrogating the concession. In the resultant furore generated by that legislation, AIOC sought to maintain the sanctity of its concession. It contested the measure taken by Iran and maintained that it cannot be altered or nullified by subsequent legislation and sought arbitration of the dispute in accordance with the provisions of the concession.

Upon Iran's refusal to arbitrate the dispute, the British government took up the espousal of AIOC'c cause. It formally caused the International Court of Justice to be seised of the case and brought an action against the government of Iran. The British government asked for a declaration that Iran was under a duty to submit the dispute to arbitration in accordance with the terms of the concession and alternatively seek various other declarations and remedies.

The court, however, found that it was not within its competence and jurisdiction to be seised of the case. Great Britain, however, sought a political solution to the issue it failed to secure a juridical solution, by mobilising other western powers to impose sanction against Iranian oil. The embargo was very effective that it paralysed the Iranian economy. Iran, subsequently, prostrate from the effect of the embargo, capitulated and agreed to the settlement of the dispute by the agreement reached in 1954 between NIOC and a consortium of transnational oil companies.[31]

In *Texaco v Libya,**[32]* it was held, the recognition by international law of the right to nationalise is not sufficient ground to empower a state to disregard its commitments because the same law recognises the power of the State to commit itself internationally, especially by accepting the inclusion of stabilisation clauses in a contract entered into with a foreign private company.

In contrast to the *Texaco v Libya case*, in the *Aminoil case*, the tribunal arrived at the conclusion that the "take over" of Aminoil's enterprises was not in 1977 inconsistent with the contract of concession, provided always that the nationalisation did not possess any confiscatory character.[33]

The grant in 1954 of a right of priority for transportation by tankers of the oil produced in Saudi Arabia to Mr. Onassis by the Saudi government generated a furore between it and ARAMCO. ARAMCO objected to the Onassis concession on the ground that it was in conflict with ARAMCO's concession.[34]

The Arbitrator of the dispute between the Sheik of Abu Dhabi and Petroleum Development Company

(1951) in determining the proper law of the contract stated:

What is the proper law applicable in construing this contract? This is a contract made in Abu Dhabi, and wholly to be performed in that country. If any municipal system of law were applicable, it would prima facie be that of Abu Dhabi. But no such law can reasonably be said to exist… and there is not in this region any settled body of legal principles applicable to the construction of modern commercial instruments.

In the arbitration between ARAMCO and the government of Saudi Arabia, the arbitration tribunal observed that the regime of mining concessions and consequently also of oil concessions has remained embryonic in Moslem law.[35]

In the arbitration between the ruler of Qatar and International Marine Oil Company, (1953) the Arbitrator came to the conclusion that the law of Qatar was applicable, after pointing out that Islamic law, being the law administered in Qatar, was appropriate law. He observed that there is no settled body of legal principles in Qatar applicable to the construction of modern commercial instruments and that the law does not contain any principle that would be sufficient to interpret this particular contract.[36]

CONCLUSIONS AND RECOMMENDATIONS

The paper proved that transnational investments involving state entities by their nature are inarbitrable because private entities such as transnational corporations have no legal capacity at international law.

The paper demonstrated that the provision for 'international arbitration' in an international development agreement by no means confer international status on the agreement. In the same vein the inclusion of an, 'internationalisation clause' in no way bring the agreement under the purview of international law.

The paper proved that within the realm of transnational investment involving state entities and transnational corporations, the principle pacta sunt servanda cannot operate in an absolute sense, not only because it is not applied absolutely in international law, but also because most investment contracts operate in a field which falls within the domestic sovereignty of the state; hence there exists greater scope for applying the doctrine of changed circumstances, clausula rebus sic stantibus in state contracts, particularly where economic conditions change and welfare of the people requires that the contract be rescinded or changed substantially.

Without prejudice to the freedom of the parties to choose the law governing the relationship between them inter se; the national law of the contracting state is still relevant and enforcement of arbitration awards can be effectuated only within its ambit.

The paper underscored the imperative of revision of investor-state dispute settlement mechanisms embodied in most investment treaties which provide rights to foreign investors to seek redress for damages arising out of alleged breaches by host governments of investment-related obligations. The system of investment dispute settlement has borrowed its main concepts and doctrines from the system of private commercial arbitration despite the fact that investor-state disputes often raise public interest issues which are usually absent from international commercial arbitration. Thus there is a need for investor-state arbitration to reconcile public international law doctrines with the private legal principles of contract law. By highlighting the hybrid nature of rights under state contract the paper sought to unravel new questions and problems regarding the validity of awards and enforceability issues.

The practice of placing state entities and foreign private trans-national corporations at parity and acting essentially as equals in their capacity as parties to a private contract must be reviewed and curtailed. We submit contrary to the foregoing that contracts with state entities should be analysed under an administrative

or public contracts doctrine.

FOOTNOTES

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[1] *Amco v Indonesia, Resubmitted* Case: Award, 31 May 1990, ICSID Reports, Vol. 1, 569, at 580 no. 40.

[2] *SPP (me) v Arab Republic of Egypt* Case: Award of 20 May 1992, ICSID Reports, Vol. 3, 189 Dissenting opinion at 249-355.

[3] See Charles Leben 'Hans Kelsen and the Advancement of International Law' [2004] European Journal of International Law, available at <http://www.ejil.org/journal/vol.9/No.2/art1-02.html#TopofpPage> accessed 21 September 2022

[4] Nicholas Miranda 'Concession Agreements: From Private Contract to Public Policy' (2007) 117 Yale LJ 510; *Anglo-Iranian Oil Co* Case**,** [1952] I.C.J. Rep 93; *Aminoil* Case (1983) 21 ILM; Bertrand Montembault 'The Stabilization of State Contracts Using the Example of Oil Contracts: A Return of the Gods of Olympia?' (2003) 6 International Business Law Journal 593-643

[5] (1985) 23 ILM 1048.

[6] (1985) 24 ILM**,** 1040.

[7] ICSID Case No. ARB/81/2

[8] ICSID Case No. ARB/81/1.

[9] See the Convention on the Settlement of Investment Disputes Between States and Nationals of other States, March 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159; The ICSID Convention, along with the text of the World Bank Executive Directors Report thereon is reproduced at (1965) 4 ILM 524.

[10].Cap A18 Laws of the Federation of Nigeria, 2004.

[11].Ibid Section 1.

[12] (2005) 1 NWLR Part 940577

[13] Unreported suit No. FHC/L/CS/476/2008.

[14] Unreported Suit No. LD/275/2008.

[15]. (1989) 3 NWLR (Part 107) 68

[16]. (2003) 15 NWLR (Part 844) 469

[17].(1965) All N.L.R. 307

[18] CAP N117 LFN 2004

[19] CAP P10 LFN 2004

[20] CAP 07 LFN 2004

[21] CAP A18 LFN 2004

[22] (2012) 6 TLRN 87 at 109.

[23] Unreported judgement in Appeal No CA/A/507/2012 delivered on 22nd July, 2016.

[24] *Shell Nigeria Exploration and Production & Ors v FIRS & Anor* No. CA/A/507/2012

[25] Ibid.

[26] *Statoil (Nig) Ltd v Nigerian Petroleum Corporation* (2013) 14 NWLR (Pt. 1373) 1 at 29

[27] *Nigerian Agip Exploration Ltd v Nigerian National Petroleum Corporation & 2 Others* (Suit No. CA/A/628/2011), decided by the Court of Appeal, Abuja Division, on 25 February 2014

[28] *Statoil (Nigeria) Limited & Anor v Federal Inland Revenue Service 7 Anor* (2014) LPELR-23144 (CA).

[29] Cap 19 Laws of the Federation of Nigeria 1990.[30] (1981) 75 AJIL 437; (1975) 24 ICLQ 542.

[31] *Anglo-Iranian Oil Co, United Kingdom v Iran* [1952] ICJ Rep 93**;** United Nations Conference on Trade and Development *State Contracts (UNCTAD Series on Issues in International Investment Agreement*) (2004) 3-45

[32] *Texaco v Libya* Int'l Arbitral Award, 104 J. Droit Int'l 350 (1977), translated in 17 I.L.M. 1 (1978)

[33]*Aminoil* Case (1983) 21 ILM 976.

[34] *Saudi Arabia v Arabian American Oil Company (Aramco***)** ARAMCO-Award, ILR 1963, at 117 et seq

[35] *Aramco* Case (1957) 27 ILR 114.

[36] *Ruler of Qatar v International Marine Oil Company Ltd* (1957) 23 ILR 116.