



Reconstruction

Bend or break

How Shell used an international investment treaty to browbeat Nigeria into a lucrative deal on OPL 245 oil field

April 2019

Executive summary

- ❑ An investment treaty between the Netherlands and Nigeria enabled Shell to put pressure on the Nigerian government to acquire a large offshore oil field called OPL 245 under extremely favourable conditions. Dutch and Italian prosecutors suspect the deal involved bribes.
- ❑ The company's internal emails show that Shell actively used its investment claim to increase pressure to come to a favourable agreement: Shell was expecting no real gains from winning the arbitration case, but gambled on the fact that Nigeria, afraid of an "embarrassing outcome", could be persuaded to come to a favourable agreement.
- ❑ Shell's CEO at the time, Jeroen van der Veer, used the threat of an investment claim in direct communications with the Nigerian president. To keep the pressure on until the very last moment, Shell waited until the deal on OPL 245 was signed before retracting its investment claim.
- ❑ The OPL 245 case demonstrates how, in disputes, Shell is not above making opportunistic use of its complex corporate structure. In various court cases where Shell was being held liable for corporate abuses in Nigeria, Shell was quick to distance itself from its Nigerian subsidiaries. By contrast, in the OPL 245 case, Shell chose to expressly highlight these links in order to secure its corporate interests.
- ❑ Calculated projections indicate that the terms of the agreement on the exploitation of OPL 245 that was reached under the pressure of the investment claim are costing Nigeria billions in lost oil tax income. 

Introduction

The Netherlands maintains an extensive network of bilateral investment treaties (BITs) with third countries. The objective of these treaties is to ensure investment protection for its multinational companies. Should their investments experience negative effects as a result of a host country's regulations, these treaties give transnational corporations the option to take their case before an international arbitration tribunal. However, Shell decided to use the option of arbitration in the BIT between the Netherlands and Nigeria to a different purpose: to put pressure on the Nigerian government in order to secure the rights over a lucrative oil field in this African country. In the event, Nigeria agreed to settle the case on exceedingly favourable terms for Shell. In 2011, Shell and its Italian partner ENI jointly acquired the concession for OPL 245, an exceedingly rich deep-sea oil field, for a payment of 1.3 billion dollars to the Nigerian government.

The Italian Public Prosecutor's Office has since accused Shell and ENI of involvement in corruption in this case,¹ maintaining that part of this amount was siphoned off as bribes to Nigerian government officials and intermediaries. In September 2018, two suspects in the corruption case were convicted by the court in Milan.² In Italy, the case against Shell was initiated by the organisations Corner House, Global Witness, HEDA and Re:Common. In the Netherlands, charges were also brought against Shell, the company's current CEO Ben van Beurden and three former Shell directors,³ over this controversial deal directly enabled by Dutch investment policy.⁴

The Dutch Public Prosecution Service (OM) will likely prosecute the case involving the Shell/ENI deal with the Nigerian government on OPL 245, but it remains to be seen whether the case will be dealt with in open court, or whether it will come to an out-of-court settlement.⁵ The four organisations who brought the case oppose a settlement, as it would allow the culpable managers to go unpunished. According to these organisations, any financial settlement would pale in comparison with the profits Shell and ENI gained from the oil field. They argue that Shell should, in any event, be compelled to return the oil field to the Nigerian state in any event.⁶

Until now, little was known about how, between 2007 and 2011, Shell used a treaty-based investment claim to exert pressure on the Nigerian government to obtain the concession for OPL245. With reference to internal Shell emails and documents, this report provides a reconstruction of the train of events. It demonstrates that the company's objective was not to win the case that it brought before the International Centre for Settlement of Investment Disputes (ICSID) - an international arbitration institution based in Washington - based on the Netherlands-Nigeria BIT of 1992. Little advantage could be expected from that. Rather, the correspondence shows that Shell was gambling on Nigeria being afraid of an "embarrassing outcome" so that it would return the rights to OPL 245 to Shell at its own initiative. The reconstruction also shows how Shell used its relationship with its Nigerian subsidiary in an opportunistic way to influence legal processes to its advantage. In addition, the report shows how Shell managed to secure substantial fiscal advantages in the 2011 deal, involving a potential loss for the Nigerian treasury of billions of dollars in oil revenues.

Finally, the report shows how Shell and ENI jointly acquired an extremely rich oil field, nearly 2,000 metres deep in the Gulf of Guinea. It is important to stress that extracting the large supply of oil it contains directly contravenes the goals and ambitions of the Paris Climate Agreement. The International Energy Agency concluded at the end of last year that no new large fossil-fuel projects can be started if we hope to limit the earth's temperature rise to under 2 degrees.⁷

OPL 245: Rich pickings

OPL 245 is considered to be one of the richest oil fields in Nigeria. It is also expected to contain substantial natural gas reserves. In 1998, the Nigerian Minister of Petroleum at the time, Dan Etete, awarded the exploration rights to OPL 245 to Malabu Oil & Gas Ltd, a Nigerian energy company directly under his control. Malabu was not established until five days before, could not boast any experience in oil exploration, held no assets whatsoever and could raise no more than a tenth of the required down payment of 20 million dollars. Despite the high corruption risk, Shell Nigeria Ultra Deep (SNUD) joined the project as a technical

partner to Malabu in 2001. The company maintains it was unaware of the close ties between Malabu and Etete. However, internal emails exchanged at the time prove differently.⁸ In that same year, the Nigerian government, after a change in leadership, took the concession away from Malabu. The democratic government reassigned many contracts which had been agreed with companies in the 1990s under the military regime. Two years later, in 2003, SNUD acquired a so-called Production Sharing Contract (PSC) from the government for exploitation of the oil field. In 2006, the Malabu company recovered OPL 245 from the Nigerian government after initiating legal proceedings over the loss of its concession⁹, abruptly leaving Shell with no share at all in the exploitation of this lucrative oil field.

Investment arbitration as a pressure tool for corporations

World-wide, there are over 3000 investment agreements and trade agreements comprising investment chapters.¹⁰ The majority of these treaties enshrine extensive property rights that shield investors from government interventions by the host country that impact negatively on their corporate activities, assets and (expected) profits. Companies can claim these rights under the investor-to-state dispute settlement (ISDS) mechanism that is a standard feature in most BITs. This mechanism offers foreign investors the opportunity to submit a claim for damages against the government of the host country to an international arbitration tribunal, circumventing the national courts.

The investment tribunal – generally comprised of three private lawyers appointed by the investor and the state – then assesses whether the disputed government measure conflicts with the protections enshrined in the treaty invoked by the investor. The tribunal makes no judgement on the legitimacy of contested measures, and cannot compel a government to revoke any measures taken. The tribunal can award the injured investor financial compensation for any damages suffered.¹¹ Claims and compensation awards can add up to billions of dollars and can weigh heavily on government budgets, in particular in developing countries.¹² This can make governments reluctant to bring in new legislative proposals, in order to avoid claims. Foreign investors can use the threat of ISDS claims to ‘persuade’ governments to water down or even retract contested measures. In this way, companies can use BITs as an instrument to influence public policy in the countries in which they operate.¹³

It can be complicated to prove changes in policies resulting directly from an ISDS claim. However, there are growing indications that governments are sensitive to the threat of ISDS.¹⁴ Multinationals and their legal advisers are all too aware of the power that ISDS emanates and are no longer using this mechanism as a “last resort” when all other options to assert their rights are exhausted.¹⁵ On the contrary, corporations view ISDS as a ‘deterrent’ to stop undesirable policies in their tracks.¹⁶ In the event of a dispute, filing an ISDS claim can also increase the pressure to reach a settlement with the government concerned¹⁷, or act as a trump card that companies can use to obtain more favorable conditions or exemptions for their investments.¹⁸ This makes ISDS a powerful weapon that internationally operating companies can add to their already extensive arsenal of lobbying instruments.

CEO Jeroen van der Veer puts pressure on Nigerian president

In a letter dated 28 January 2007, Shell’s CEO at the time, Jeroen van der Veer, sought to pressurise Olusegun Obasanjo, the then president of Nigeria. Van der Veer warned the president that Shell was considering taking legal action against his country over the revocation of the OPL 245 contract, based on the Bilateral Investment Treaties (BITs) of Nigeria with the Netherlands and the UK. Van der Veer subtly underscored Shell’s efforts to improve the international image of Nigeria.¹⁹

In response to this unprecedented development, Shell has taken the precautionary measure of instructing its counsel to take all necessary legal steps to defend and protect its significant investment interest in the Block, while the various issues raised by this development are examined.

In the light of the foregoing, I humbly and respectfully solicit the urgent intervention of Your Excellency to preserve the sanctity of our contract with Government and avert an unnecessary legal contest over this.

Mr President, I am getting clear advice from my lawyers that there is no legal justification for not fulfilling Government's contractual obligations to Shell in respect of the Block in the manner proposed. If such a course of action were taken, I understand that the Government would not only be in breach of Shell's subsisting PSC rights, but also of its rights under applicable International investment protection laws potentially leading to the enforcement of the relevant Bilateral Investment Treaties to which the Federal Republic of Nigeria, the Netherlands and the United Kingdom are signatories.

Your Excellency, as you are well aware, Shell has a strong and long standing commitment to Nigeria. I should also stress that I and my Executive Director colleagues have in recent times been pleased to champion the case for Nigeria strongly with governments and opinion leaders in Europe and the US. I most sincerely hope that the spirit of trust and friendship in this relationship can remain solid and not be undermined by an unwanted dispute.

Of course, Malcolm Brinded and myself are always available to discuss this matter face to face at your convenience.

Yours respectfully,

On 26 April 2007, law firm Clifford Chance LLP submitted an official request for arbitration to the International Centre for Settlement of Investment Disputes (ICSID) in Washington, on behalf of Shell's Nigerian subsidiary SNUD Ltd.²⁰ This company, which, in 2003, had been granted the Production Sharing Contract for the exploitation of OPL 245, is 99.99 per cent owned by Shell Petroleum NV, in the Netherlands. According to Clifford Chance LLP, this entitled SNUD to the protections enshrined in the BIT between the Netherlands and Nigeria.

- 3.3.3 The Claimant qualifies as a national of the other Contracting Party pursuant to the Netherlands-Nigeria BIT. The Claimant is, as to 99.99%, owned by Shell Petroleum NV, a company incorporated in the Netherlands (Exhibit 3). Article 1(b)(iii) of the Netherlands-Nigeria BIT includes within the definition of a "national" of either Contracting Party: "legal persons not constituted under the law of that Contracting Party, but controlled, directly or indirectly, by ... legal persons [constituted under the law of that Contracting Party]".

According to the law firm, the revocation of SNUD’s exploitation rights should be considered an “expropriation”. Clifford Chance LLP argued in their petition that Nigeria was in violation of as many as four articles of the investment treaty between Nigeria and the Netherlands, i.e. articles 6, 3(1), 3(2) and 3(4).

5.3 Breaches of the Netherlands-Nigeria BIT

5.3.1 The actions on the part of the Federal Government of Nigeria amount to, or have an effect equivalent to, expropriation. Such expropriation does not fall within the ambit of any of the exceptions recognised in the Netherlands-Nigeria BIT. The apparent offer of: “a mutually acceptable substitute of comparable potential against the \$210 million, which Shell has already paid ... as signature Bonus” (letter: Minister of State, Petroleum Resources to SNUD dated 1 December 2006), subsequently reformulated as: “[the substitution of] another block of comparative prospectivity with OPL 245” (letter: Technical Assistant to the Honourable Minister of State for Petroleum Resources addressed to Shell Petroleum Development Company, dated 18 December 2006) - both in Exhibit 7 hereto - does not constitute an offer of compensation consistent with the requirements of Article 6(i) of the Netherlands-Nigeria BIT in any event.

It is significant that Clifford Chance LLP demanded that Nigeria return the exploitation rights to SNUD. Should Nigeria fail to do so, the country should be required to pay compensation. Of course it would be up to the arbitral tribunal to determine the exact amount, but Clifford Chance LLP pointed out that SNUD had already committed 460 million dollars to the project.²¹ However, the company ultimately wanted 1.8 billion dollars in compensation.²² This figure matched the estimated total value of the OPL 245 block in December 2006, as calculated by SNUD in a study undertaken before the arbitration case was started.²³ Another source even refers to an amount of over 2 billion dollars.²⁴

7. RELIEF SOUGHT

7.1 The Claimant seeks the following relief:

- 7.1.1 A declaration that the Respondent has breached the Netherlands-Nigeria BIT;
- 7.1.2 An award ordering the Federal Government of Nigeria to revoke, cancel and unconditionally withdraw its purported and wrongful reallocation of any and all rights in respect of OPL 245 to Malabu and to fully reinstate and thereafter honour in full the Claimant's rights in respect of OPL 245 with immediate effect;
- 7.1.3 A monetary award for damages suffered as a consequence of any and all breaches of the Netherlands-Nigeria BIT in an amount to be established by the Tribunal, to be increased with interest on all such amounts from the date that the Federal Republic of Nigeria incurred responsibility under international law until payment in full;

Nigeria's fear of losing

A meeting between a Shell delegation and a Nigerian minister in early 2008 revealed how much discomfiture the arbitration case was causing the Nigerian government. The minister, who remains unnamed in the report of the conversation, said that the procedure was embarrassing for Nigeria.²⁵

On a leaving note he was quite frank by saying that the arbitration causes embarrassment for the government and that certainly the government has issued contradictory letters on OPL 245 in the past.

The arbitration case was suspended for a time to allow for negotiations. But when talks stalled in 2008, Shell resumed procedures at ICSID, with the intent of forcing a breakthrough in the lingering dispute over OPL 245.²⁶

245 looks like it will run for a while yet, perhaps the arbitration may kick in some actions?

In the spring of 2010, things began to move. In an internal email, Shell manager Ian Craig wrote to colleagues about the willingness of Nigeria (referred to as FGN in the emails) to settle the case, hinting at temporary suspension of the pending ICSID case to see whether the Nigerian government is prepared to settle.²⁷

Following initial engagements with the parties there appears to be willingness to settle this prior to the arbitration award. This can be expected up to 90 days (end of June) after the final case hearing takes place which is planned to commence on March 29th and last a week.

The appearance of a third party to buy a share of Malabu's purported participation in the block and FGN willingness to avoid a potential embarrassing arbitration outcome have increased the probability of a settlement. Settlement would be a 50/50 license split between SNUD and Malabu with Malabu reimbursing Shell their 50% share of past costs incurred to date including their share of the signature bonus. In this settlement Shell swaps 50% of its Contractor rights for a 50% licence holder rights (value neutral at RV) and receives some US\$300 mln.

The BIT timeline is tight for Settlement execution. Although the strategy is to negotiate the Settlement agreement in parallel to the arbitration, the possibility of suspending the proceedings may be considered if there are clear indications from FGN that a settlement as per proposed mandate terms is achievable. This suspension should be for a limited period of time in order to execute the settlement. Otherwise BIT should continue its course.

Indeed, Shell expected Nigeria to settle, not least because of fears of losing the arbitration case.²⁸

FGN, represented by Minister of State Petroleum (MoSP) is keen to settle, driven by specific Nigerian political considerations as well avoiding an unfavourable outcome of Netherlands-Nigeria Bilateral Investment Treaty arbitration (the final arbitration hearing is planned to commence on 29th March 2010 and a final irrevocable decision by the arbitration court is expected by mid-year). Malabu is also amenable to settlement (accepts the 50:50 construct although at this point not the payment of past costs to SNUD) having entered into discussions with a 3rd party to divest a major part of (post settlement) interest in OPL 245. We expect that Malabu intends to keep a minor interest following the divestment.

In late March 2010, a final hearing in the ICSID arbitration case took place in Paris.²⁹ Afterwards, Shell director Peter Robinson wrote to colleagues that the meeting was favourable for Shell and that he expected renewed pressure on Nigeria to quickly bring about an agreement with Shell.³⁰

1.3 if for 40% pretty good! Arb went well for us - expect renewed fgn/nnpc pressure to settle after easter. Should be interesting. We need to get line to buyer as soon as possible. P

Shell bluffing on arbitration case

Shell also used the arbitration case to exert pressure on the Nigerian company Malabu and former minister Dan Etete. As Etete held the rights to OPL 245, this controversial Nigerian ex-politician and businessman, who was later convicted of money laundering in France, was necessary to reach a deal. In 2007, a meeting took place between a Shell delegation and "Chief" Etete. A subsequent report of the conversation that took place, appears to suggest that Shell warned Etete that he could again lose his rights to OPL 245 if Shell were to win the ICSID arbitration case in Washington.³¹

- The ICSID arbitration is against Nigerian govt, not Malabu. Malabu indifferent to cases, as it will get the block or damages from govt. In response, █████ agreed that the ICSID arbitration was an action between Shell and Government only, and that Malabu was not directly involved in those proceedings. That said, Malabu would potentially be impacted, to the extent that part of the relief sought by Shell in the ICSID arbitration was cancellation of the purported reallocation of the block to Malabu. Shell's view was that the reallocation of the block to Malabu was an unlawful breach by Government of its treaty obligations, thus providing the basis for Shell's action

That, however, was mostly a bluff on Shell's part, as ICSID did not have the authority to force the Nigerian government to return the original 2003 Production Sharing Contract for OPL 245; the most it could do was to award financial compensation for the value of the lost possession. Neither did the company itself expect to regain the oil block through the ICSID process.³²

The decision by the Arbitration Panel is imminent, following the final hearing in March/ April 2010. This is Treaty based expropriation arbitration between SNUD and FGN. We believe we will be successful (70% POS), which results in a cash award in favor of SNUD, payable by/enforceable against the FGN. Although SNUD's primary demand is for confirmation that the PSC with NNPC stands, it is not likely arbitrators would want to grant such relief.

Financial compensation only

Shell expected to gain financial compensation only if it won the case. The amount was uncertain, but a payment of between 500 million and 900 million dollars was likely.³³

The value of the alternative (continuation of the arbitration process) amounts to the expectation outcome of the ongoing litigation. The outcome is highly uncertain and estimated to be in the range of \$500-\$900mln (in the RV price scenario) based on the view of the external counsel supporting the arbitration, considering the following possible outcomes:

However, even with an award in hand, it might prove for Shell to collect its dues from the Nigerian government. Another clear disadvantage of pushing through with the arbitration case could also jeopardise Shell's wider business relationships with the Nigerian government.³⁴

The only alternative to this agreement is continuation of the ongoing BIT arbitration proceedings originally commented by SNUD in April 2007 to completion. Whilst the legal case is considered strong it is not without risks. On the assumption that Shell is successful the arbitration outcome would see Shell awarded a financial settlement in compensation for the loss of PSC contractor rights. Payment would be from FGN to Shell. It is likely that securing the payment will be problematic and impact the FGN/Shell relationship. Further, current legal actions between various parties involved in OPL 245 will continue, will require active management and could result in adverse outcomes for Shell. Moreover, continued arbitration will be a significant impediment to Shell's ability to improve relations with FGN across the breadth of business activities in Nigeria.

Ergo, in many ways, a settlement with the Nigerian government would seem better than to continue the ICSID procedure.³⁵

There is a high chance that any compensation award to SNUD will raise further issues related to enforceability of compensation award or to impediments to develop/monetise OPL245 that may occur if/when the arbitration panel would award against FGN, eroding the value associated with continuing the arbitration.

It is clear that in almost all possible cases the proposed settlement yields greater value monetarily and in relationship terms than continued litigation.

Shell failed to reach an agreement with the Nigerian government and Malabu on OPL 245 in 2010. There was also doubt within Shell as to whether the ICSID procedure was still effective as a means of pressure. An internal email to the Shell directors dated 8 October of that year states that a settlement in the arbitration case based on the Netherlands-Nigeria BIT is likely. At the same time, the writer concludes that the Nigerians have become indifferent to pressure from the arbitration case.³⁶

At present we are heading for a BIT settlement that will probably be enforceable and certainly relationship-damaging with FGN;

- recent FGN moves strengthened his position; and they seem impervious to BIT pressure;

One document states that Nigeria no longer appears to be afraid of losing face in the event of a negative verdict. The Nigerian government thus no longer appears conducive to settling the case amicably, in a way that would be favourable to Shell.³⁷

Following a series of attempts to settle this amicably the appearance of ENI and their willingness to purchase 50% interest in the block for cash has significantly increased the POS of a deal acceptable to all parties. Since the change of administration FGN position has moved against Shell, this is unlikely to change in the short term. The block has been re-allocated to Malabu in full subject to signature bonus payment. The impact of a potentially embarrassing arbitration outcome has lost force and influence in FGN eyes to force an amicable settlement favourable to Shell.

Shell keeps the pressure on

But one month later, things appeared to change. During an interview with the Nigerian Attorney General (AG), the chief prosecutor, Shell was informed that the Nigerian government was in fact willing to settle with Shell.³⁸

- AG was to brief Mr. President last night;
- Understands (although not in detail of terms) the need for settlement agreement;
- Expects finalization can happen quickly, but willing to mutually suspend arbitration if this is not possible (and fact he used the standard "in next 2.week" probably means we will need to suspend);

Starting in the autumn of 2010, the Nigerian chief prosecutor served as mediator in talks between Malabu/Etete, the Nigerian government, Shell and the Italian oil concern ENI. The Italians entered the negotiations as Shell's partner. On 29 April 2011, the two companies jointly secured all rights to oil field OPL 245 in a "resolution agreement", for a payment of 1.3 billion dollars.

But it was only in May 2011, 2.5 weeks after the OPL deal was finalised, that law firm Clifford Chance LLP sent a request to ICSID in Washington, on behalf of the Nigerian Shell subsidiary SNUD, to halt procedures against Nigeria as an agreement in the case had been reached.³⁹ Apparently, Shell had wanted to be able to use its claim under the Netherlands-Nigeria BIT to continue to pressurise the Nigerian government up until the very last moment.

"Everybody in the oil industry was scared of Shell"

Another motive for Shell's approaching the arbitration institution in Washington may have been that the Dutch-British multinational wanted to scare off the competition. Nigerian ex-petroleum minister Dan Etete and his company Malabu had been unsuccessful in establishing a partnership with other foreign oil concerns or investors for the exploitation of OPL 245 since 2006. This came to light in a case against Etete which came before the High Court in London in 2012/2013, brought by a Nigerian intermediary who was involved in the final deal on OPL 245. Etete stated to the court that Shell's claim to the Nigerian oil field scared off potential partners.

*"Everybody in the oil industry was scared of Shell and its claim to OPL 245."*⁴⁰

Shell's internal emails also mention other competition. The CEO of Russian oil concern RUSAL, also potentially interested in doing business with Malabu, in 2008 received a threatening letter from Shell subsidiary SNUD, stating SNUD would take legal action if the Russians pursued an agreement on OPL 245 with Malabu or the Nigerian government.⁴¹

Accordingly we would regard any engagement with either Malabu or the Government by the United Company RUSAL ("RUSAL") to the extent it affects Shell's Contractor rights in OPL 245, as a deliberate and unwarranted interference with Shell's contractual rights under the PSC. We trust you would understand that in such circumstances we would be compelled to institute appropriate legal action against RUSAL to restrain RUSAL from any such interference

In the letter to RUSAL, Shell also referred to the arbitration case it had brought against Nigeria.

To protect our interest Shell has commenced legal proceedings against the Government of the Federal Republic of Nigeria ("the Government") and Malabu.

By scaring off other foreign oil companies and investors with its ICSID-claim, Shell could also exert indirect pressure on the government of Nigeria to give in and return OPL 245 to Shell. The concession could only be developed with the help of a foreign partner, for the Nigerian company Malabu lacked the capacity to go it alone. As long as foreign partners held back, however, OPL could not be exploited and there would be no revenues from the concession for the Nigerian government.

Payment based on “corruption agreement”, according to Italian prosecutor

According to a reconstruction of the case by the Italian prosecutor, when Shell and ENI reached their “resolution agreement” with Nigeria in April, ENI, partly on behalf of Shell, immediately deposited a principal sum of 1,092 billion dollars to the Nigerian government.⁴² The Nigerian government then paid 800 million dollars of that sum to the Malabu company of ex-minister Etete.⁴³ Etete is suspected to have passed on most of the money to current and former government officials and other people as bribes. The Italian prosecutor stated that there was evidence of a “corruption agreement”:⁴⁴

This office believes that the sums paid by ENI for transfer to Malabu and EVP originate from a corruption agreement and, for the most part, were intended to bribe senior Nigerian public officials and, in any case, are a profit from the offence of international corruption.

In his 2015 request for legal assistance to the Netherlands, the Italian prosecutor sees a pivotal role for Shell in the affair.⁴⁵

From the evidence so far collected and outlined above it is clear that also Shell played a crucial role in the illegal activities resulting in the signature of the Resolution Agreement of 29 April 2011 and payment of \$ 1,092,040,000.

Shell and ENI maintain that they never were informed of any payment of bribes. In September 2018, however, when an Italian court issued the first verdict in the corruption case, in which two intermediaries were convicted, it concluded that both companies had to have been aware of the illicit payments.⁴⁶ Moreover, the emails and documents cited above show that the multinational was using its claim under the Netherlands-Nigeria BIT to pressurise Nigeria in order to reach a settlement on OPL 245.

Relationship with Nigerian subsidiaries

The OPL 245 case demonstrates how Shell makes opportunistic use of its complex company structure in disputes. Ten years ago, Friends of the Earth Netherlands (Milieudefensie) and four Nigerian farmers sued Shell in a Dutch court over environmental damage resulting from the concern's land-based oil activities in Nigeria. In this case, which is still ongoing, Shell blamed its Nigerian subsidiary SPDC for all wrongdoing. Even though it exerts full control over SPDC⁴⁷, Shell claims it has no authority over SPDC's actions and has refused to compensate the farmers affected by oil pollution.⁴⁸

A similar case initiated in the UK by 42,500 Nigerians affected by environmental damage, was declared inadmissible by a British court in 2017, in part because SPDC was viewed as a completely different entity from Shell. The court further concluded that, as the result of company structuring, the parent company was not liable because it had insufficient technical expertise, and little or no oversight of its subsidiary. This verdict has allowed Shell to evade responsibility for the activities of its subsidiaries.⁴⁹

In the current case, however, the multinational radically reversed this relationship in order to safeguard its rights to a lucrative oil field, stating that its Nigerian subsidiary SNUD is part of the Dutch parent company, and as such is also entitled to the protection provided by the Netherlands-Nigeria BIT. Not only does Clifford Chance LLP claim that SNUD is 99.99 per cent owned by Shell; the request for arbitration even states that some of the top executives of the parent company personally made efforts to defend the interests of the Nigerian subsidiary against the Nigerian government.⁵⁰

5.2.3 SNUD has sought to protect and preserve its rights in respect of OPL 245. On 26 January 2007, Mr Jeroen van der Veer, the Chief Executive Officer of Royal Dutch Shell plc, **the ultimate parent company of the Claimant**, wrote to the President of the Federal Republic of Nigeria protesting any such re-allocation of OPL 245 to Malabu and requesting the President's urgent intervention (Exhibit 8). On 7 February 2007, Mr Malcolm Brinded, Executive Director Exploration and Production and himself a Board member of Royal Dutch Shell plc, met with the Nigerian President to discuss the situation.

Shell is clearly not above giving alternating explanations about its relationships with its subsidiaries in Nigeria to influence legal processes in its favour, at the cost of the local population.

Nigeria loses out on billions

There is no question that the disputed OPL 245 deal is detrimental to the Nigerian people. According to the Italian prosecutor, a major portion of the 1.3 billion dollars that ENI and Shell paid to the Nigerian government for this rich oil field was funnelled off as corrupt payoffs to a small elite, and thus was not available for spending on education, public health or other services which would have benefitted a broad layer of the population.

New research by Resources for Development Consultancy, an international mining research bureau, shows that the so-called "resolution agreement" of 2011 is exceedingly favourable for Shell and ENI, and as such highly unfavourable for the Nigerian treasury.⁵¹ The agreement requires ENI and Shell to pay greatly reduced taxes on the oil produced by OPL 245, concludes the research bureau. Would they have been subject to the same fiscal regime as that which applied to the Production Sharing Contract of Shell subsidiary SNUD in 2003, the Nigerian government would receive 14.3 billion dollars by 2034. The 2011 deal only leaves 9.8 billion dollars for the Nigerian treasury. This means the Nigerian government stands to lose out on a sum of more than 4.5 billion dollars.⁵² Research for Development Consultancy calculates that the loss in shared profits as a result of the Shell/ENI deal amounts to more than double the combined education and healthcare budget of Nigeria, a country in which 87 million people live in extreme poverty.⁵³

According to Resources for Development Consultancy, when the favourable conditions of the "resolution agreement" are contrasted against the fiscal terms which Malabu was subject to in its 2006 agreement with the government, the losses for Nigeria become even greater. Malabu would have paid even more to the treasury on its oil income, a sum of 15.6 billion dollars in total. Because a contract with Malabu for OPL 245 is no longer under consideration, Nigeria thus loses out on nearly 6 billion dollars. If a high oil price is assumed, Resources for Development calculates the loss for the country increases even further, to 10.6 billion dollars.⁵⁴

This lost tax income is funding that cannot be used for education, public health and other public services to benefit the Nigerian people. The IMF states that governments of "mature" oil countries are generally able to skim off 65 to 85 per cent of income from oil fields.⁵⁵ Resources for Development Consultancy calculated that the Nigerian government's share of OPL 245 yields would only amount to a meagre 41 per cent.⁵⁶ Jointly, ENI and Shell, together with the French oil company Total, had already been able to command a substantial tax discount from Nigeria on the exploitation of a gas field over the 2005-2013 period that amounted to a loss of 3.3 billion dollars for the Nigerian government.⁵⁷

Shell's response to the findings

SOMO and Friends of the Earth Netherlands submitted a draft version of this reconstruction to Shell, offering the company the opportunity to point out factual inaccuracies and possibly provide additional information. In a response, dated 29 January 2019, Shell states that its 2007 decision to initiate an international arbitration claim against Nigeria was "perfectly legitimate". Shell writes that when, in 2006, Nigeria expropriated Shell's oil block, the company tried to negotiate with the government to come to an extrajudicial agreement, but that this attempt failed. Shell justifies the subsequent decision to launch an ICSID procedure as follows:

"Simply walking away from an investment of this order of magnitude would be too costly for shareholders and would also have delivered the wrong message to the Nigerian government and other governments; conveying that they would be at liberty to expropriate property."

Shell says while it tried to avoid resorting to arbitration, it deemed it a "necessary and legitimate step to protect our rights and investments in the oil block." The company also maintains it kept the Dutch government "fully informed" about the arbitration. Finally, Shell emphasizes that the 2011 agreement regarding OPL 245 was "a perfectly legal transaction". Shell disputes the calculations and conclusions of the Resources for Development Consultancy, maintaining that the projections on Nigeria's lost tax income from OPL 245 are based on "incorrect factual assumptions" and "outdated and irrelevant" data. ENI calls the conclusion of the bureau "biased and inaccurate".⁵⁸ However, Resources for Development Consulting states that, in addition to data from the exploitation of deep-sea oil fields in countries neighbouring Nigeria, it primarily used figures on the oil reserves in OPL 245 that originated from ENI and Shell themselves.⁵⁹

Conclusion

This reconstruction provides a unique look behind the scenes into how Shell used the bilateral investment treaty between the Netherlands and Nigeria to keep the pressure on to reach an agreement about the lucrative OPL 245 oil field.

The option to initiate an investment arbitration claim, with generous financial compensation as a likely outcome, provided Shell with additional leverage in the negotiations on the rights to exploit the OPL 245 oil block, an option that was not available to the Nigerian company Malabu Oil.

Internal Shell emails and documents show that the Nigerian government clearly felt the looming threat of having to pay out a very substantial sum of money in compensation. This is confirmed in an interview with the then Attorney General of Nigeria, who states that the Nigerian government was prepared to come to an agreement with Shell and Malabu, on the condition that the arbitration case would be withdrawn.⁶⁰ Shell only complied after it had gained what it was after. The contested deal is not only fraught with corruption according to the Italian prosecutor, but the fiscal terms of the new contract are exceedingly beneficial to the company, to the extent that Nigeria stands to lose out on billions in tax revenues.

The number of ISDS cases involving corruption is rising. At the same time, there is mounting clarity that investments made on corrupt terms are not covered by bilateral investment protection agreements. This follows from a number of relevant ICSID rulings in other arbitration cases.⁶¹ In a case against Ghana, for example, arbitrators ruled that *"investment will not be protected if it has been created in violation of national or international principles of good faith; by way of corruption, fraud, or deceitful conduct; or if its creation itself constitutes a misuse of the system of international investment protection under the ICSID Convention"*.⁶²

A growing number of treaties – including several recent EU treaties, but also the new model text for Dutch bilateral investment treaties – deny companies who realised their investment in corrupt or fraudulent ways access to ISDS. The irony is that regarding Shell's investment in OPL 245, the arbitration case and the alleged payment of bribes went hand in hand.

The overriding question is whether it continues to be desirable or responsible to provide transnational economic actors such as Shell, who, in terms of economic clout, tend to be equal or even larger than sovereign states, with such special and one-sided property rights under international agreements. Because such rights enable Shell to establish an overly strong legal position in a fragile state such as Nigeria, where local entrepreneurs and the Nigerian population at large do not have the same recourse to the law in case of government abuse.

In addition, this reconstruction shows once again how BITs may be misused by multinationals as a tool to exert pressure on governments, supplementing traditional lobbying and threatening to relocate. In this way, BITs constitute an important instrument for corporations to safeguard their partisan financial interests, without having to take their corporate social responsibility.

Yet the Dutch government categorically denies that BITs can be used as a tool for political leverage.⁶³ In an official letter to the Dutch Lower House, the Minister for Foreign Trade and Development Cooperation, Sigrid Kaag, underscores the importance of BITs:

“Against the backdrop of the ever more important role that private investors play in achieving sustainable and inclusive growth, modern investment agreements contribute to improvement of the investment climate for treaty parties. Foreign investments can lead to additional employment and help attract knowledge and innovation. This is of particular importance for developing countries, who must rely on bringing in private investment in order to achieve the *UN Sustainable Development Goals*.”⁶⁴

In this quote, the Dutch minister completely overlooks the detrimental effect that ISDS claims can have on public budgets and social spending in developing countries. She also disregards the pressure that can emanate from even the threat of a claim, and which, as the OPL 245 case demonstrates, can be used by transnational corporations to exact preferential treatment and conditions.

A genuinely forward-looking investment model should claim maximum space to ensure that investments contribute to the UN Sustainable Development Goals. This demands a fundamentally different approach to international investment relations. Investment agreements should no longer only cover protection of rights for foreign investors, but should also extend to their obligations to contribute to the sustainable economic development of the host country and the local population, and to abide by internationally accepted standards regarding human rights and the protection of the environment. Such an investment policy should also be more inclusive, for example by giving the local people a larger role in monitoring foreign investment projects, including opportunities for victims of human rights violations to hold investors to account.

OPL 245 Timeline

29 april 1998	OPL 245 concession awarded to Malabu Oil by the Nigerian government
2 july 2001	Concession to Malabu revoked
22 december 2003	Nigerian government awards OPL 245 concession to SNUD, a Nigerian subsidiary of Shell
30 november 2006	OPL 245 concession re-awarded to Nigerian oil company Malabu
26 january 2007	Former Shell CEO Jeroen van der Veer warns Nigerian president about legal action based on Netherlands-Nigeria BIT
26 april 2007	Arbitration case initiated at ICSID in Washington by law firm Clifford Chance LLP, on behalf of Shell subsidiary SNUD, based on Netherlands-Nigeria BIT
november 2007	Arbitration case suspended to allow negotiations to proceed
december 2008	Arbitration case resumes
march 2010	ICSID hearing in Paris
november 2010	New negotiations on OPL 245 between Shell, ENI and Nigerian government, with mediation by Nigerian Attorney General, the chief prosecutor
29 april 2011	Agreement between Shell, ENI and Nigerian government on exploitation of OPL 245 by both oil companies
17 may 2011	Clifford Chance LLP retracts arbitration case at ICSID on behalf of SNUD
14 october 2015	Italian prosecutor asks the Dutch Public Prosecution Service for help in the corruption investigation against Shell and ENI regarding the OPL 245 deal with the Nigerian government
17 february 2016	Dutch Fiscal Information and Investigation Service [FIOD] raids Shell headquarters in The Hague to obtain information on the OPL 245 deal
19 september 2017	Charges against Shell, Shell chair and three former Shell executives filed with Dutch Public Prosecution Service by Corner House, Global Witness, HEDA and Re:Common
20 december 2017	Italian court gives green light for prosecution of Shell, ENI and over 10 individuals in the Milan OPL 245 case
september 2018	Conviction of the first two suspects, an Italian and a Nigerian intermediary, in the OPL 245 case
march 2019	Dutch Public Prosecution Service confirms preparations for criminal proceedings against Shell for alleged corruption in the OPL 245 deal

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Colophon

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