

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
WASHINGTON, D.C.

In the arbitration proceeding between

INTEROCEAN OIL DEVELOPMENT COMPANY

and

INTEROCEAN OIL EXPLORATION COMPANY

Claimants

v.

FEDERAL REPUBLIC OF NIGERIA

Respondent

ICSID Case No. ARB/13/20

PROCEDURAL ORDER NO. 7

Concerning Emails Received on 11 June 2017

Members of the Tribunal
Professor William Park, President
Professor Julian Lew
Justice Edward Torgbor

Secretary of the Tribunal
Mr. Benjamin Garel

20 March 2018

1. The Tribunal has given careful consideration to the Parties' submissions dated 8 August 2017 and 31 October 2017 with respect to materials referred to as "the June 11th documents" consisting of emails and attachments received by legal representatives of the Claimants and the Respondent on 11 June 2017 from accounts in the name of sinaogungbade@outlook.com and sinaogungbade@mail.com, also sent to other named recipients and to the Tribunal secretary Mr. Benjamin Garel.
2. The Tribunal confirms the admission of the June 11th documents into the evidentiary record of these proceedings. In accordance with ICSID Arbitration Rule 34, the Tribunal shall judge the probative value of any evidence on the record, including that of the June 11th documents, according to factors which include *inter alia* their relevance, materiality and genuineness. In addition, these documents, as any other document in the evidentiary record of these proceedings, may be excluded from the record by the Tribunal if it finds reasons to do so. The Tribunal will remain vigilant in considering the manner in which the June 11th documents came to light. The Tribunal may decide to give the documents little or no weight if their provenance, authority or veracity remains doubtful.
3. With reference to the discussion on Day 3 of the July 2017 hearing (page 979, line 4 to page 996, line 22), the Tribunal now invites the Parties to submit their post-hearing briefs in accordance with the terms agreed by the Parties, which, subject to the Parties' confirmation, are recalled hereinafter:
 - a. One round of Post-Hearing Briefs;
 - b. Simultaneous unilateral transmission by the Parties to the Secretary;
 - c. 30-page limit, excluding cover page and including footnotes, appendices, maps, diagrams, signing page, prayer for Relief;
 - d. No new evidence or legal authorities unless authorized by the Tribunal further to request for leave and under exceptional circumstances;
 - e. One 15-page long Annex to Post-Hearing Briefs excluding cover page and including footnotes, appendices, maps, diagrams, signing page, prayer for Relief;
 - f. Annex to focus exclusively on the following questions: What is the law relevant to the issue of the timing for the calculation of damages, and how should the Tribunal apply it to the present case in the event that the Tribunal decides to award damages;
 - g. New legal authorities may be submitted with the Annexes;

- h. Formatting of Post-Hearing Briefs and Annexes:
 - i. Paper size: A4
 - ii. Margins: minimum 2.5 centimeters
 - iii. Font type and size: Times New Roman, 12 point
 - iv. Line spacing: 1.5 line
 - v. Numbered paragraphs
 - vi. Footnotes in Times New Roman 10.5 point, single-line spacing
 - i. Any reference to the Claimants' exhibits shall follow the new exhibits numbering provided by the Secretary on July 14, 2017.
 - j. Post-Hearing Briefs and Annex to be submitted within 30 days of this Procedural Order, i.e. by 20 April 2018.
4. The Parties are invited to review and confer on the above terms and either confirm that they reflect their agreement or jointly indicate to the Tribunal the modifications or clarifications they deem necessary.
5. Finally, with reference to the Office of the Commissioner of Police's letter dated 16 October 2017, transmitted by Counsel for the Respondent on 31 October 2017, the Tribunal invites the Respondent to update the Tribunal on the ongoing investigation of the Nigerian police regarding their complaint of identity theft and cyber impersonation.

[SIGNED]

William W. Park
President of the Tribunal
For the Majority, with Judge Torgbor Dissenting
Date: 20 March 2018

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DISSENTING DECISION

Concerning Emails Received on 11 June 2017

1. Brief Factual Background

- 1.1 By an undated written Request submitted to the Tribunal in about June 2017 the Claimants sought leave to file "*additional documents*" in the form of emails dated 11th June 2017 ("the 11th June Emails"). The Respondent objected to the Request. By a subsequent further written Request dated 5th August 2017 the Claimants sought "*the admission into evidence of the 11th June 2017 emails...*"

The Request states that the 11th June documents consist of emails and their attachments received by the Claimants' legal representatives on 11th June 2017, from accounts in the name of sinaogungbade@outlook.com and sinaogungbade@mail.com (Request, para 1). Mr. Oluwasina Ogungbade, who is a member of the Respondent's legal team in this arbitration, denies the authorship of these emails and complains about identity theft of his email accounts. The emails were also sent to numerous other named recipients (including a number of Nigerian media houses) and the Tribunal Secretary, Mr. Benjamin Garel (Request para 1). The Respondent's objection to the Request included the unfortunate accusation that the Claimants' legal representatives had fabricated the emails and its attached documents (Objection, para 2).

- 1.2 On 21st July 2017, during the evidential hearing of this case, the legal representatives of the Parties respectively addressed the Tribunal on the admission to, or the rejection of the emails from, the evidentiary record. The Tribunal thereafter granted on a provisional basis the Claimants' Request to file the additional documents in order to look at them before making a final decision on their admission or rejection.

- 1.3 The Claimants purport to provide context and relevance for their Request by reference to documents under cover of emails titled "*The Real Truth about Pan Ocean Oil v Nigeria*" from an undisclosed person or source. Troubling questions include: How does the Tribunal discover or uncover the "*real truth*" from an unknown person whose own identity and probity are under cover? Do documents from a clandestine source of an unidentified and untested person constitute "*adduced evidence*" in terms of ICSID Rule 34(1)? Should the Tribunal countenance such brazen interference with its process?

2. Analysis

- 2.1 On receiving these documents provisionally on 21st July 2017, the Tribunal also received oral submissions from the Parties in addition to the written submissions already on record.
- 2.2 Nothing has happened since then to change the mysterious origin and dubious character of these documents. The Claimants admit that *they were correspondence from a third party who is neither a party in the case or a client to the lawyers in this case* (Request para 20), an admission that places the Request, not within ICSID Rule 34(1), but Rule 37(2), requiring a non-disputing party to have filed written submissions with the Tribunal regarding the matter within the scope of the dispute, and the Tribunal's consideration of the matters listed under ICSID Rule 37(2)(a), (b) and (c), all of which presuppose the existence and disclosure of the non-disputing party. Needless to say, neither did the sender of these documents come forward to adduce evidence before the Tribunal nor offer written submissions on the matter within the scope of the dispute. On the other hand, the Respondent has produced a Police Investigation Report that demonises and condemns these documents for being *fabricated* by an *unknown impersonator*. The Tribunal is awaiting an update of the Police Investigation Report before making a final decision to admit or reject these documents.

3. Decision

Pending the updated Police Investigation Report, I do not consider it safe to admit these emails by mere confirmation.

Reasons:

- 3.1 They are not evidence of any sort, except of their obviously mischievous purport.
- 3.2 The Tribunal has established its procedure for evidence to be adduced to it, and all evidence on record has been adduced by persons who made themselves known and available for cross examination. As noted, no one has come forward to claim these mysterious emails or offer them as evidence, or been cross-examined on them, like all other witnesses.
- 3.3 These documents, unlike all other evidence on record, do not qualify as "*evidence adduced*" by any witness in terms of ICSID Rule 34(1) which provides:-

"The Tribunal shall be the judge of the admissibility of any evidence adduced and of its probative value."

- 3.4 The Police Investigation Report is emphatic they are forgeries from an unknown impersonator.
- 3.5 The documents are not credible and no weight or credibility attaches to them because they are authoritatively discredited.
- 3.6 The Claimants have established no legal or procedural basis for their admission and their Request is not founded on any ICSID Rule.
- 3.7 The Tribunal is cautioned under Rule 37 to ensure that the non-disputing party's submission does not, amongst other things, unduly burden or unfairly prejudice either party. So, as this secret third party has neither offered testimony nor written submissions to the Tribunal, there is no procedural or legal basis for admitting these documents for the Tribunal to proceed to judge what probative value to attach to them. Deferring or postponing a decision on the admissibility, relevance, weight or the probative value of these documents would not cure such grave omission or procedural irregularity.
- 3.8 As the Tribunal has established the procedure for admitting evidence adduced to it by testimony or documents, it will be unprocedural for it to admit the 11th June documents by **mere confirmation** instead of by its established procedure; and because the manner of their

production is bizarre and irregular, merely taking cognizance of that manner does not regularise the irregularity.

- 3.9 To the extent these emails relate to the Respondent's evidence on third party funding, it bears recalling that the Tribunal embarked on a lengthy process of investigating the funders of the parties. Both the Solicitor General and Attorney General of Nigeria have confirmed that the firm of Afe Babalola is acting for the Nigerian Government at no cost. Proof to the contrary should not be based on fabricated information. The Tribunal embarked on this quest in order to be satisfied that the "*arbitrators are not conflicted by a third-party funder*". The Tribunal has established it is not so conflicted.
- 3.10 The evidentiary hearing is closed and so the suggestion that the Tribunal will at some unspecified later date determine the **genuineness** of these emails is otiose. The Tribunal of legal experts has not the expertise to determine the genuineness of forged documents, unlike the Police Investigating Authority.

4. Conclusion

Whichever way one looks at it, the admission of dubious and unauthenticated documents by mere confirmation rather than by the Tribunal's established procedure is a grave risk to its process and integrity, and an unintended affront to its undertaking under ICSID Rule 6(2) to judge fairly as between the parties, for which reason the Tribunal should neither countenance such improper interference nor deviate from that process.

Dated: 20th March 2018.

[SIGNED]

**By Justice Edward Torgbor
Co-Arbitrator**