

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. 5

On the Claimants' Requests Regarding

- (i) the Authority of Volterra Fietta Lawyers to Represent the Respondent and
(ii) the Source and Terms of the Funding of the Respondent's Defence**
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Members of the Tribunal
Professor William Park, President
Professor Julian Lew
Justice Edward Torgbor

Secretary of the Tribunal
Mr. Benjamin Garel

15 October 2016

I. Claimants' Two Requests

1. This current procedural order addresses Claimants' applications
 - (i) that the Tribunal direct the Respondent to produce an instrument authorizing the English law firm of Volterra Fietta to act as counsel to the Respondent in this matter and
 - (ii) that Tribunal direct the Respondent to disclose (a) the identity of the person(s) (corporate or natural) funding the defence of the Claimants' claims in this matter and (b) the terms and details of the third party funding arrangement with this (these) person(s).
2. Much of the analysis turns on three key communications that will be discussed in greater detail.
 - (a) The first is a letter from the Attorney-General of Nigeria to Aare Afe Babalola dated 18 November 2013 stating that the representation of the Respondent was "*to be conducted at absolutely no cost to the Federal Government of Nigeria.*"
 - (b) The second is a letter from the law firm Afe Babalola & Co to ICSID dated 19 September 2015 stating that the firm of. Volterra Fietta, as well as Ms. Rose Rameau, were engaged as co-counsel but without mention that they also would be "*at absolutely no cost to the Federal Government of Nigeria.*"
 - (c) The third is a letter from the Attorney-General of Nigeria dated 4 August 2016 addressed to Mr. Benjamin Garel as Secretary to this Arbitral Tribunal, confirming the authority of Aare Afe Babalola to act for Respondent and noting that the firm's services would be rendered *pro bono*, but avoiding any mention of the services of the firm Volterra and Fietta, or Ms. Rameau.
3. A separate decision will determine Respondent's application with respect to security for costs.
4. For the sake of good order, the Tribunal notes in passing that Claimants' own third party funding source was disclosed during the August 2016 hearings in London. This matter will be addressed more fully in the decision concerning the application on security for costs.

II. Procedural History

5. As a preliminary matter, the Tribunal considers it useful to describe the context in which the Claimants' requests were submitted and this Procedural Order is rendered.

A. Request Regarding the Authority of Volterra Fietta Lawyers to Represent the Respondent

6. In a letter dated 26 July 2016, the Claimants requested the Respondent to provide them with "a copy of the instrument under the hand of the Attorney General of the Federation and Minister of Justice by which the law firm of Volterra Fietta of 1, Fitzroy Square, London W1T SHE was authorized to represent the Respondent" in this case.
7. On the first day of the hearing on 2 August 2016, the Claimants asked the Tribunal to make an order that the Respondent submit a letter of representation.¹
8. The Respondent stated that such request was unnecessary because the law firm of Afe Babalola & Co was authorized to represent the Respondent in this case and to constitute and lead the legal team working on this case as they see fit. The Respondent added that the involvement of the law firm of Volterra Fietta in these proceedings was known to the Claimants since September 2015 and was never raised as an issue until the Claimants' letter of 26 July 2016.²
9. After having heard the Parties, the Tribunal directed the Respondent to provide, by the end of the second hearing day on Wednesday, 3 August 2016 a letter from the Attorney-General "*saying that the Government of Nigeria is aware that Mr. Volterra's firm is part of the team, and is representing the Government of Nigeria as part of the team.*"³
10. At the start of the second hearing day, on Wednesday, 3 August 2016, the Respondent had the Solicitor-General of the Federal Government of Nigeria, Mr. Taiwo Abidogum read a statement (i) indicating that the Attorney-General was absent and inaccessible to sign the letter requested by the Tribunal, (ii) affirming his authority, under Nigerian Law, to "*do that which has been requested of the honourable Attorney-General*", (iii) confirming that the Respondent's Nigerian lawyers (of the Afe Babalola & Co law firm), in giving effect to the instructions received from the Federal Government, was at liberty to constitute a legal team comprised of legal practitioners of their choice, and (iii) confirming further that by engaging the law firm of Volterra Fietta, the Afe Babalola & Co law firm has not acted contrary to the Respondent's instructions.⁴
11. The Tribunal invited the Claimants, in case they wanted to submit an application to the Tribunal, to do so in writing by the next morning, on Thursday, 4 August 2016.⁵ The

¹ Hearing Transcript, Day 1, 12:17-23

² Hearing Transcript, Day 1, 13:2-14:12

³ Hearing Transcript, Day 1, 34:17-24

⁴ Hearing Transcript, Day 2, 1:6-3:23

⁵ Hearing Transcript, Day 2, 24:11-19

Claimants confirmed that they would be submitting a written application the next morning.⁶ The Tribunal invited the Respondent to submit its written response to such an application on Friday, 5 August 2016 in the morning.⁷

12. At the start of the third hearing day, on Thursday, 4 August 2016, the Claimants filed their request, which they explained was seeking an order directing the Respondent to produce the authority of the law firm of Volterra Fietta to represent the Federal Government of Nigeria.⁸
13. At the close of the third hearing day, the Respondent announced it would provide the Tribunal and the Claimants, by the next morning, on Friday, 5 August 2016 with the letter from the Attorney-General of the Federal Government of Nigeria that the Tribunal had requested on the first day of the hearing.⁹ The Tribunal invited the Claimants to submit their comments on such letter by the next Monday, 8 August 2016.¹⁰
14. The Respondent submitted its Reply to the Claimants' Applications on Friday, 5 August 2016 in the morning. The same day, the Respondent also submitted the letter from the Attorney-General (dated 4 August 2016) that it had announced the day before.
15. On Monday, 8 August 2016, the Claimants submitted their comments on the Attorney-General's letter.

B. Request Regarding the Source and Terms of the Funding of the Respondent's Defense

16. In a letter dated 26 July 2016, the Claimants requested the Respondent to disclose the identity of the third- party funding its defense of the Claimants' claims and the terms of the funding arrangement.
17. On the first hearing day on 2 August 2016, the Claimants raised the issue of the funding of the Respondent's defense. After a long discussion between the Parties and the Tribunal, the Tribunal directed the Respondent "*to disclose whether there is in fact a third-party funder who is responsible for paying the lawyers' fees*"¹¹ and to indicate by midday on the second hearing day, Wednesday, 3 August 2016 when such disclosure could be made.¹²
18. At the start of the second hearing day, on Wednesday, 3 August 2016, the Respondent had the Solicitor-General of the Federal Government of Nigeria, Mr. Taiwo Abidogum read a statement which, in addition to the information mentioned in paragraph 6 above,

⁶ Hearing Transcript, Day 2, 39:9-13

⁷ Hearing Transcript, Day 2, 24:15-19

⁸ Hearing Transcript, Day 2, 2:11-14

⁹ Hearing Transcript, Day 3, 123:20-124:6

¹⁰ Hearing Transcript, Day 3, 126:20-124:6

¹¹ Hearing Transcript, Day 1, 35:4-37:11

¹² Hearing Transcript, Day 1, 39:18-21

purportedly aimed at addressing the Tribunal's direction regarding third-party funding. While objecting to the Tribunal's authority to request such information on the basis that "[t]he way in which the Republic of Nigeria organizes and funds its operations, including defending this case, is part of its sovereign authority" and "does not concern any third party"¹³ the Respondent confirmed that "[n]o financial 'institution' has become solely responsible for paying the fees of the Respondent's legal counsel, or is directly involved in this arbitration."¹⁴

19. The Tribunal invited the Claimants, in case they wanted to submit an application to the Tribunal, to do so in writing by the next morning, on Thursday, 4 August 2016.¹⁵ The Claimants confirmed that they would be submitting a written application the next morning.¹⁶ The Tribunal invited the Respondent to submit its written reply to such an application on Friday, 5 August 2016 in the morning.¹⁷
20. At the start of the third hearing day, on Thursday, 4 August 2016, the Claimants filed their request, which they explained was seeking an order directing the Respondent "to disclose the identity of the third-party funder and the details of the third-party funding."¹⁸
21. The Respondent submitted its Reply to the Claimants' Applications on Friday, 5 August 2016 in the morning. The letter from the Attorney-General submitted by the Respondent also addressed the third-party funding issue and indicated that the Respondent's case is not funded by any third party institution and that "Aare Afe Babalola's services are being rendered pro bono to the Federal Government of Nigeria."
22. As mentioned above, on Monday, 8 August 2016, the Claimants submitted their comments on the Attorney-General's letter dated 4 August 2016.

III. Parties' Positions

23. While the Tribunal does not aim at providing an exhaustive and detailed account of the Parties' respective positions as expressed at the hearing and in their relevant written submissions, the Tribunal confirms that it has reviewed in detail and analyzed the entirety of the Parties' positions and arguments.

¹³ Hearing Transcript, Day 2, 4:7-14

¹⁴ Hearing Transcript, Day 2, 5:9-16

¹⁵ Hearing Transcript, Day 2, 24:11-19

¹⁶ Hearing Transcript, Day 2, 39:9-13

¹⁷ Hearing Transcript, Day 2, 24:15-19

¹⁸ Hearing Transcript, Day 2, 2:14-16

A. On the question of the authority of Volterra Fietta to represent the Respondent

a) Claimants' Position

Position expressed in their Requests of 4 August 2016

24. The Claimants contend that, under Nigerian Law, the lawyers in the law firm of Volterra Fietta have no authority to represent the Respondent.¹⁹ In particular, the Claimants argue that:

- The power to represent the Federal Government of Nigeria is vested exclusively in the Attorney-General of the Federation, including in civil proceedings.²⁰
- Without a delegation of powers, a private person cannot exercise the representation powers of the Attorney-General in civil criminal proceedings.²¹
- In these proceedings, the Attorney-General's instruction was given to Aare Afe Babalola. No written authorization was extended to any other law firm. Absent such authorization, the law firm of Volterra Fietta cannot appropriately represent the Respondent in these proceedings.²²
- Challenging the authority of counsel to represent the Federal Government of Nigeria is not the prerogative of the sole Federal Government of Nigeria.²³

Position regarding the Attorney-General's Letter dated 4 August 2016

25. In their "Response to Respondent's Letter dated 4 August 2016", the Claimants note that that the letter "does not mention Volterra Fietta by name and simply approves of the legal team 'as constituted by Aare Afe Babalola SAN, ORF, CON' without any indication that he is aware of the exact composition of the team."²⁴ The Claimants also note that the letter does appear to authorize Aare Afe Babalola to include in his legal team lawyers from outside of his chambers. The Claimants however contend that this does not imply that such outside lawyers have authority to "represent" the Respondent as co-counsel on record or at sittings of the Tribunal.²⁵

¹⁹ Claimants' Requests of 4 August 2016, paras. 8-20

²⁰ Claimants' Requests of 4 August 2016, paras. 8-9

²¹ Claimants' Requests of 4 August 2016, para. 10

²² Claimants' Requests of 4 August 2016, para. 11

²³ Claimants' Requests of 4 August 2016, para. 12

²⁴ Claimants' Response to the A-G's Letter dated 4 August 2016, para. 11

²⁵ Claimants' Response to the A-G's Letter dated 4 August 2016, para. 12

b) Respondent's Position

As expressed in its Reply to the Claimants' Requests, dated 5 August 2016

26. The Respondent contends that the Claimants' request that the Respondent produce the authority of Volterra Fietta to represent the Respondent has no basis in the ICSID Convention and Arbitration Rules.²⁶
27. The Respondent first alleges that the interpretation of the ICSID Convention and Arbitration Rules is determined exclusively by public international law, including the Vienna Convention on the Law of Treaties, and that Nigerian law has no relevance.²⁷
28. The Respondent then refers to ICSID Arbitration Rule 18 – Representation of the Parties, and observes that “*Rules 18(1) envisages two forms of role for the representation of parties in ICSID arbitrations*”: A role where agents, counsel or advocates “represent” a party; and a role where they “assist” a party.²⁸ The Respondent then notes that under Rule 18(1), it is for a party, and that party alone, to identify the names and authority of the agent, counsel or advocate that represent or assist it.²⁹ The Respondent further observes that under Rule 18(2), unless otherwise excluded by the context, an agent, counsel or advocate that is authorized to represent (as opposed to assist) a party can identify the names of other agents, counsel or advocates and their authority.³⁰
29. The Respondent also notes that the Claimants not only accept that Aare Afe Babalola SAN and members of his chambers validly represent the Respondent, but also that Ms. Rose Rameau is a valid representative of the Respondent. The Respondent therefore contends that the Claimants do not have an issue with the interpretation and application of ICSID Arbitration Rule 18 (or any other legal norm) but merely with the inclusion of Volterra Fietta lawyers in the Respondent's legal team.³¹
30. In the Respondent's view, the involvement of Volterra Fietta and Ms. Rameau is in full compliance with ICSID Arbitration Rule 18: the Respondent appointed Aare Afe Babalola SAN as its representative; Mr. Babalola SAN is assisted by members of his chambers who are also the Respondent's representatives; the Respondent's representatives identified Robert Volterra and Christophe Bondy of the Volterra Fietta law firm, as well as Ms. Rameau, “*to assist the Respondent as counsel as advocates*”; these appointments were notified to ICSID by letters of 18 November 2013 (with respect of Aare Afe Babalola SAN) and 19 September 2015 (with respect to the firm Volterra Fietta and Ms. Rameau).³²

²⁶ Respondent's Reply to the Claimants' Requests, dated 5 August 2016, paras. 3-23

²⁷ Respondent's Reply to the Claimants' Requests, dated 5 August 2016, para. 3

²⁸ Respondent's Reply to the Claimants' Requests, dated 5 August 2016, para. 5

²⁹ Respondent's Reply to the Claimants' Requests, dated 5 August 2016, para. 6

³⁰ Respondent's Reply to the Claimants' Requests, dated 5 August 2016, para. 7

³¹ Respondent's Reply to the Claimants' Requests, dated 5 August 2016, para. 10

³² Respondent's Reply to the Claimants' Requests, dated 5 August 2016, paras. 11-14

31. The Respondent also contends that the Tribunal had no jurisdiction and no power under ICSID Arbitration Rule 18 to direct the Respondent, at the hearing, to produce a letter signed by the Attorney-General.³³ The Respondent further considers that the Tribunal's refusal to accept the oral statement of the Respondent's Solicitor-General and its insistence on being provided by the Respondent with a written document, were misplaced and contrary to the jurisprudence of the International Court of Justice.³⁴
32. In the Attorney-General's letter dated 4 August 2016, submitted as part of the Respondent's Reply to the Claimants' Requests (and reproduced *in extenso* below), the Attorney-General states that "Aare Afe Babalola SAN, OFR, CON's authority extends to constituting the legal team and experts of its choice, whether counsel in his chambers or not, who in its professional judgment possess the skill and expertise necessary for the representation of the Federal Government of Nigeria." The Attorney-General then confirms that he approves "of the legal team as constituted by Aare Afe Babalola SAN, OFR, CON."

Attorney-General's letter dated 4 August 2016

Dear Mr. Garel,

RE: INTEROCEAN OIL DEVELOPMENT CORPORATION AND
INTEROCEAN OIL EXPLORATION COMPANY VS. FEDERAL
REPUBLIC OF NIGERIA (ICSID CASE NO. ARB/13/20)

The above pending ICSID arbitration where you serve as Secretary refers.

2. I hereby confirm that in line with the instruction from my Office to Aare Afe Babalola SAN, OFR, CON of 18th November, 2013, Aare Afe Babalola SAN, OFR, CON has the authority to do all that is necessary to put up a robust defence to the claims in this arbitration.

3. Indeed, Aare Afe Babalola SAN, OFR, CON's authority extends to constituting the legal team and experts of its choice, whether counsel in his chambers or not, who in its professional judgment possess the skill and expertise necessary for the representation of the Federal Government of Nigeria. I therefore approve of the legal team as constituted by Aare Afe Babalola SAN, OFR, CON.

4. As you will note from the letter of instruction issued by this office to Aare Afe Babalola SAN, OFR, CON on the 18th of November, 2013, this case is

³³ Respondent's Reply to the Claimants' Requests, dated 5 August 2016, paras. 15-16

³⁴ Respondent's Reply to the Claimants' Requests, dated 5 August 2016, paras. 17-22

being defended at no cost to the Federal Government of Nigeria. In other words, Aare Afe Babalola's services are being rendered pro bono to the Federal Government of Nigeria. This case is not being funded by any third party institution.

5. Please, accept the continued assurances of my highest regards and esteem.

33. In the letter under the cover of which the Attorney-General's letter was submitted, the Respondent explains that in his letter, the Attorney-General "*confirms the authority of Aare Afe Babalola SAN, not only to represent the Respondent in these proceedings but also to co-opt into the Respondent's legal team, legal practitioners within or outside his firm.*" In the Respondent's view, "*this confirms the authority of the law firm of Volterra Fietta and Rose Rameau to assist the law firm of Afe Babalola & Co.*"

B. On the question of the disclosure by the Respondent of the identity of its third-party funder and the terms of the funding arrangement

a) *Claimants' Position*

As expressed in their Requests of 4 August 2016

34. The Claimants consider that, because the Attorney-General's letter of 18 November 2013 states that the representation of the Respondent by Aare Afe Babalola SAN shall be "*conducted at absolutely no cost to the Federal Government of Nigeria*", "*some person(s) other than the Respondent itself is funding the Respondent's defence of the present claims.*"³⁵
35. The Claimants further observe that arbitral tribunals owe to themselves and to parties a duty to avoid conflicts of interests so as to preserve the integrity of proceedings, and that when the facts and circumstances of a case reveal a third party funding arrangement, the Tribunal may direct the relevant party to disclose the identity of the funder and the terms of the funding arrangement.³⁶
36. The Claimants also refute the argument advanced by the Respondent that "[t]he way in which the Republic of Nigeria organizes and funds its operations, including defending this case, is part of its sovereign authority" and "does not concern any third party."³⁷ For the Claimants, this argument is self-serving and inconsistent with the "agreement by the Respondent to fully participate in these proceedings" implied by the Respondent's consent to ICSID jurisdiction over investment disputes under the Nigerian Investment Promotion Commission Act.³⁸ The Claimants note that in that regard the Respondent has

³⁵ Claimants' Requests of 4 August 2016, paras. 21-22

³⁶ Claimants' Requests of 4 August 2016, paras. 23-25

³⁷ Hearing Transcript, Day 2, 4:7-14

³⁸ Claimants' Requests of 4 August 2016, para. 26

never invoked its sovereignty before in these proceedings, including when requests for advance payments were made to the parties.³⁹

37. For the Claimants, disclosure by the Respondent of the identity of a third party funder and of the terms of any funding arrangement is necessary:

“To avoid conflict of interest on the part of the arbitrators as a result of the third party funder;

b. To preserve the right of the Claimants and preserve the integrity of the process and ICSID authority and rules;

c. To ensure transparency and identify the true/real party to the case

d. To ensure a fair decision on the allocation of costs.

e. From the point of view of the Claimants, to be certain that this case is not in fact being funded by Festus Fadeyi on behalf of the FG.N.”

Regarding the Attorney-General’s Letter dated 4 August 2016

38. The Claimants consider that the Attorney-General’s letter dated 4 August 2016 only repeats the statement given by the Respondent’s Solicitor-General on 3 August 2016 and therefore does not address the Tribunal’s concerns regarding the adequacy of the Respondent’s response to the Tribunal’s direction at the hearing.⁴⁰
39. In the Claimants’ own words, they “strongly suspect that the third party is Dr Festus Fadeyi and/or Pan Ocean which is clearly of importance to it although clearly not a matter which would present a conflict issue to the Tribunal.” The Claimants further observe that without the identity of the third party funder, the Tribunal members cannot perform conflicts checks.⁴¹
40. The Claimants add that Nigerian Law only authorizes *pro bono* arrangements if the lawyer responsible for the litigation costs and expenses is reimbursed in full by the client for such expenses. In this connection, Claimants note that the record of these proceedings show that parties have made four installments of US\$100,000 each as their respective portions of the arbitrators’ fees and administrative fees in this arbitration, and that this remains apart from the apparent costs associated with the engagement of the services of Messrs. Robert Volterra, Christophe Bondy and other personnel in the law firm of Volterra Fietta and Ms. Rose Rameau. In light of the advance payments made by the Respondent to ICSID the costs necessarily incurred by the large legal team put together by the Respondent, the Claimants conclude “*that the funding of the Respondent’s case calls for closer scrutiny.*”⁴²

³⁹ Claimants’ Requests of 4 August 2016, para. 27

⁴⁰ Claimants’ Response to the A-G’s Letter dated 4 August 2016, paras. 14-15

⁴¹ Claimants’ Response to the A-G’s Letter dated 4 August 2016, para. 17

⁴² Claimants’ Response to the A-G’s Letter dated 4 August 2016, paras. 20-23

b) Respondent's Position

Position expressed in its Reply to the Claimants' Requests, dated 5 August 2016

41. The Respondent contends that the Claimants' requests has no foundation or authority and is contrary to its sovereign authority.⁴³ In particular, the Respondent considers that the Claimants' inference that "*some person(s) other than the Respondent itself is funding the Respondent's defence of the present claims*" is an unfounded and self-serving speculation from the Claimants, as parties to an international investment arbitration finance their cases in many different ways.⁴⁴
42. The Respondent also insists that it has not admitted or indicated that a third party funder was financing its defence of the Claimants' case, and notes that there is no risk for the Claimants that the Respondent would not pay a costs award rendered in the Claimants' favor. The Respondent further observes that there can be no conflict of interest, and therefore, no prejudice to the integrity of the proceedings, arising from the lack of the Tribunal's knowledge about how a party is financing its defence of an arbitration, as the absence of knowledge about a potential third party funder having an interest in the proceedings prevents any predisposition or bias (or appearance thereof) of arbitrators towards either party.⁴⁵
43. In addition, the Respondent objects to the Tribunal's authority to direct a sovereign State "*to divulge how it finances any of its sovereign operations, including the defence of this case before the Tribunal.*"⁴⁶ Relying on the decision from the German Federal Constitutional Court in the *Philippine Embassy Bank* case, the Respondent argues that imposing a disclosure of how the Respondent funds its defence in this case would constitute an interference, contrary to international law, in matters within the exclusive competence of the State.⁴⁷
44. The Respondent further rejects the Claimants' contention that parties to an international investment arbitration have a duty to disclose third party funding arrangements, and that the Tribunal has a duty to inquire about the identity of any third party funder and the terms of any funding arrangement. In that respect, the Respondent notes that the Claimants themselves have not disclosed their own third party funding arrangement and that, if the Tribunal had indeed a duty to inquire, it would have been obliged to inquire into the Claimants' funding of its case.⁴⁸
45. The Respondent concludes by reiterating its refusal: "to divulge any information about arrangements regarding its sovereign dealings, including any arrangement for the

⁴³ Respondent's Reply to the Claimants' Requests, dated 5 August 2016, paras. 24-36

⁴⁴ Respondent's Reply to the Claimants' Requests, dated 5 August 2016, paras. 24, 36

⁴⁵ Respondent's Reply to the Claimants' Requests, dated 5 August 2016, paras. 25, 30, 36

⁴⁶ Respondent's Reply to the Claimants' Requests, dated 5 August 2016, paras. 26, 36

⁴⁷ Respondent's Reply to the Claimants' Requests, dated 5 August 2016, paras. 27-28, 36

⁴⁸ Respondent's Reply to the Claimants' Requests, dated 5 August 2016, paras. 29, 34, 36

management of [...] this case in particular.”⁴⁹

Position expressed in the Attorney-General’s Letter dated 4 August 2016

46. In its letter dated 4 August 2016, the Attorney-General of the Respondent indicates that the Aare Afe Babalola’s services are rendered *pro bono* and that the case is not being funded by any third party institution.
47. In the letter under the cover of which the Attorney-General’s letter was submitted, the Respondent states that the Attorney-General’s letter “*discloses that the matter is being handled pro-bono by Aare Afe Babalola SAN, CON and that there is no case of third party funding involved.*”

IV. Analysis

48. The Claimants have submitted two requests to the Tribunal.

A. Claimants’ First Request: Authorization of Volterra Fietta

49. *The first request* is that the Tribunal direct the Respondent to produce an instrument authorizing the English law firm of Volterra Fietta to act as counsel to the Respondent in this matter.
50. The Tribunal considers it necessary to recall briefly the relevant timeline of the Parties’ submissions prior to addressing this request.
 - a) In its letter dated 19 September 2015, titled “Notification of Engagement of Co-Counsel for Respondent”, Aare Afe Babalola SAN notified ICSID that Mr. Volterra and Mr. Bondy of the law firm Volterra Fietta and Ms. Rameau “*have been engaged by the Respondent to appear as Co-Counsel along with Counsel already on record.*”
 - b) On the first hearing day, the Tribunal directed the Respondent to have its Attorney-General produce a letter “*saying that the Government of Nigeria is aware that Mr Volterra’s firm is part of the team, and is representing the Government of Nigeria as part of the team.*”⁵⁰
 - c) On the second hearing day, the Respondent reserved its rights regarding the propriety or legality of the Tribunal’s direction.⁵¹ The Respondent nevertheless indicated having tried, but unsuccessfully due to the Attorney-General’s

⁴⁹ Respondent’s Reply to the Claimants’ Requests, dated 5 August 2016, para. 35

⁵⁰ Hearing Transcript, Day 1, 34:20-23

⁵¹ Hearing Transcript, Day 2, 2:7-9

unavailability, to comply with the Tribunal's direction.⁵²

- d) On the third hearing day, the Respondent indicated that the Attorney-General was available and was "*making an effort to get the letter, as requested by the Tribunal.*"⁵³
 - e) The Respondent has produced, together with its Reply to the Claimants' Requests, a letter from the Attorney-General dated 4 August 2016.
 - f) In its Reply, the Respondent states that the Tribunal's direction at the hearing "*fell outwith its jurisdiction*"⁵⁴ and its insistence, following the oral statement made by the Respondent's Solicitor-General, "*on the presentation of a written submission is misplaced.*"⁵⁵
 - g) The Respondent also indicates in its Reply that the submission of the Attorney-General's letter is done "*voluntarily*", despite its position that the Tribunal's direction is illegal under international law.⁵⁶
 - h) The Attorney-General's letter confirms the authority of Aare Afe Babalola SAN to constitute his legal team working on this matter with counsel from or outside of his chambers.
 - i) The letter does not mention any name of any counsel, including that of Mr. Volterra, Mr. Bondy or Ms. Rameau.
51. The Tribunal notes a number of peculiarities contained in the approach adopted by the Respondent to address the question of the involvement in these proceedings of counsel outside of Afe Babalola & Co.
52. At first, and as notified to ICSID on 19 September 2015, Mr. Volterra, Mr. Bondy and Ms. Rameau were "*engaged by the Respondent to appear as Co-Counsel along with Counsel already on record.*" As such, Volterra Fietta and Ms. Rameau were added to the list of the Respondent's Representatives on the ICSID website, along with Counsel already on record, Aare Afe Babalola.⁵⁷
53. Then the Respondent explained at the hearing, in the words of Mr. Volterra, that "[t]he submission in November of last year was signed by both firms. There can be no doubt that there have been multiple firms representing the Respondent."⁵⁸
54. Nevertheless, the Respondent also stated that the law firm of Aare Afe Babalola was lead counsel and leading the team of lawyers representing the Federal Government of Nigeria, constituted under the authority of the Respondent and which included Messrs. Volterra

⁵² Hearing Transcript, Day 2, 2:9-19

⁵³ Hearing Transcript, Day 3, 123:24 to 124:2

⁵⁴ Respondent's Reply to the Claimants' Requests, dated 5 August 2016, para. 16

⁵⁵ Respondent's Reply to the Claimants' Requests, dated 5 August 2016, para. 18

⁵⁶ Respondent's Reply to the Claimants' Requests, dated 5 August 2016, paras. 19-23

⁵⁷ <https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/casedetail.aspx?CaseNo=ARB/13/20&tab=PRO>

⁵⁸ Hearing Transcript, Day 1, 20:18-21

and Bondy, as supporting counsel.⁵⁹

55. A clear inconsistency exists between the co-counsel role described in the letter of 19 September 2015, as confirmed by Mr. Volterra himself at the hearing, and the indication also made at the hearing that Messrs. Volterra and Bondy are “*supporting counsel*.”
56. On the second hearing day, the Respondent’s Solicitor-General stated:

*“I therefore confirm, as requested by the Tribunal, that the law firm of Afe Babalola & Co was instructed through its principal and founding partner, Aare Afe Babalola, SAN, CON, to represent the Federal Government of Nigeria in these proceedings. I confirm further that in giving effect to this instruction, the firm, as is firmly established under Nigerian law and practice, is at liberty, as has been done in this case, to constitute a legal team comprising of legal practitioners of his choice who, in their professional judgment, possess the skill and expertise necessary for the representation of the Federal Government of Nigeria.”*⁶⁰

57. However, in its Reply to the Claimants’ Requests, the Respondent states that “lawyers from Volterra Fietta, including Robert Volterra and Christophe Bondy, as well as Ms Rameau are to assist [Aare Afe Babalola SAN and Adebayo Adenipekun] in their representation of the Respondent as counsel and advocates in the present ongoing ICSID dispute.”⁶¹ The Respondent further states that

*“The application of Rule 18 is sufficient to determine the question of the role of the Volterra Fietta firm and Ms Rameau as assisting the Respondent in this case. Rule 18(1) was fulfilled by the notification contained in the letter transmitted by Aare Afe Babalola, SAN to Mr Benjamin Garel, Tribunal Secretary, on 19 September 2015.”*⁶²

58. The Tribunal notes that the letter of 19 September 2015 to ICSID notified that Volterra Fietta and Ms. Rameau were “*engaged by the Respondent to appear as Co-Counsel along with Counsel already on record*.” This language does not, in the Tribunal’s view, imply that the newly engaged Co-Counsel were only assisting – as opposed to representing – the Respondent, but rather that that “*there have been multiple firms representing the Respondent*”, as stated by Mr. Volterra at the hearing.⁶³
59. As noted above, the letter from the Attorney-General dated 4 August 2016 does not mention the name of any lawyer from the Volterra Fietta, or the name of Ms. Rameau, in

⁵⁹ Hearing Transcript, Day 1, 21:10 to 23:4

⁶⁰ Hearing Transcript, Day 2, 3:6-17

⁶¹ Respondent’s Reply to the Claimants’ Requests, dated 5 August 2016, para. 13

⁶² Respondent’s Reply to the Claimants’ Requests, dated 5 August 2016, para. 14

⁶³ Hearing Transcript, Day 1, 21:10 to 23:4

spite of the clear direction given by the Tribunal at the hearing.⁶⁴

60. The Respondent has indicated in its Reply that such letter was produced voluntarily and notwithstanding its objection to the Tribunal's authority or jurisdiction to request it.⁶⁵ The Tribunal therefore understands that the letter was not produced in compliance with the Tribunal's directions. However, the Respondent had, at the hearing, announced that it would produce such letter "*as requested by the Tribunal.*"⁶⁶
61. That being said, the Tribunal agrees with the Respondent that this issue of authority to represent the Respondent could have been raised and addressed much earlier in the proceedings. The involvement of Volterra Fietta and Ms. Rameau in these proceedings has been known since 19 September 2015. The Claimants have contended at the hearing that it is only during the pre-hearing conference call that "*it became absolutely clear [...] that there were indeed two firms.*"⁶⁷
62. In the Tribunal's view, the letter of 19 September 2015 was unequivocal as to the role and status of co-counsel or Messrs. Volterra and Bondy and Ms. Rameau, all of who were thereafter listed as Respondent's representatives on the ICSID website. The Respondent's submissions were also unequivocally authored and filed by both Aare Afe Babalola & Co and by Volterra Fietta.
63. The Tribunal notes that the Claimants' concern seems to be only with Volterra Fietta appearing for the Respondent, and not with Ms. Rameau, which is also somewhat inconsistent.
64. In their Response to the Attorney-General's letter, the Claimants do not reiterate their request that the Tribunal direct the Respondent to produce an instrument authorizing the English law firm of Volterra Fietta to act as counsel to the Respondent in this matter, but state that it is "*ultimately a matter for the Tribunal to be satisfied of [...].*"
65. Given the inconsistencies and ambiguities noted above, as well as the concerns over third-party funding discussed below, the Tribunal considers it not unreasonable to direct the Attorney-General to confirm in writing that the firm of Volterra Fietta and Ms. Rameau are validly representing⁶⁸ the Respondent in these proceedings. In a case of this nature, there can be little if any inconvenience to the Respondent in preparing such a letter.

⁶⁴ Hearing Transcript, Day 1, 34:20-23

⁶⁵ Respondent's Reply to the Claimants' Requests, dated 5 August 2016, paras. 19-23

⁶⁶ Hearing Transcript, Day 3, 123:24 to 124:2

⁶⁷ Hearing Transcript, Day 1, 18:15-22

⁶⁸ The Tribunal is not convinced by the Respondent's interpretation of ICSID Arbitration Rule 18 and the distinction between parties' representatives which "represent" and parties' representatives which "assist." In the Tribunal's view, under Rule 18, titled "Representation of the Parties", all agents, counsel or advocates appearing for a party must provide authority, and not only those who "represent." The reference to Rule 5 of the PCA Arbitration Rule is also unconvincing, as Rule 5 is precisely titled "Representation and assistance" and provides that parties must specify whether appointments under Rule 5 are made for purposes of representation or assistance, which ICSID Rule 18 does not.

B. Claimants' Second Request: Identity and Terms of Third Party Funding

66. *The second request* submitted by the Claimants is that Tribunal direct the Respondent to disclose (a) the identity of the person(s) (corporate or natural) funding the defence of the Claimants' claims in this matter and (b) the terms and details of the third party funding arrangement with this (these) person(s).
67. The Tribunal needs first to recall the importance of ensuring and safeguarding the integrity of the proceedings, with respect to the Tribunal members, ICSID and both the Claimants and the Respondent.
68. One of the Tribunal's duties, under ICSID Arbitration Rule 6(2) and inherent to its mission to ensure the integrity of the proceedings, is to avoid conflicts of interest. It is in fulfillment of such duty that arbitrators, when notified of their appointment and prior to accepting them, run conflict checks and disclose, when applicable, past and present relationship as well as other circumstances which may cause their reliability for independent judgement to be questioned by a party.
69. The declaration signed by each member of the Tribunal upon acceptance of their appointments under ICSID Arbitration Rule 6(2) also states: "*I acknowledge that by signing this declaration, I assume a continuing obligation to promptly notify the Secretary-General of the Centre of any such relationship or circumstance that subsequently arises during this proceeding.*"
70. In the Tribunal's view, this continuing obligation warrants that arbitrators must run conflict checks whenever new relevant information becomes available. It also warrants that arbitrators, when the circumstances so require, must actively inquire and seek relevant information in order for them to determine whether or not they need to run new conflicts checks.⁶⁹
71. The Tribunal further considers that the circumstances that have been raised and addressed by the Claimants, first orally at the hearing, then in writing in their Request dated 4 August 2016, called and call for the Tribunal to inquire about and seek potentially relevant new information.
72. The letter from the Attorney-General to Aare Afe Babalola dated 18 November 2013 stated that the representation of the Respondent was "*to be conducted at absolutely no cost to the Federal Government of Nigeria.*"
73. The letter from Afe Babalola & Co to ICSID dated 19 September 2015 stated that Messrs. Volterra and Bondy as well as Ms. Rameau were engaged as co-counsel along counsel already on record, Afe Babalola & Co. The letter did not indicate that the engagement of lawyers from Volterra Fietta as well as Ms. Rameau would also be "*at absolutely no cost*

⁶⁹ The Tribunal does not suggest that there is a duty to investigate any and all cases if a third party funder is involved, but rather that if there are elements to suggest that one is involved (as is the case in these proceedings) the Tribunal has a duty, as part of duty to avoid conflicts, to inquire about whether or not a third-party funder is indeed involved.

to the Federal Government of Nigeria.”

74. The Claimants’ request for disclosure of third-party funding information made first in their letter to the Respondent dated 26 July 2016 and then at the hearing brought the issue to the Tribunal’s attention.
75. After having heard the Parties at the hearing, the Tribunal determined that it needed to know whether there was indeed a third-party funding the Respondent’s defence of the Claimants’ claims, so as to be able, if necessary, to run a conflict check.
76. The Tribunal’s determination was reinforced by the Respondent’s approach to the question of the authority of Volterra Fietta and Ms. Rameau to participate in the proceedings, as described above (paragraphs 45 to 61). Because of the uncertainty of the role and status of the various counsel working for the Respondent, it was and still is unclear whether the arrangement between Are Babalola & Co and the Federal Government of Nigeria also applies to Volterra Fietta and Ms. Rameau.
77. The Respondent’s position seems now to be that there is a sole and unique team of lawyers working under the supervision of Aare Afe Babalola and Adebayo Adenipekun, which include Messrs. Volterra and Bondy as well as Ms. Rameau who assist the lawyers from Mr. Babalola’s law firm.
78. If that is the case, it may be taken or understood that all lawyers working on this case for the Respondent are working *pro bono*. The Tribunal notes that the out-of-pocket expenses incurred in this case are likely to be considerable given the flights and hotel arrangements that have been and will still be necessary to make. The numbers of hours devoted to this case is also likely to be considerable.
79. The Tribunal however notes that the Respondent, in its Counter-Memorial on the Merits dated 17 November 2015 asks the Tribunal to “*order the Claimants to pay all of the Respondent’s costs in connection with this arbitration, including [...] all legal fees and expenses incurred by the Respondent (including, but not limited to, the fees and expenses of legal counsel and experts).*”⁷⁰ In the Tribunal’s view, if the Respondent’s counsel work *pro bono*, the Respondent cannot incur any cost in connection with the arbitration. In that respect, the Respondent’s application for security for costs in an amount of USD 8 million (which will be dealt with by the Tribunal in a separate procedural order) is also inconsistent with the *pro bono* arrangement.
80. While the Tribunal has no firm knowledge of the existence of a third-party funder operating in these proceedings for the benefit of the Respondent, and has therefore no tangible reasons to believe that a conflict of interests does exist, it has enough elements and information at hand, albeit (and because it is) conflicting and inconsistent,⁷¹ to

⁷⁰ Counter-Memorial of the Respondent, 17 November 2015, para. 489(e)

⁷¹ As mentioned previously, the inconsistencies noted by the Tribunal are: (1) The statement by the Attorney-General that “*Aare Afe Babalola’s services are being rendered pro bono*” whereas the Respondent is seeking an award on costs and has applied to the Tribunal for security for costs; (2) the fact the letter from Afe Babalola & Co

determine out of an abundance of caution that it needs to know how the Respondent is funding its defence so that the appropriate conflict checks can be run, if necessary.

81. The Tribunal notes in that respect that the statement in the Attorney-General's letter that "*this case is not being funded by any third party institution*" begs the question of whether an individual, group, corporation or other entity – as opposed to an "institution" is funding the Respondent's case.
82. The Tribunal has heard and considered the Respondent's argument, both at the hearing⁷² and in its Reply to the Claimants' requests,⁷³ that there can be no bias or predisposition of the Tribunal members deriving from their lack of knowledge about the funding of the Respondent's case. The Tribunal is not convinced by the Respondent's approach.
83. First, if this approach was to be followed in international arbitration proceedings, there would be no reasons to run conflict checks at all.
84. The Respondent's position would mean that most concerns about conflict of interests could be dismissed simply on the basis that the arbitrator in question did not know. Such an approach would encourage willful blindness on the part of arbitrators and counsel, defeating the very purpose of running conflict checks at the outset of, and continuously throughout proceedings, which is to avoid conflicts of interests before they occur.
85. Second, the Tribunal is concerned that, if later in these proceedings it is revealed that any of the Tribunal's members has or had a relationship with a third party that has an interest in the outcome of the case because it is funding, such revelation could be misconstrued as a lack of rectitude on the part of the Tribunal.
86. A lack of rectitude could also be reproached to the Tribunal if it did not inquire to decide whether or not a conflict of interest could exist.
87. Therefore, the Tribunal confirms its determination that in this proceeding, given the circumstances recounted above, the Tribunal must know who ultimately provides the funds for the undertaking of the Respondent's participation and defence in these proceedings, including costs and expenses of ICSID and for attendance of the hearing.
88. Moreover, Respondent must supply the terms on which such funding has been provided, detailing *inter alia* whether any individual, entity, organisation association, government, or person of any sort, providing monies to undertake Respondent's defense, serve as a conduit for funding from another source or other sources, either directly or indirectly. If a conduit relationship does exist, Respondent must disclose the person providing resources to the financial intermediary to secure payment of costs incurred in these proceedings.

dated 19 September 2015 refers to Messrs. Volterra and Bondy as well as Ms. Rameau as "co-counsel" whereas the Attorney-General's letter dated 4 August 2016 (a) does not refer at all to these individuals and (b) does not refer to any "co-counsel" but to Afe Babalola & Co "constituting the legal team."

⁷² Hearing Transcript, Day 1, 16:12-15

⁷³ Respondent's Reply to the Claimants' Requests, dated 5 August 2016, para. 25

89. The Tribunal has given careful consideration to the Respondent's argument that an order to disclose third-party funding information is precluded because the Respondent is a sovereign State.⁷⁴ Such argument finds no basis in law or policy. The Respondent has indeed not established why its status of sovereign would relieve the Tribunal of its duty to protect the integrity of the proceedings. Nor has the Respondent presented evidence that the Tribunal is released from its duty to avoid conflicts of interests and to make the necessary inquiries to determine if such conflicts could arise.
90. The Respondent is a contracting party to the ICSID Convention, an international treaty, and has consented to ICSID arbitration. As such, the Respondent has committed to fulfill the international obligations that the Convention create, for instance with respect to recognition and enforcement of awards under Articles 53 and 54. Being a sovereign does not allow States to avoid or escape their obligations under the ICSID Convention.
91. Section 3 of Chapter 4 of the ICSID Convention and the ICSID Arbitration Rules does not specifically provide for Tribunals' power to order the disclosure of third-party funding information. Equally, it does not preclude the Tribunal ordering the disclosure of third party funding. Article 44 of the ICSID Convention however provides:
- “Any arbitration proceeding shall be conducted in accordance with the provisions of this Section and, except as the parties otherwise agree, in accordance with the Arbitration Rules in effect on the date on which the parties consented to arbitration. **If any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question.**”* (emphasis added)
92. The Tribunal has decided that it needs to know who is funding the Respondent's case so as to be able to fulfill its duty under ICSID Arbitration Rule 6(2). The Tribunal simply decides a question of procedure under Article 44. The Respondent, as sovereign as it is, cannot escape or avoid its international obligation to comply with the Tribunal's decision.
93. The decision from the German Federal Constitutional Court in the *Philippine Embassy Bank* creates no norm or a principle of international law that could relieve the Tribunal from its duties under the ICSID Convention or allow the Respondent to escape its obligations under an international treaty. Moreover, the Tribunal considers that the decision is inapposite in this case, as the Tribunal's decision does not concern sovereign funds but, precisely, the funds that a non-sovereign third-party is providing to cover legal fees and expenses of the Respondent's counsel.
94. In the interests of transparency and due process, this third-party funding information must be supplied to the Claimants as well as the Tribunal, to permit a full and honest consideration of the serious concerns expressed by Claimants which, by reason of

⁷⁴ Respondent's Reply to the Claimants' Requests, dated 5 August 2016, paras. 26-28

Respondent's refusal to comply fully with the Tribunal's orders, have been augmented rather than assuaged.

95. To recapitulate, inconsistencies, ambiguities and contradictions exist in the manner in which Respondent has addressed the Tribunal's question about the authority of its counsel, as revealed at the hearing and in the ensuing written submissions. The issue of the funding of the Respondent's defence in these proceedings, which stems from the *pro bono* arrangement between the Respondent and its Nigerian counsel is also, in the Tribunal's view, one that could, in and of itself, cause some questioning. Combined with the aforementioned inconsistencies, ambiguities and contradictions (as noted in paragraphs 52 to 65), it provides the Tribunal with clear and strong indications that a third-party funder could be involved on the Respondent's side. The Tribunal is therefore of the view that the inconsistencies, ambiguities and contradictions need to be defused and the question of the existence of a third-party funder on the Respondent's side further investigated, as part of the Tribunal's duty and efforts to avoid conflicts of interests.
96. For the foregoing reasons, the Tribunal now decides:
- a) The Respondent shall supply a letter from the Attorney General confirming that the Volterra Fietta law firm and Ms. Rameau are validly appearing in these proceedings on behalf of the Respondent.
 - b) Assuming confirmation that the Volterra Fietta firm is appearing on behalf of the Respondent, the Attorney General shall confirm whether or not that engagement is at no cost to the Federal Republic of Nigeria.
 - c) The Attorney General shall disclose the persons (whether or not qualifying as third party financial institutions in the narrow sense) who are underwriting the expenses of the legal teams in this arbitration, and who are paying the fees and expenses of the members of the legal team. The disclosure shall cover any person ultimately responsible for covering fees and out-of-pocket costs (including deposits with ICSID) of (i) the firm of Afe Babalola & Co, (ii) the firm of Volterra Fietta and/or (iii) Ms. Rameau. For the avoidance of doubt, the Tribunal expects disclosure in regard to any individual, entity, organisation association, government, or person of any sort, providing monies to undertake Respondent's defense, even if serving as a conduit for funding from another source, either directly or indirectly.
 - d) For the sake of good order and parity, the Claimants shall confirm, in a letter issued jointly by both corporations (Interocean Oil Development Company and Interocean Oil Exploration Company) the identify of any persons (whether or not qualifying as third party financial institutions in the narrow sense) who are underwriting the expenses of the Claimants' legal team in this arbitration, and who are paying the fees and expenses of the members of the legal team. The disclosure shall cover any person ultimately responsible for covering fees and

out-of-pocket costs (including deposits with ICSID) of Mr. Olasupo Shasore and his firm Ajumogobia & Okeke, as well as for Professor Oba Nsugbe, Ms. Bimpe Nkontchou, and Mr. Bello Salihu. For the avoidance of doubt, the Tribunal expects disclosure in regard to any individual, entity, organisation association, government, or person of any sort, providing monies to support Claimants' representation, even if serving as a conduit for funding from another source, either directly or indirectly.

- e) All disclosures directed by this order shall be made a delivered to ICSID and the other party by no later than fourteen (14) days from the present ruling.

For the Tribunal

[SIGNED]

William W. Park
President of the Tribunal
Date: 14 October 2016