INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

ICSID Case No. ARB/20/41

ENI INTERNATIONAL B.V.

ENI OIL HOLDINGS B.V.

AND

NIGERIAN AGIP EXPLORATION LIMITED

v.

FEDERAL REPUBLIC OF NIGERIA

PROCEDURAL ORDER NO. 4

Decision on Petition under ICSID Arbitration Rule 37(2)

Members of the Tribunal

Dr. Laurent Lévy, President of the Tribunal
Mr. J William Rowley K.C., Arbitrator
Professor Zachary Douglas K.C., Arbitrator

Secretary of the Tribunal

Ms. Aïssatou Diop

Assistant to the Tribunal

Ms. Ankita Godbole

07 March 2023

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I. BACKGROUND

1. On 1 August 2022, ReCommon, the Human and Environmental Development Agenda ("HEDA") and Corner House Research ("CHR") (together, the "Petitioners") – an Italian, Nigerian, and UK-based non-governmental organization respectively – addressed a letter to the Tribunal and ICSID, expressing their interest to participate in this arbitration as *amici curiae* and seeking directions regarding the appropriate timing for making a written non-disputing party ("NDP") submission.

2. On 5 August 2022, the Tribunal Secretary (i) notified the Parties of the Petitioners' letter; (ii) informed them that the Tribunal intended to grant the Petitioners two weeks to substantiate their request for NDP status; and (iii) invited the Parties, if they so desired, to make any preliminary observations on the letter.

3. On the same day, the Tribunal Secretary informed the Petitioners that they had two weeks to substantiate their request for NDP status on the basis of ICSID Arbitration Rule 37(2) ("Rule 37(2)") and specify their requests for relief.

4. On 15 August 2022, the Claimants submitted their preliminary observations on the Petitioners' request to intervene ("C-Preliminary Observations"). In these observations, the Claimants also requested that the Parties be allowed to publish all procedural correspondence and eventual decisions pertaining to the Petition.

5. On 19 August 2022, the Respondent submitted its preliminary observations and responded to the Claimants' preliminary observations ("R-Preliminary Observations"). Among other matters, Nigeria opposed the Claimants' request for publication.

6. On 26 August 2022, following a brief extension, the Applicants filed a single joint petition substantiating their request to intervene (the "Petition"), which was shared with the Parties on 29 August 2022.

7. On 1 September 2022, the Claimants requested the Tribunal to decide their request for publication as set out in C-Preliminary Observations at the time of establishing the briefing schedule for the Petition.

8. On 5 September 2022, the Tribunal (i) invited the Parties to submit their observations on the Petition simultaneously, on 30 September 2022; (ii) denied the Claimants' publication request as it was premature at that stage; and (iii) informed the Parties that it would decide the publication issue at the same time as the Petition.

9. On 30 September 2022, (i) the Claimants filed their response to the Petition ("C-Response") accompanied by Exhibits C-369 to C-375 and legal authorities CLA-102 to CLA-124; and (ii) the Respondent filed its response to the Petition ("R-Response") together with Exhibits R-206 and R-207 and legal authorities RL-204 to RL-216.

10. The proceedings were suspended on 12 December 2022 due to the resignation of one of the Tribunal-members and before the Tribunal could issue its decision on the Petition. The proceedings resumed on 17 January 2023, following the reconstitution of the Tribunal.

11. This decision addresses the Petitioners' request to intervene in these proceedings as NDPs under Rule 37(2).

II. THE PETITIONERS

12. ReCommon, HEDA and CHR are non-governmental organizations with a stated mandate to promote human rights, accountability, transparency, democracy, good governance and sustainable use of resources. The Petitioners confirm that they are entirely independent organizations, not affiliated with any government or political party, or the Parties to this arbitration. The Petitioners further confirm that they have not received and will not receive any assistance, financial or otherwise, from the Parties in connection with their participation as NDPs.[1]

13. The Petitioners request the Tribunal to grant them:

> "(i) Leave to file a written submission concerning matters within the scope of the dispute […]; and
>
> (ii) Access to the specific arbitral documents indicated in Part 6 [of the Petition], for the purpose of enabling useful, unique, and well-informed submissions by the Petitioners."[2]

14. According to the Petitioners, they satisfy the conditions stipulated in Rule 37(2) because (a) they bring a perspective and particular knowledge that is different from the disputing parties; (b) their submission will address a matter within the scope of the dispute; (c) they have a significant interest in the proceedings; (d) their participation will not disrupt the proceedings or burden either party; (e) the subject matter of the present case is appropriate for NDP participation; and (f) access to relevant documents will improve their ability to assist the Tribunal.

(a) The Petitioners have particular knowledge different from the Parties

15. The Petitioners submit that each of them has "(i) in-depth knowledge of the anti-corruption obligations of States and private corporations; (ii) a detailed knowledge of the legal issues that have already been aired in court cases in Italy, UK and Nigeria in relation to the legality of the contracts underlying the OPL 245 transaction; [and] (iii) a forensic knowledge of the factual background to the OPL 245 transaction" arising from the investigations and litigation they have undertaken or are currently undertaking in relation to this transaction.[3]

16. Consequently, so they say, their knowledge is unique and extends beyond the evidence disclosed in the various proceedings initiated against the Claimants in Nigeria, Italy and the UK, and places them in a position to furnish documentation that the Parties are either unlikely to have or may not have disclosed or information that would not be mentioned for any other reason. Moreover, the Petitioners claim that their advocacy work against corruption has yielded

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1 Petition, ¶¶ 3.03-3.30, 3.39, 5.27-5.30.

2 Petition, ¶ 7.01.

3 Petition, ¶¶ 3.38, 5.11.

documentation on the Nigerian government's assurances to civil society groups regarding OPL 245 that would provide the Tribunal with a more complete understanding of the case.[4] Finally, the Petitioners assert that they have conducted a "detailed legal analysis of the issues arising from the OPL 245 transaction, particularly relating to the legality of the contracts and to the arguments put before the Italian courts". Taken together, the Petitioners argue that they possess knowledge, perspectives and insights that the Tribunal will not receive from the Parties.[5]

(b) The Petitioners will address a matter with the scope of the dispute

17. The Petitioners submit that the legal and factual points that they intend to raise fall squarely within the scope of the dispute. By way of example, the Petitioners contend that an investor has a legal responsibility to assess the extent of corruption risk before making an investment, and to put in place measures to mitigate against such risk, failing which it is not entitled to legal protection. The Petitioners claim that they "are able to bring substantial factual evidence to bear" that the Claimants did not adequately assess the corruption risk prior to investing in OPL 245.[6] Likewise, they claim to have substantial knowledge regarding the legality of the 2011 Resolution Agreements entered into by the Claimants to acquire OPL 245, which is a core issue in dispute.[7]

(c) The Petitioners have a significant interest in the proceedings

18. The Petitioners submit that the issue of corruption has "direct and indirect relevance to the Petitioners' mandates and activities at the local, national and international levels", because those objectives "cannot be effectively attained without working to expose and combat corruption".[8] Further, so the Petitioners say, they have "a historic and continuing, specific and direct interest" in the arbitration as a result of the multiple, targeted investigations, criminal prosecutions and other actions that they have taken collectively and individually to combat corruption in relation to the OPL 245 transaction.[9] Finally, the Petitioners submit that each of them has a continuing history of active involvement in supporting communities affected by the Claimants' oil and gas operations in Nigeria, through "(i) undertaking on-the-ground fact finding missions and documenting the impacts of Eni's activities; and (ii) submitting questions to Eni's Annual General Meeting."[10] It is the Petitioners' position that these factors collectively demonstrate that they have a significant interest in the proceedings.

(d) The intervention will not disrupt the proceedings or burden the Parties.

19. According to the Petitioners, their participation will not disrupt this arbitration or burden the Parties because all of the Petitioners are experienced in litigating before domestic courts and have never disrupted the other proceedings in which they have been involved. To reduce the

4 Petition, ¶¶ 5.12-5.14.

5 Petition, ¶¶ 5.15-5.16.

6 Petition, ¶ 5.19.

7 Petition, ¶ 5.20.

8 Petition, ¶ 4.14.

9 Petition, ¶ 5.24.

10 Petition, ¶ 5.25.

burden, they propose to file a single joint submission and the Tribunal can control the parameters of that submission to prevent undue burden or unfair prejudice to the Parties.[11]

(e) This case is appropriate for NDP participation

20. The Petitioners submit that the issue of corruption arising in this arbitration is "of particular public interest for Nigerians, […] the civil society groups that represent them, and for the broader international community".[12] They explain that corruption has had a ruinous economic and social impact in Nigeria, such as "(i) the diversion of public funds from water and agriculture projects, healthcare and schools; (ii) the bribing of judges and magistrates; and (iii) pollution (particularly in the oil sector) resulting from unenforced environmental protection", which has in turn undermined the Nigerian people's fundamental human rights. As a result, Nigerians have a particular interest in the fight against corruption and ensuring that the laws implemented to combat it are adhered to.[13] Similarly, Nigerian anti-corruption groups have a specific interest in this arbitration since they have sought and received assurances from the Nigerian government (through the erstwhile Minister of Petroleum Resources) that it will not take any far-reaching decisions in its dealings with Eni until the outcome of the ongoing court proceedings in respect of OPL 245 is clear.[14]

21. Finally, matters of corruption are of direct concern to the international community as evidenced by the pronouncement of several international courts and tribunals,[15] by the statements of the UN Human Rights Council[16] and by the numerous international treaties and conventions entered into by States to combat corruption by ensuring its unbiased prosecution.[17]

22. In light of the above, the Petitioners submit that this arbitration and the Tribunal's deliberations will address important questions including the appropriate line between legitimate, non-compensable regulatory action on the one hand and illegitimate, compensable State conduct under international law on the other hand, against the back-drop of possible corruption by the

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11 Petition, ¶ 5.33.

12 Petition, ¶ 4.04.

13 Petition, ¶ 4.05.

14 Petition, ¶ 4.07, citing Civil Society Network Against Corruption, Letter to The Minister of State, Ministry of Petroleum Resources, "Investigation and Prosecution of Suspects of Malabu Fraud viz a viz and Latest Exploration Agreement signed with Eni-Agip on Italy", 3 February 2017, available at https://cms.hedang.org/civil-society-network-against-corruption-document/; Ministry of Petroleum Resources, Letter to Civil Society Network Against Corruption, "Re: Investigation and Prosecution of Suspects of Malabu Fraud viz a viz and Latest Exploration Agreement signed with Eni-Agip on Italy", 17 March 2017, available at https://cms.hedang.org/investigation-and-prosecution-of-suspects-in-malabu-fraud/.

15 Petition, ¶ 4.08, citing Award in [1994] *Arbitration International 277,* with a note by Dr. J. Gillis Wetter - "Issues of Corruption before International Arbitral Tribunals: The Authentic Text and True Meaning of Judge Gunnar Lagergren's 1963 Award in ICC Case no. 1110; *World Duty Free Company Limited v. Republic of Kenya*, ICSID Case No. ARB/00/7, Award, 4 October 2006, ¶ 173.

16 Petition, ¶ 4.09.

17 Petition, ¶ 4.10.

investor.[18] Given the international public interest in the fight against corruption, the subject matter of the dispute is appropriate for NDP participation.

(f) Access to documents

23. The Petitioners underline that arbitration has been increasingly moving towards greater transparency and that NDPs have been granted access to documents relevant and necessary to streamline their submissions so that they are of the greatest possible assistance to the Tribunal. By contrast, without such access the Petitioners may fail to address relevant issues or even duplicate submissions. Consequently, so the Petitioners submit, "the appropriate approach to the release of documents should be a presumption in favour of disclosure, albeit subject to limited redactions, as appropriate, for commercial confidentiality and legal privilege".[19]

24. On this basis, the Petitioners request the Tribunal to grant them access to the following documents, "subject to the redaction […] of any commercially confidential or otherwise privileged information that is not relevant to the concerns of the Petitioners as Non-Disputing Parties"[20]:

> "(i) Any rulings or orders of the Tribunal or any agreement between the Parties concerning the choice of law to be applied and the conflict of laws rules to be applied.
>
> (ii) The written legal submissions (memorials) filed by the Parties with the Tribunal to date, together with any annexes that contain legal opinions that may be of relevance to the Petitioners' stated concerns.
>
> (iii) Any written replies filed by any Party in response to any legal submissions of any other Party as specified in the previous bullet point.
>
> (iv) Any submissions of the Parties that may be filed with the Tribunal in response to this Petition and, if the Petitioners are granted leave to file a written submission, any subsequent observations thereon that may be filed by any Party.
>
> (v) Any future procedural rulings or orders of the Tribunal or filings of the Parties that may fall within the scope of the documents requested in the foregoing bullet points."[21]

III. THE PARTIES' OBSERVATIONS

A. The Claimants' observations

[18] Petition, ¶¶ 4.12-4.13.

[19] Petition, ¶¶ 6.04-6.05.

[20] Petition, ¶ 6.01.

[21] Petition, ¶ 6.07.

25. The Claimants submit that the Petition should be rejected because it does not meet the criteria under Rule 37(2).[22]

(a) The Petitioners cannot assist the Tribunal

26. The Claimants submit that there is a presumption in favour of the disputing parties providing the Tribunal with all assistance and materials to decide their dispute;[23] and that consequently, the onus is on a prospective NDP to establish that it can further assist the Tribunal by bringing a perspective, particular knowledge, or insight that is "different from" that of the disputing parties.[24]

27. According to the Claimants, although the Petitioners assert that they wish to file a submission "concerning matters within the scope of the dispute", they have not articulated the precise contours of their proposed submission. Indeed, the Petition appear to be "seeking leave to make far-reaching submissions in relation to all issues in the arbitration, including: (i) the FRN's withholding of conversion; (ii) various questions of treaty interpretation and public international law (the 'issues of major public concern' that the [Petitioners] allege the Tribunal 'will be required to determine'); and (iii) allegations that OPL 245 was procured by corruption."[25] However, they have not established that they can offer a different perspective from the Parties on these matters.

28. As regards the withholding of conversion, the Petitioners have no relevant experience on the legal and factual matters at issue and in any event, these matters will be addressed extensively by both Parties' submissions and witness, expert and documentary evidence.[26] On the question of treaty interpretation and public international law, the Tribunal is aided by extensive submissions from the Parties and by counsel with extensive experience in investment treaty disputes.[27] Finally, the Petitioners also cannot bring a different perspective on the allegation that OPL245 was procured by corruption. Any knowledge or perspective that they have is already well known and/or before the Tribunal, because it arises from previous legal proceedings initiated against the Claimants and their associates, which are in the public domain, and is not different from Nigeria's allegations in the present proceedings.[28]

29. In the circumstances, the Petitioners cannot assist the Tribunal in determining any factual or legal issues arising in this proceeding.

(b) The Petitioners do not have a significant interest in this proceeding

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22 C-Response, ¶¶ 5-6.

23 C-Response, ¶ 7(i), citing *Apotex Inc. v The Government of the United States of America*, Procedural Order No. 2 on the Participation of a Non-Disputing Party, 11 October 2011, CLA-108, ¶ 24; Gary B Born, Stephanie Forrest, "Amicus Curiae Participation in Investment Arbitration", 2019, Vol. 34 (3), ICSID Review, CLA-121, p. 647.

24 C-Response, ¶ 7(ii), citing *Aguas Provinciales de Santa Fe S.A., Suez, Sociedad General de Aguas de Barcelona S.A. and InterAguas Servicios Integrales del Agua S.A. v Argentine Republic*, ICSID Case No.ARB/03/17, Order in Response to a Petition for Participation as Amicus Curiae, 17 March 2006, CLA-103, ¶ 23.

25 C-Response, ¶ 9.

26 C-Response, ¶ 11.

27 C-Response, ¶ 12.

28 C-Response, ¶ 13.

30. Although the Claimants do not deny that the Petitioners have been persistently pursuing allegations of corruption in relation to OPL 245 for more than a decade, they submit that this does not establish the significant interest required under Rule 37(2)(c).

31. According to the Claimants, under Rule 37(2)(c), "a general interest in the rule of law or human rights is not sufficient to justify intervention, including as that general interest will be shared by many similar organisations. Applicants must establish a specific interest in the issues on which they propose to make submissions."[29] Thus, in relation to the allegations of corruption – the only aspect of the case on which the Applicants could have any possible relevant experience – they must establish a specific interest to fight against corruption, but have failed to do so. Pointing to each Petitioners' constituent documents, the Claimants submit that their mandate to promote human rights, sustainable development, transparency and good governance does not satisfy the requisite "significant interest" threshold under Rule 37(2).[30] By way of comparison, the Claimants point to the World Health Organization and the European Commission, both of which have successfully intervened in investment arbitration proceedings because they have a significant interest "in a dispute concerning the public health effects of the regulation of the tobacco industry" and the interpretation of EU law, respectively.[31]

(c) Allowing the Petition would disrupt the proceedings and prejudice the Claimants

32. It is the Claimants' submission that allowing the Petition at this stage of the procedural timetable would disrupt the proceedings and unfairly prejudice them. They point out that the Petitioners were aware of the initiation of the present proceedings in September 2020, as demonstrated by the November 2020 letter to ICSID, condemning the latter's decision to register the case. Nonetheless, the Petitioners waited for 20 months, until August 2022, to file the Petition. For the Claimants, allowing the Petitioners to participate at this juncture would be disruptive and prejudicial because they have only one opportunity left to address the merits, i.e. the Reply due on 20 January 2023, and the time left to prepare the Reply is already severely constrained due to the various delays in the procedural steps till date and the extended document production phase. In such circumstances, the calendar has no room for further adjustments in order to cure the unfairness to the Claimants with a response to the Petitioners' proposed submission.[32]

33. In summation, the Claimants assert that the Petition must be rejected because the Petitioners' "views are well known, have been considered (and dismissed) by the courts and other authorities of multiple jurisdictions, and have been […] pleaded at great length and in great detail by the

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29 C-Response, ¶ 17, citing *Resolute Forest Products Inc. v Government of Canada*, PCA Case No. 2016-13, Procedural Order No. 6 on the Participation of Prof. Robert Howse and Mr. Barry Appleton as Amici Curiae, 29 June 2017, CLA-113, ¶ 4.6; *Odyssey Marine Exploration, Inc. v The United Mexican States*, ICSID Case No. UNCT/20/1, Procedural Order No. 6: Decision on the Application for Leave to File a Non-Disputing Party Submission (Amicus Curiae), 20 December 2021, CLA-124, ¶ 19; *Apotex Inc. v The Government of the United States of America*, Procedural Order No. 2 on the Participation of a Non-Disputing Party, 11 October 2011, CLA-108, ¶ 28.

30 C-Response, ¶¶ 18-20.

31 C-Response, ¶ 22.

32 C-Response, ¶¶ 24-29.

FRN in the present proceedings" with the result that "there is simply no need for […] the type of sprawling and undefined submission that the Applicants seek leave to make."[33]

(d) Alternatively, the Petitioners' admission should be conditional

34. Assuming (*quod non*) the Tribunal were to admit the Petition, then the Claimants submit that the Petitioners' participation should be subject to the following conditions:

a. It should be limited to the production of documents relating to the matters of corruption at issue in this case, specifically, documents not already disclosed in the proceedings in Nigeria, Milan or the UK and not already in either Party's possession, and submissions in relation to such documents;[34]

b. The submission should be limited to 10 pages in length;[35]

c. The submission should be filed by 11 November 2022 at the latest in order to mitigate any disruption to the procedural timetable and to minimize prejudice to the Claimants;[36]

d. The Petitioners' request to access the record should be rejected as they have failed to establish why they need to review the record in order to make their submission;[37] and

e. Any submission should be conditioned on the Petitioners providing an undertaking to bear any costs arising from their intervention in this proceeding as this will serve as a deterrent against procedural misconduct on the part of the Petitioners.[38]

35. Finally, regardless of the Tribunal's determination on the requests in the Petition, the Claimants request the Tribunal to "allow the Parties to publish all procedural correspondence and any decisions pertaining to the Application" as an exception to the confidentiality provision in Section 26.6 of PO1.[39] In the alternative, the Claimants request the Tribunal to order the Petitioners to be bound by the confidentiality commitments in Clause 26 of PO1, and in case of a breach of that provision, to allow the Parties to publish all procedural correspondence, and any decisions, pertaining to the Petition.[40] The Claimants explain that the Petitioners have a record of casting public aspersions on parties and adjudicatory bodies when the outcome of the proceedings is not to their liking. Thus, in order to guard against a situation where the Petitioners are free to comment to the media and the Parties are unable to respond, the Tribunal should make an exception to the confidentiality requirement in Section 26 of PO1. This would allow the Parties,

33 C-Response, ¶ 3.

34 C-Response, ¶ 32.

35 C-Response, ¶ 33.

36 C-Response, ¶¶ 34-36.

37 C-Response, ¶¶ 37-40.

38 C-Response, ¶¶ 42-45.

39 C-Response, ¶¶ 46, 51.

40 C-Response, ¶ 52.

especially the Claimants, to react quickly to any adverse statements made by the Petitioners in the media.[41]

36. In light of the above, the Claimants request the following reliefs:

> "(i) REJECT the Application;
>
> (ii) in the alternative to the relief requested in (i), and in the event that the Tribunal allows the Applicants to intervene, ORDER that any submission by the Applicants be:
>
> a) limited to (i) documents relating to alleged corruption concerning OPL 245 which have not already been disclosed in the proceedings in Nigeria, Milan or the United Kingdom and are not already in the possession of either party, and (ii) submissions relating to those documents of no more than 10 pages in length;
>
> b) filed by no later than 11 November 2022; and
>
> c) conditioned on the Applicants' submitting an undertaking, in a form satisfactory to the Tribunal, to bear any costs arising from their intervention in this proceeding;
>
> (iii) ORDER that the Applicants shall have no access to any documents or pleadings filed in this proceeding;
>
> (iv) ORDER that the Parties may publish all procedural correspondence and any decisions pertaining to the Application; and
>
> (v) in the alternative to the relief requested in (iv), ORDER that the Applicants are subject to the confidentiality commitments set out at Clause 26 of PO 1, and that in the event of breach by the Applicants of that provision, the Parties may publish all procedural correspondence, and any decisions, pertaining to the Application."[42]

B. The Respondent's observations

37. It is Nigeria's submission that the Petitioners satisfy the relevant test under Rule 37(2) and the Tribunal should thus grant their request to file a written submission concerning matters within the scope of the dispute.

(a) The Petitioners' perspective is different from the disputing parties

38. Nigeria acknowledges that it is not possible to verify the accuracy of the Petitioners' claim that they possess knowledge and documentation that neither disputing party is likely to have and that extends beyond the evidence disclosed before the Milan Court, the English High Court or presently being considered by the Nigerian Courts. Nevertheless, Nigeria considers it "quite possible that [the Petitioners] have indeed acquired material that neither Nigeria nor Eni has put

41 C-Response, ¶¶ 47-51.

42 C-Response, ¶ 53.

before the Tribunal, or which the Parties might not otherwise put before the Tribunal" because of their "vigorous and active interest" in OPL 245 for almost 10 years.[43]

39. This possibility appears to be real for Nigeria because the Petitioners have already referred to correspondence with the Respondent that is relevant to Nigeria's pleaded case. Given this, so Nigeria claims, it is possible that further documentation could come to light if the Petition is granted, which would assist the Tribunal in resolving the dispute.[44] Moreover, Nigeria points out that the Petition refers to categories of documents which it may not have access to but which could nevertheless be relevant to the resolution of the dispute, namely:

> "(i) documents related to Eni's due diligence process prior to entering into the Resolution Agreements in 2011, including, for instance, supposed "lacunae" and "board disputes" in connection with that process; (ii) ReCommon's interactions with Eni as one of its shareholders; (iii) the decision by the Milan Prosecutors' Office to investigate and prosecute Eni and others for corruption offences in relation to OPL 245; (iv) the corruption investigations in other jurisdictions; and (v) the Petitioners' engagement with the OECD Working Group on Bribery over recent rulings by the Italian judiciary, including the Milan Court's acquittal of Eni over OPL 245".[45]

40. Further, according to Nigeria, while the Petitioners' perspective on the dispute will differ from the Claimants, it appears likely that it will also differ from Nigeria's perspective for the following reasons.[46]

a. First, the Petitioners are NGOs whose primary interest derives from their campaigning activities in areas such as human rights, corruption, good governance, transparency and government accountability. While the Nigerian Government shares this goal, it is subject to responsibilities and exigencies that are very different from those incumbent on the Petitioners. This is why, so Nigeria says, the Petitioners' are likely to bring a different perspective that can be expected to assist the Tribunal if their request to intervene is granted.[47]

b. Second, the Petitioners have all been engaged in a number of domestic and international proceedings regarding OPL 245 in some way or another. This suggests, so Nigeria says, that the Petitioners' input may assist the Tribunal "in better understanding certain factual and legal aspects which may impact its jurisdiction and possibly the merits of the claims."[48] Nigeria understands this to be the Petitioners' intention as they have participated in numerous proceedings that are germane to this case and thus not only have an interest in the corruption issues in this case, but also have experience in litigating those issues, with

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43 R-Response, ¶ 13(a).

44 R-Response, ¶ 13(b).

45 R-Response, ¶ 13(c).

46 R-Response, ¶ 11.

47 R-Response, ¶¶ 14-15, 20.

48 R-Response, ¶ 22.

the result that their contribution to these proceedings, if permitted, may be significantly tangible.[49]

c. Third, Nigeria submits that given the Petitioners' track record, there is no reason to question their expertise on matters of corruption and transparency and thus, the Petitioners' assertions as to the knowledge and insight they will bring to these proceedings.[50]

(b) The Petition will directly address matters within the scope of the dispute

41. Nigeria notes that the Petitioner refer to two topics that they intend to address in their written submission, if permitted. First, the extent to which an investor's protection under a BIT should be affected by the steps taken by that investor to assess and mitigate the risk of corruption in advance of making the investment and second, the legality of the Resolution Agreements. According to Nigeria, these matters are clearly within the scope of the present dispute.[51]

(c) The Petitioners have a significant interest in the proceedings

42. Nigeria submits that all three Petitioners have been involved in some way with the criminal investigation into OPL 245 in various jurisdictions. For example, (a) all three filed complaints with the Economic and Financial Crimes Commission; (b) two of the Petitioners filed complaints with the Milan Prosecutor's Office and all three previously sought, albeit unsuccessfully, to intervene in the Milan proceedings; (c) all three filed complaints with the Dutch Federal Prosecutor's Office; and (d) HEDA is currently before the Nigerian courts in a case concerning the alleged corruption underlying the OPL 245 deal. It asserts that these proceedings and their impact on the negotiations between the Parties over the conversion of OPL 245 are key issues in this arbitration, which supports the view that the Petitioners have a significant interest in the proceedings for the purpose of the ICSID Rules.[52]

43. Moreover, the Petitioners' interest is also underlined by the broader public interest in combatting corruption, as they are organizations that purport to represent the interests of the general Nigerian public. As the Petitioners' activities and activism center on investigating and holding allegations of corruption to account, it makes sense for Nigeria that the Petitioners have the requisite significant interest in the proceedings.[53]

(d) The Petitioners' intervention would not disrupt the proceedings

44. It is Nigeria's submission that the Petitioners' intervention would not disrupt the proceedings because (i) they intend to file a single written submission; (ii) there is adequate time in the procedural calendar to accommodate the filing of such submission and the Parties' comments thereon; (iii) the Tribunal has the power and discretion to limit any perceived disruption by setting

49 R-Response, ¶ 23.

50 R-Response, ¶ 24.

51 R-Response, ¶ 27.

52 R-Response, ¶¶ 32-33.

53 R-Response, ¶ 35 and ¶¶ 36-38.

appropriate deadlines and page limits for the Petitioners' submissions and the Parties' observations; and (iv) the Petitioners are experienced in litigation.[54]

(e) Petitioners' request to access documents

45. Nigeria notes that all documents or categories of documents requested by the Petitioners are subject to confidentiality restrictions under PO1. It takes the position that such confidentiality should not be jeopardized or compromised as a result of the Petition being granted. Noting that the Petitioners have not confirmed whether and how they will observe confidentiality, Nigeria submits that it will not agree to the Petitioners' request for documents "until such time that it is satisfied that the confidentiality attaching to the requested materials can be guaranteed by the Petitioners".[55]

(f) Request for publication

46. Finally, regarding the Claimants' request for publication, Nigeria submits that it is premature at this stage and does not warrant deviating from the existing confidentiality regime, because neither the Parties nor the Tribunal is aware of what submissions the Petitioners will make.[56] This being said, Nigeria confirms that it "is content to be in the Tribunal's hands on this matter" and "has no objection in principle to the Tribunal ordering such publication, to the extent the Tribunal considers it reasonable and appropriate to do so, and provided that publication is strictly limited to the material described in Eni's letter of 15 August 2022 (quoted above)."[57]

IV. DISCUSSION

A. Preliminary Observations

47. The Petitioners request the Tribunal to allow them to participate in this arbitration as NDPs and file a written submission (a); and to grant them access to certain documents in the case record to facilitate the preparation of such written submission (b).

48. The legal framework applicable to the determination of the first of these two requests is contained in Rule 37(2), which reads as follows:

> "(2) After consulting both parties, the tribunal may allow a person or entity that is not a party to the dispute (in this Rule called the 'non disputing party') to file a written submission with the tribunal regarding a matter within the scope of the dispute. In determining whether to allow such a filing, the tribunal shall consider, among other things, the extent to which:
>
> (a) the non-disputing party submission would assist the tribunal in the determination of a factual or legal issue related to the proceeding by bringing

54 R-Response, ¶¶ 39-41.

55 R-Response, ¶ 46.

56 R-Preliminary Observations, p. 4 of 6.

57 R-Response, ¶ 49.

> a perspective, particular knowledge or insight that is different from that of the disputing parties;
>
> (b) the non-disputing party submission would address a matter within the scope of the dispute;
>
> (c) the non-disputing party has a significant interest in the proceeding.
>
> The tribunal shall ensure that the non-disputing party submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party, and that both parties are given an opportunity to present their observations on the non-disputing party submission."

49. As can be seen from the language of this rule, Rule 37(2) grants an arbitral tribunal the discretionary authority to permit NDP participation through the filing of a written submission. In determining a request to intervene, the tribunal must consult the disputing parties and examine whether the written submission will satisfy the considerations mentioned in this rule. The list of considerations is not exhaustive and a tribunal can consider "other things", including factors that militate against allowing NDP participation notwithstanding the considerations expressly listed in Rule 37(2) being satisfied.[58] Finally, if NDP participation is permitted, a tribunal must put in place measures that ensure that the NDP submission does not disrupt the proceedings or unfairly prejudice the disputing parties.

50. By contrast, Rule 37(2) is silent on a NDP's access to the case record. The ICSID Convention and Arbitration Rules are equally silent on the matter. The Tribunal notes that some ICSID tribunals have granted NDPs access to specific documents or certain portions of documents in the record with a view to avoiding a redundant or unfocused written submission.[59] However, this practice remains exceptional and is usually subject to the disputing parties' agreement, if any, on the confidentiality of the proceedings.[60]

51. With these considerations in mind, the Tribunal shall first address the Petitioners' request to file a written submission (**B**) and then, their request for documents (**C**). Following from its determination on these questions, the Tribunal will examine the Claimants' request for publication of the part of the record related to the Petition (**D**).

B. Request to file a Written Submission

52. In light of the Petitioners' and the Parties' submissions, the Tribunal starts by reviewing whether the Petitioners satisfy the criteria mentioned in Rule 37(2).

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58 G. Born and S. Forrest, "Amicus Curiae Participation in Investment Arbitration", (2019) 34(3) ICSID Review 626, CLA-121 / RLA-204, pp. 644-645. See also, L. Sobota and G. Verhoosel, "Written and Oral Procedures", in J. Fouret et. al. (eds.), THE ICSID CONVENTION, REGULATIONS AND RULES (2019), RLA-205.

59 See, *Piero Foresti, Laura de Carli and others v. Republic of South Africa*, ICSID Case No. ARB(AF)/07/01, Letter from Secretary of the Tribunal to the Petitioners dated 5 October 2009, CLA-106; *Infinito Gold Ltd. v. Costa Rica*, ICSID Case No. ARB/14/5, Procedural Order No. 2 dated 1 June 2016, RLA-209, ¶¶ 40 *ff*.

60 L. Sobota and G. Verhoosel, "Written and Oral Procedures", in J. Fouret et. al. (eds.), The ICSID Convention, Regulations and Rules (2019), RLA-205, ¶ 24.113; L. Bastin, "Amici Curiae in Investor-State Arbitration: Eight Recent Trends", (2014) 30 Arb. Int'l 125, RLA-212, p. 142.

53. With respect to the first criterion in Rule 37(2), the Petitioners must demonstrate that they can assist the Tribunal by contributing knowledge or insight differing from that of the disputing Parties and which will assist in determining the issues in dispute. Arbitral decisions interpreting this criterion and a materially similar condition in other procedural rules have interpreted it as imposing upon prospective NDPs the burden to show that their submission has utility beyond the assistance and materials provided by or likely to be provided by the disputing Parties and would not be duplicative of the latter's submissions.[61]

54. The Tribunal considers that the Petitioners' input might assist it in better understanding certain factual aspects of the present dispute, specifically aspects relating to the allegations of corruption in relation to the OPL 245 transaction raised by Nigeria against the Claimants. Such factual aspects may have an impact on the Tribunal's jurisdiction or the merits of the claim. The Petitioners aver that they have been conducting their own investigation into these allegations since 2012/2013,[62] and are responsible for filing complaints with relevant authorities in Nigeria, Italy and the UK, which in turn led to investigations against and the criminal prosecution of the Claimants and their associated entities and individuals for corruption before the courts in these jurisdictions.[63] At this stage, the Tribunal cannot rule out that the Petitioners' involvement has given them access to knowledge and documents regarding the factual background of the OPL 245 transaction and its aftermath that the Parties "(i) are either unlikely to have or (ii) may not have disclosed or (iii) that would not be mentioned for any other reason".[64] At least *arguendo,* the Tribunal is ready to accept the correctness of the Petitioners' averment in this regard.

55. By contrast, the Tribunal is not persuaded by the Petitioners' assertion that they would be able to assist the Tribunal by providing a perspective on the legal issues arising from the OPL 245 transaction, which is "wholly independent" from either of the disputing Parties.[65] In circumstances where the disputing Parties are represented by experienced counsel who have and will further extensively brief the legal issues arising in this arbitration and have also submitted expert evidence on such issues, to borrow the *Apotex* Tribunal's words, it appears

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61 G. Born and S. Forrest, "Amicus Curiae Participation in Investment Arbitration", (2019) 34(3) ICSID Review 626, CLA-121 / RLA-204, pp. 646-647; *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, Procedural Order No. 6 dated 21 July 2016, ¶¶ 37-39; *Resolute Forest Products Inc. v Government of Canada*, PCA Case No. 2016-13, Procedural Order No. 6 on the Participation of Prof. Robert Howse and Mr. Barry Appleton as Amici Curiae, CLA-113, ¶ 4.4; *Odyssey Marine Exploration, Inc. v The United Mexican States*, ICSID Case No. UNCT/20/1, Procedural Order No. 6: Decision on the Application for Leave to File a Non-Disputing Party Submission (Amicus Curiae) dated 20 December 2021, CLA-124, ¶¶ 23; *Apotex Holdings Inc. and Apotex Inc. v. United States*, ICSID Case No. ARB(AF)/12/1, Procedural Order on the Participation of the Applicant, Mr. Barry Appleton, as a Non-Disputing Party dated 4 March 2013, ¶¶ 31-34; *Apotex Holdings Inc. and Apotex Inc. v. United States*, ICSID Case No. ARB(AF)/12/1, Procedural Order on the Participation of the Applicant, BNM, as a Non-Disputing Party dated 4 March 2013, ¶¶ 22-26; *Methanex Corporation v. United States of America*, UNCITRAL, Decision of the Tribunal on Petitions from Third Persons to Intervene as "amici curiae" dated 15 January 2001. CLA-102 / RLA-214, ¶ 48.

62 Petition, ¶¶ 3.07, 3.19, 3.32.

63 Petition, ¶ 5.24(ii).

64 Petition, ¶¶ 5.11-5.13.

65 Petition, ¶ 5.15.

"most unlikely"[66] that the Petitioners would provide the Tribunal with any further assistance on such legal matters.

56. Thus, the Tribunal finds that the Petitioners could contribute particular knowledge regarding the factual aspects of the corruption allegations at issue in these proceedings, which knowledge could differ from that of the disputing parties and could assist the Tribunal in better understanding the dispute.

57. With respect to the second criterion in Rule 37(2), it follows from paragraph 54 that the Petitioners will address matters within the scope of the dispute.

58. With respect to the third criterion in Rule 37(2), the Tribunal notes that the Petitioners' stated mandates include *inter alia*, the promotion of accountability, transparency, good governance and sustainable use of resources.[67] Their investigations and advocacy work into the OPL 245 transaction has been and is being undertaken in furtherance of these objectives. As the present arbitration relates to the impact of this very transaction, in the words of the *Infinito Gold* Tribunal, the Petitioners "can thus be deemed to have an interest in ensuring that this Tribunal has all the information necessary to its decision-making".[68]

59. In summary, the Tribunal finds that the Petitioners satisfy the criteria in Rule 37(2), confers them with NDP status and permits them to make a written submission.

60. Consequently, pursuant to Rule 37(2) *in fine*, the Tribunal must ensure that (i) this written submission "does not disrupt the proceeding or unduly burden or unfairly prejudice either party", and (ii) "both parties [have] an opportunity to present their observations on the [NDP] submission". Accordingly, the Tribunal issues the following directions:

    a. The Petitioners shall submit factual documents not already forming part of the record (see, paragraphs 62-63 below) that are relevant to the allegations of corruption in relation to the OPL 245 transaction made by the Respondent against the Claimants, as well as to possible further instances of corruption tainting the Claimants' investment and their rights in relation to OPL 245. The documents shall be numbered consecutively and carry the prefix "NDP-" (thus, "Exh. NDP-1", "Exh. NDP-2" and so forth).

    b. The Petitioners shall file a single, joint written submission of **20 pages** in length, which will be limited to commenting upon (i) the factual aspects pertaining to the allegations of corruption with respect to OPL 245, either committed by the Claimants or in sufficient link with their investment; and (ii) how and why the documents introduced by the Petitioners pursuant to paragraph 60(a) above are relevant to the corruption allegedly tainting OPL 245. The written submission shall relate to facts alone and not include any legal submissions.

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66 *Apotex Holdings Inc. and Apotex Inc. v. United States*, ICSID Case No. ARB(AF)/12/1, Procedural Order on the Participation of the Applicant, Mr. Barry Appleton, as a Non-Disputing Party dated 4 March 2013, ¶¶ 33-34.

67 See, Petition, ¶ 3.03 (HEDA); ¶ 3.13 (CHR) as stated in its Memorandum of Association, ¶ 3; ¶ 3.25 (ReCommon).

68 *Infinito Gold Ltd. v. Costa Rica*, ICSID Case No. ARB/14/5, Procedural Order No. 2 dated 1 June 2016, RLA-209, ¶ 36.

c. The written submission and documents will be submitted to the ICSID Secretariat, which shall communicate them to the Tribunal, the Tribunal Assistant and each Party.

d. The documents submitted by the Petitioners pursuant to paragraph 60(a) above shall not automatically form part of the record unless (i) they are referred to in and substantiate the arguments made by the Petitioners in the written submission submitted pursuant to paragraph 60(b) above; or (ii) they are introduced into the record either by the Tribunal *ex-officio* or by a Party together with a forthcoming submission.

e. The filing of the written submission and documents shall not be subject to any cost undertakings and the NDP shall receive no compensation whatsoever from either Party in this arbitration.

f. The Parties shall submit their observations on the NDPs' written submission and documents on **26 May 2023**. Reply observations may be filed on **4 August 2023,** after making a reasoned request and being granted leave by the Tribunal.

C. Request to access documents

61. The Petitioners request access to (i) the Tribunal's decisions and procedural orders, including those to be issued in the future; (ii) the Parties' pleadings together with their supporting documents; and (iii) the Parties' observations on the Petition and their forthcoming observations on the NDPs written submission.[69]

62. As noted previously, there is limited precedent for granting NDPs access to the case record, particularly if the proceedings are, as in the instant case, subject to confidentiality. This being said, to ensure that the Petitioners effectively discharge their task of providing the Tribunal with useful insight on the factual aspects of the corruption allegations and that they do so without disrupting the proceedings or prejudicing the Parties, it is preferable that the Petitioners are aware of some information that has already been submitted to the Tribunal.

63. In the Tribunal's view, keeping in mind this dual objective, the scope of the written submission to be filed by the Petitioners as set out in paragraphs 60(a) and 60(b) above, and the fact that several of the documents relevant to the corruption allegations are already in the public domain, it is sufficient to provide the Petitioners with the consolidated list of factual exhibits submitted by each Party. In the circumstances, the Tribunal directs as follows:

a. Within **1 week from the date of this decision**, ICSID shall make available to the Petitioners, the Claimants' and the Respondent's respective consolidated index of factual exhibits filed up to the date of this Procedural Order;

b. The Petitioners shall not be provided access to any other part of the record, including future additions to the record in this case; and

c. The Parties' lists of factual exhibits are being provided to ensure that the Petitioners only place on record pursuant to paragraph 60(a) above, documents that are not already part

[69] Petition, ¶¶ 6.01, 6.07.

of the record. Accordingly, the Petitioners shall use the Parties' respective lists of factual exhibits exclusively for the purposes of preparing their written submission for this arbitration and shall not share them with any third parties or use them outside of these proceedings. They shall destroy such lists and any documents from this proceeding as soon as they have used them for the purpose for which they shall have received them.

D. Request for publication

64. Having considered the Parties' positions on the Claimants' request for publication, the Tribunal considers it sufficient at this stage, to order the publication of this Procedural Order alone. The Parties may apply to the Tribunal to reconsider its decision on publication in the event there is a change in circumstances that justifies publication of the whole or part of the case record in relation to the Petition.

65. Accordingly, the Tribunal directs ICSID to publish this Procedural Order as soon as practicable, following its issuance.

V. ORDER

66. In light of the above considerations, the Tribunal determines as follows:

a. The ICSID Secretariat shall notify this Procedural Order to the Petitioners and shall publish it as soon as practicable;

b. Within 1 week from the notification of this Order and provided the Petitioners have confirmed in writing to the ICSID Secretariat that they will fully abide by this Order also within this time period, the Secretariat shall make available to the Petitioners, the Claimants' and Respondent's respective consolidated index of factual exhibits available in the record as of the date of this Procedural Order;

c. Within 3 weeks of receiving the Parties' indices of exhibits, the Petitioners may submit factual documents not already forming part of the record that are relevant to (i) the allegations of corruption in relation to the OPL 245 transaction made by the Respondent against the Claimants, and (ii) possible further instances of corruption tainting the Claimants' investment and their rights in relation to OPL 245;

d. Within 3 weeks of receiving the Parties' indices of exhibits, the Petitioners may file a single, joint written submission of 20 pages in length, which will be limited to commenting upon (i) the factual aspects pertaining to the allegations of corruption with respect to OPL 245, either committed by the Claimants or in sufficient link with their investment; and (ii) how and why the documents introduced by the Petitioners pursuant to paragraph 66(c) above are relevant to the corruption allegedly tainting OPL 245. The written submission shall relate to facts alone and not include any legal submissions.

e. The written submission and documents shall be submitted to the ICSID Secretariat, which shall communicate them to the Tribunal, each Party and the Tribunal Assistant;

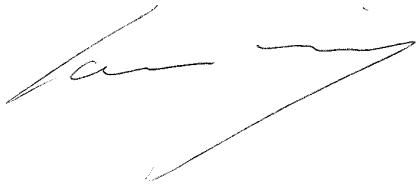
f. The documents submitted by the Petitioners pursuant to paragraph 66(c) above shall not automatically form part of the record unless (i) they are referred to in and substantiate the arguments made in the written submission filed pursuant to paragraph 66(d) above; or (ii) they are introduced into the record either by the Tribunal *ex-officio* or by a Party together with a forthcoming submission;

g. The Petitioners shall use the Parties' respective indices of factual exhibits, which are being provided to ensure that the Petitioners only place on record documents that are not already part of the record, exclusively for the purposes of preparing their written submission for this arbitration and shall not share them with any third parties or use them outside of these proceedings;

h. The Petitioners shall destroy the indexes and any documents from this proceeding as soon as they have used them for the purpose for which they shall have received them;

i. The Parties shall submit their observations on the NDPs' written submission and documents simultaneously on 26 May 2023. Reply observations may be filed on 4 August 2023, after making a reasoned request and being granted leave by the Tribunal; and

j. All other remaining requests for relief are denied.



Dr. Laurent Lévy
President of the Tribunal
Date: 07 March 2023