

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

**Interocean Oil Development Company and
Interocean Oil Exploration Company**

v.

Federal Republic of Nigeria

(ICSID Case No. ARB/13/20)

**DECISION ON THE PROPOSAL TO DISQUALIFY
ALL MEMBERS OF THE ARBITRAL TRIBUNAL**

Chairman of the Administrative Council

Dr. Jim Yong Kim

Secretary of the Tribunal

Mr. Benjamin Garel

Date: October 3, 2017

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TABLE OF CONTENTS

I. PROCEDURAL HISTORY	4
II. PARTIES' ARGUMENTS.....	7
A. The Respondent's Disqualification Proposal	7
1) Ground 1: The Tribunal's Comments Touching on the Integrity of the Respondent's Counsel	7
2) Ground 2: Professor Park Failed to Disclose His Involvement as Arbitrator in a Related Arbitration.....	9
3) Ground 3: Professor Park's and Professor Lew's Failure to Disclose Their Membership in a Task Force on Third Party Funding.....	10
4) Ground 4: The Tribunal's Numerous Procedural Irregularities, Considered Together, Indicate That it is Biased Against the Respondent	11
B. The Claimants' Reply.....	15
1) Ground 1: The Tribunal's Comments Touching on the Integrity of the Respondent's Counsel	15
2) Ground 2: Professor Park's Involvement as Arbitrator in a Related Arbitration.....	16
3) Ground 3: Professor Park's and Professor Lew's Membership in a Task Force on Third Party Funding.....	18
4) Ground 4: The Tribunal's Numerous Procedural Irregularities Before and During the July 2017 Hearing.....	18
III. ANALYSIS	23
A. The Applicable Legal Standard.....	23
B. Timeliness	25
C. Merits.....	28
IV. DECISION	33

I. PROCEDURAL HISTORY

1. On July 31, 2013, Interocean Oil Development Company and Interocean Oil Exploration Company (“**Interocean**” or the “**Claimants**”) submitted a Request for Arbitration to the International Centre for Settlement of Investment Disputes (“**ICSID**” or the “**Centre**”) against the Federal Republic of Nigeria (“**Nigeria**” or the “**Respondent**”).
2. On September 9, 2013, the Secretary-General of ICSID registered the Request for Arbitration pursuant to Article 36(3) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (“**ICSID Convention**”), under ICSID Case No. ARB/13/20.
3. On December 11, 2013, the Secretary-General notified the Parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to have been constituted on that date, in accordance with Rule 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings (“**ICSID Arbitration Rules**”). Mr. James Claxton, ICSID Legal Counsel, was designated to serve as Secretary of the Tribunal. Mr. Claxton was subsequently replaced by Mr. Benjamin Garel, ICSID Legal Counsel.
4. The Tribunal is composed of Professor William W. Park, a national of Switzerland and the United States of America, President, appointed by the Parties in accordance with Article 37(2)(b) of the ICSID Convention; Professor Julian Lew, a national of the United Kingdom, appointed by the Claimants; and Judge Edward Torgbor, a national of the United Kingdom and Ghana, appointed by the Respondent.
5. On February 13, 2014, the Tribunal held its first session with the Parties. During the first session, the Parties confirmed that the Tribunal was properly constituted and that they had no objection to the appointment of any member of the Tribunal.
6. In accordance with Annex A of Procedural Order No. 1, issued on February 26, 2014, the Respondent filed a Memorial on Preliminary Objections on March 14, 2014. On April 11, 2014, the Claimants filed a Counter-Memorial on Preliminary Objections. On April 25, 2014, the Respondent filed a Reply on Preliminary Objections. On May 9, 2014, the Claimants filed a Rejoinder on Preliminary Objections.

7. On June 26, 2014, the Tribunal held a Hearing on Preliminary Objections in London. They subsequently issued a Decision on Preliminary Objections on October 29, 2014, (the “**Decision on Jurisdiction**”).
8. On February 17, 2016 and April 20, 2016, the Tribunal issued, respectively, Procedural Order No. 3 and Procedural Order No. 4 concerning the production of documents.
9. The Tribunal held the first Hearing on the Merits from August 2 through August 4, 2016, in order to hear the Parties’ fact witnesses as well as their damages and legal experts (the “**August 2016 Hearing**”).
10. Shortly before and at the outset of the hearing, the Claimants made two applications to the Tribunal: (a) challenging the validity of the appointment of Volterra Fietta & Co. and Ms. Rosemary Rameau as Respondent’s co-counsel and (b) seeking the disclosure by the Respondent of any agreement providing for the funding of its defense by a third party.
11. During the hearing, the Respondent also requested provisional measures from the Tribunal, seeking an order that the Claimants post security for its costs in the arbitration.
12. As a result of the time spent by the Parties and the Tribunal on these applications and request, only the fact witnesses were heard at the hearing. The examination of damages and legal experts was postponed to a second hearing, which was subsequently scheduled to be held on July 19 through July 21, 2017 (the “**July 2017 Hearing**”).
13. On October 15, 2016, the Tribunal issued Procedural Order No. 5 concerning the applications made by the Claimants before and at the August 2016 Hearing.
14. On February 1, 2017, the Tribunal issued Procedural Order No. 6 concerning the request for provisional measures filed by the Respondent at the August 2016 Hearing.
15. On June 19, 2017, the Claimants filed two applications seeking leave to introduce additional documents into the record. The first application concerned a number of emails, which the Parties and the Secretariat had received from an unknown source on June 11, 2017 (the “**June 11, 2017 Emails**”). The second application concerned a letter from the Nigerian Investment Promotion Commission dated September 26, 2016 (the “**NIPC Letter**”).

16. On June 30, 2017, the Respondent filed its responses to the Claimants' applications of June 19, 2017.
17. By email dated July 7, 2017, the Tribunal informed the Parties that the question of the introduction of the NIPC Letter into the record by the Claimants would be addressed as necessary at the opening of the July 2017 Hearing scheduled on July 19-21, 2017. The Tribunal further indicated that the question of the admission of the June 11, 2017 Emails would be discussed on the third day of the July 2017 Hearing.
18. On the first day of the July 2017 Hearing, the Tribunal informed the Parties of its decision to admit the NIPC Letter into the record. The Tribunal then heard the Parties' legal and damages experts. At the end of the hearing, the Tribunal, after consulting the Parties, issued two directives: one regarding the filing of post-hearing briefs, and the other regarding the Claimants' request to introduce the June 11, 2017 Emails into the record.
19. By letter of August 4, 2017, the Respondent notified ICSID of its intention to submit a proposal for the disqualification of all three members of the Tribunal by no later than August 18, 2017.
20. On August 16, 2017, the Respondent proposed the disqualification of all three members of the Tribunal (the "**Challenged Arbitrators**") in accordance with Article 57 of the ICSID Convention and ICSID Arbitration Rule 9 (the "**Proposal**"). On that date, the Centre informed the Parties that the proceeding had been suspended until the Proposal was decided, pursuant to ICSID Arbitration Rule 9(6). The Centre also established a procedural calendar for the Parties' submissions on the Proposal.
21. On September 4, 2017, the Claimants filed their observations on the Proposal.
22. On September 11, 2017, each of the three Challenged Arbitrators furnished his explanations regarding the Proposal.¹
23. On September 18, 2017, each Party submitted further observations on the Proposal.

¹ The Challenged Arbitrators' explanations dated September 11, 2017 are appended to this Decision as Annexes A (Prof. Park), B (Prof. Lew) and C (Judge Torgbor).

II. PARTIES' ARGUMENTS

A. The Respondent's Disqualification Proposal

24. The Respondent's arguments in support of its Proposal were set forth in its submissions of August 16, 2017 and September 18, 2017. These arguments fall within four grounds, which relate either to the entire Tribunal or to certain members of the Tribunal. They are summarized below.

1) Ground 1: The Tribunal's Comments Touching on the Integrity of the Respondent's Counsel

25. The Respondent states that the July 2017 Hearing schedule only provided for expert conferencing with the damages experts and that on the second day before the lunch break, at the end of the Respondent's legal experts' examination, the President of the Tribunal indicated that the Tribunal would also like to conduct expert conferencing with the legal experts at the end of that day.²
26. The Respondent further states that the Tribunal authorized one of its counsel, Mr. Adenipekun, to confer with its legal expert Mr. Ayoola, while he was still on the stand, regarding his availability to participate in an expert conferencing session at the end of that day. The Respondent adds that Mr. Ayoola indicated that he was not available.³
27. The Respondent takes issue with three sets of comments made by the President of the Tribunal, later that day and on the third hearing day, in connection with these events.
28. The first comments, made after the mid-afternoon break on the second hearing day, were as follows:

Secondly, the Tribunal was--and we'll be very honest with you. The Tribunal was distressed that the Respondent's legal expert had to leave town so quickly because we would have wanted to have the opportunity to put Respondent's legal expert and Claimants' legal expert, at least Mr. Oditah and Mr. Ayoola together for further questioning, and now it seems like that is no longer a prospect, and we are trying to figure out what we will do about it. We would have liked to have been able to encourage Mr. Ayoola to remain. There were

² Respondent's Proposal, p. 4.

³ Respondent's Proposal, pp. 4-5.

*conversations with him that we weren't privy to, so we don't know what was said.*⁴

29. The second comments, made at the beginning of the third hearing day on July 21, 2017, were as follows:

The Tribunal will take this all on board at the break. Just to summarize, though, although it is correct that the Tribunal did not make any finding of fault as to why the conferencing of the Legal Experts could not take place, we were disappointed that it did not take place. We noticed that there were conversations between Respondent's counsel and Mr. Ayoola immediately after his testimony when we suggested that there be witness conferencing. We don't know what the content of those conversations was, so we can't comment. But there is a sense on the part of the Tribunal that it is unsatisfactory that there was no opportunity for the Legal Experts, or at least some of them, to sit together the way the Quantum Experts did. And when the Quantum Experts sat together, we had a great deal of fruitful exchange. We were deprived of that fruitful exchange with the Legal Experts. (emphasis supplied by the Respondent)⁵

30. The third comments, made shortly after the second comments, were as follows:

Yes. As I said, the Tribunal was not a party to that conversation. We make no conclusion about it. We have not allocated fault in this matter, but we do express our disappointment because we would have liked to have seen Justice Ayoola and Professor Oditah, in particular, together because they were two experts who differed sharply on the analysis of Nigerian law. (emphasis supplied by the Respondent)⁶

31. The Respondent argues that the Tribunal's comments create an appearance of bias because they were repeated several times and they used strong language such as "distressed", "unsatisfactory" and "disappointed".⁷ The Respondent also contends that the Tribunal repeated that it was not part of the conversation between Mr. Adenipekun and the expert, whereas the conversation took place in the hearing room, in front of the Tribunal who could and did ask questions to Mr. Ayoola. The Respondent adds that the Tribunal could have tried to convince and encourage the expert to stay, but did not.⁸

⁴ Respondent's Proposal, pp. 6-7; Tr. Day 2, 699:1-14.

⁵ Respondent's Proposal, pp. 7-9; Tr. Day 3, 902:15 – 903:10.

⁶ Respondent's Proposal, pp. 9-12; Tr. Day 3, 904:15-22.

⁷ Respondent's Proposal, pp. 9-10

⁸ Respondent's Proposal, pp. 9-10.

32. The Respondent further submits that the Tribunal's comments imputed bad faith to Mr. Adenipekun and, evaluated objectively by a third party, suggested not only that the conversation he had with the expert influenced Mr. Ayoola to indicate that he was not available for the expert conferencing session, but also that the Tribunal doubted the accuracy of Mr. Adenipekun's report of such conversation.⁹
33. The Respondent adds that the Tribunal's reference to its lack of knowledge of the contents of Mr. Adenipekun's conversation with the expert was not necessary to express its regrets not to be able to have a conferencing session with the legal experts. For the Respondent, the Tribunal's repeated comments "*were actuated by a belief or perception that its lead counsel lacks integrity*", which, relying on the Chairman's decision in *Burlington Resources, Inc v. Republic of Ecuador*, is evidence of the Tribunal's lack of impartiality.¹⁰

2) Ground 2: Professor Park Failed to Disclose His Involvement as Arbitrator in a Related Arbitration

34. The Respondent contends that Professor Park failed to disclose that he was acting as arbitrator in an arbitration between TOTAL Exploration & Production Nigeria Ltd., Chevron Petroleum Nigeria Ltd., Nexen Petroleum Nigeria Ltd., and Esso Exploration and Production Nigeria (Offshore East) Ltd. as claimants and the Nigeria National Petroleum Corporation (the "NNPC") as respondent ("**the TOTAL et al v. NNPC Arbitration**"), in which an award was rendered on December 13, 2013, three days after Professor Park had accepted his appointment in the present ICSID Case No. ARB/13/20.¹¹
35. The Respondent submits that because the issues decided in the TOTAL et al v. NNPC Arbitration are similar to, related to and overlap with the issues in ICSID Case No. ARB/13/20, and because the NNPC was identified in the Claimants' Request for Arbitration as one of the "*principal contact points and instrumentalities concerned with this matter*", Professor Park should have disclosed his involvement in that case immediately upon his appointment in ICSID Case No. ARB/13/20.¹²

⁹ Respondent's Proposal, p. 6.

¹⁰ Respondent's Proposal, pp.12-13.

¹¹ Respondent's Proposal, pp. 12-14.

¹² Respondent's Proposal, p. 14.

36. The Respondent adds that even if Professor Park did not know enough about the issues in ICSID Case No. ARB/13/20 at the time of his appointment, his duty to disclose is a continuous one and he should have made the required disclosure once the issues became clear.¹³
37. The Respondent concludes that Professor Park's involvement in the TOTAL et al v. NNPC Arbitration as well as his failure to disclose it raise reasonable doubts as to his impartiality.¹⁴

3) Ground 3: Professor Park's and Professor Lew's Failure to Disclose Their Membership in a Task Force on Third Party Funding

38. The Respondent recalls that in 2014, after the commencement of this arbitration, the International Council for Commercial Arbitration (ICCA) and Queen Mary University of London (QMUL) jointly created a Task Force on Third-Party Funding. Professor Lew and Professor Park are members of this task force, the latter as co-chair. The Respondent also mentions that Professor Fidelis Oditah, one of the Claimants' legal experts, is also a member of this task force.¹⁵
39. The Respondent further recalls that the stated mission of the Task Force is to study and make recommendations regarding the procedure, ethics, and policy issues relating to third party funding in international arbitration.¹⁶
40. The Respondent also notes that the issue of third party funding in this case only arose after the creation of the task force, at the time of the August 2016 Hearing, and was adjudicated by the Tribunal in its Procedural Order No. 5. The Respondent adds that it complied with Procedural Order No. 5 by providing a letter from its Attorney-General dated October 27, 2016 explaining how its defense was funded. The Respondent further adds that the Tribunal's concern with the potential existence of a third-party funder was to be able to check and avoid any potential conflict of interests.¹⁷

¹³ Respondent's Proposal, p. 15.

¹⁴ Respondent's Proposal, p. 15.

¹⁵ Respondent's Proposal, p. 15.

¹⁶ Respondent's Proposal, pp. 15-16.

¹⁷ Respondent's Proposal, pp. 16-18.

41. The Respondent contends that the June 11, 2017 Emails which the Claimants sought to introduce into the record have reopened the third party funding issue and placed it at the center of the case. The Respondent also submits that these Emails aim to prove that the funding of its defense is not as explained in the Attorney-General's letter of October 27, 2016, but rather, that the individual accused by the Claimants of having orchestrated the expropriation of its investment is providing funds to the Respondent.¹⁸
42. The Respondent further contends that the Tribunal's decision to admit these documents into the record was greatly influenced by the fact that two of its members are members of the ICCA/QMUL task force on third party funding. The Respondent also notes that none of the Tribunal's members has indicated that a conflict would arise if that individual was in fact funding the Respondent's defense, yet the Tribunal still decided to admit the June 11, 2017 Emails.¹⁹
43. The Respondent therefore concludes that because Professor Park and Professor Lew are members of the task force on third party funding, they cannot be relied upon as impartial and independent arbitrators with respect to the central issue of third party funding in this case.²⁰

4) Ground 4: The Tribunal's Numerous Procedural Irregularities, Considered Together, Indicate That it is Biased Against the Respondent

44. The Respondent contends that from the beginning of the case until the July 2017 Hearing, the Tribunal "*embarked on a consistent trend of fundamental procedural irregularities*", which considered together indicate that the Tribunal is biased against the Respondent.²¹ These alleged irregularities are summarized below.

Procedural Irregularities Allegedly Committed Before the July 2017 Hearing

- (i) The Tribunal refused to consider and determine in its Decision on Jurisdiction dated October 29, 2014 that the Claimants were not registered with the NIPC and deferred such determination to a later stage of the proceedings. The Respondent recalls that the

¹⁸ Respondent's Proposal, p. 18.

¹⁹ Respondent's Proposal, p. 18.

²⁰ Respondent's Proposal, pp. 18-20.

²¹ Respondent's Proposal, p. 19.

jurisdiction of ICSID in this case is subject to the registration of the Claimants with the NIPC. The Respondent further recalls that the Claimants had affirmed in their Request for Arbitration dated July 30, 2013 that they were registered with the NIPC but later admitted in their Rejoinder on Jurisdiction dated May 19, 2014 that they were not registered with the NIPC. For the Respondent, the Tribunal ostensibly gave an unfair advantage and opportunity to the Claimants to remedy the non-registration issue.²²

- (ii) During the hearing on jurisdiction on June 26, 2014, the Tribunal raised an issue regarding the comprehensiveness of the NIPC's register while being aware of the Claimants' admission in their Rejoinder that they were not registered with the NIPC. The Respondent contends that the issue raised by the Tribunal was irrelevant and that the Tribunal raised it only to discredit the NIPC register and minimize the importance of the Claimants' non-registration with the NIPC.²³
- (iii) The Tribunal never inquired into nor sanctioned the fact that the Claimants filed submissions after the deadline established by the Tribunal on multiple occasions, without requesting nor obtaining an extension of time. The Respondent contends that "*the Tribunal would go at any length to help the Claimants in the conduct of their case.*"²⁴
- (iv) In Procedural Order No. 4 the Tribunal granted the Claimants' further requests for the production of documents whereas (a) the production of these documents had already been denied by the Tribunal in its Procedural Order No. 3; (b) the Tribunal in its Procedural Orders Nos. 1 and 2 had scheduled only one round of document production requests; and (iii) the second production of documents ordered by the Tribunal significantly reduced the Respondent's time to prepare its Reply and to prepare for the August 2016 Hearing on the merits, thereby impairing the Respondent's right to a fair hearing. For the Respondent, any reasonable bystander would agree that by issuing Procedural Order No. 4, the Tribunal was inclined to go

²² Respondent's Proposal, pp. 19-20.

²³ Respondent's Proposal, p. 20.

²⁴ Respondent's Proposal, pp. 20-21.

to any length to accommodate the Claimants' unjustified requests to the detriment of the Respondent.²⁵

- (v) The Tribunal requested that the Attorney-General of the Respondent confirm in writing that some of the Respondent's counsel were duly authorized to represent the Respondent in this arbitration, despite receiving such confirmation orally from the Respondent's Solicitor-General at the August 2016 hearing and receiving a copy of the Nigerian law authorizing the Solicitor-General to exercise the duties and functions of the Attorney-General in his absence. The Respondent contends that in doing so, the Tribunal "*went against the time-honoured principle that the only person who can question the appearance of counsel in a matter is the person who the counsel claims to represent.*"²⁶

Procedural Irregularities Allegedly Committed During the July 2017 Hearing

Expert Conferencing

- (vi) According to the Respondent, the Tribunal belatedly raised the possibility of conducting expert conferencing of the Parties' legal experts for the sole purpose of assisting the Claimants to remedy their case. The Respondent relies in that respect (i) on the intensity with which the Tribunal sought to conduct expert conferencing with the legal experts, (ii) on the disappointment expressed over the inability to conduct such expert conferencing session, and (iii) on the Claimants' inexplicable readiness to participate in the proposed expert conferencing session.²⁷

Admission into the Record of the June 11, 2017 Emails and the NIPC Letter

- (vii) At the July 2017 Hearing, the Tribunal granted the Claimants' request to introduce new documents into the record without any factual or legal basis to do so, while both Parties agreed that these documents did not emanate from them. The Respondent

²⁵ Respondent's Proposal, pp. 21-22.

²⁶ Respondent's Proposal, p. 22.

²⁷ Respondent's Proposal, pp. 22-23.

- submits that the documents were admitted in disregard of the applicable law and procedure simply because the Claimants have placed reliance on them.²⁸
- (viii) The Tribunal directed the Respondent to file a response to the Claimants' application to admit the June 11, 2017 Emails into the record, which it did on June 30, 2017. The Respondent notes that in its response it argued that the June 11, 2017 Emails were covered by privilege.²⁹
 - (ix) The Tribunal also directed the Respondent to file a response to the Respondent's second application dated June 19, 2017 seeking to introduce into the record the NIPC Letter, which it did on June 30, 2017.³⁰
 - (x) The Tribunal subsequently informed the Parties that it would hear them on the admissibility of the NIPC Letter and of the June 11, 2017 Emails during the July 2017 Hearing.³¹
 - (xi) The Tribunal did not hear the Parties on the admission of the NIPC Letter in the morning of the first July 2017 Hearing day.³²
 - (xii) The Tribunal did hear the Parties on the admission of the June 11, 2017 Emails on the third day of the July 2017 Hearing.³³
 - (xiii) On the third day of the July 2017 Hearing, when announcing the Tribunal's decision to provisionally admit the June 11, 2017 Emails into the record, the President of the Tribunal remarked that the Respondent had raised the issue of privilege for the first time that day. The Respondent submits that the issue of privilege had been raised in its written submissions and that the President's remark indicates that the Tribunal members did not read these submissions.³⁴

²⁸ Respondent's Proposal, pp. 23-24.

²⁹ Respondent's Proposal, p. 24.

³⁰ Respondent's Proposal, p. 24.

³¹ Respondent's Proposal, p. 24.

³² Respondent's Proposal, p. 25.

³³ Respondent's Proposal, p. 25.

³⁴ Respondent's Proposal, p. 25.

- (xiv) The Tribunal adopted two different approaches with respect to the admissibility of the Claimants' new documents: for the NIPC Letter, the Tribunal admitted it at the outset of the hearing, without hearing the Parties; for the June 11, 2017 Emails, the Tribunal left it to the end of the hearing to hear and consider the Parties' oral arguments and to determine the issue. The Respondent submits that the approach used for the NIPC Letter made it available to the Claimants for the rest of the hearing, including during the cross-examination of one of the Respondent's legal experts. By contrast, the approach used for the June 11, 2017 Emails prevented the Respondent from referring to them not only to address the question of third-party funding, but also to refute the Claimants' allegations made on the basis of these emails concerning the merits of the case.³⁵
- (xv) By provisionally admitting the June 11, 2017 Emails and thereby getting an opportunity to look at them, the Tribunal made a case for the Claimants that even they did not make.³⁶
- (xvi) By provisionally admitting the June 11, 2017 Emails, the Tribunal also circumvented the important procedural requirement that the Claimants must establish the existence of "exceptional circumstances" under paragraph 16.3 of Procedural Order No. 1.³⁷

B. The Claimants' Reply

45. The Claimants' arguments opposing the Respondent's Proposal were set forth in its submissions of September 4 and September 18, 2017. These arguments are summarized below.

1) Ground 1: The Tribunal's Comments Touching on the Integrity of the Respondent's Counsel

46. The Claimants submit that the Tribunal merely expressed its disappointment at the unavailability of the Respondent's legal experts to participate in an expert conferencing

³⁵ Respondent's Proposal, p. 26.

³⁶ Respondent's Proposal, p. 26-27.

³⁷ Respondent's Proposal, p. 28.

session, and that the Tribunal did not apportion any blame for it.³⁸ They do not accept that the Tribunal's expression of disappointment had the connotation urged by the Respondent.³⁹

47. The Claimants also note that the schedule for the July 2017 Hearing allotted a time for expert conferencing and did not expressly state which of the experts would participate in the conference.⁴⁰ The Claimants add that its experts were available in case they would be needed for the expert conferencing session.⁴¹ For the Claimants, a reasonable third party would consider expert conferencing useful to assist a tribunal in better understanding the issues in dispute and would not find it unreasonable for a tribunal to express its disappointment that an expert is unavailable to participate in a expert conferencing session.⁴²
48. The Claimants submit that the Chairman's rulings in the *Burlington v. Ecuador* and *Blue Bank v. Venezuela* cases are inapposite.⁴³ They also oppose the Respondent's contention that the Tribunal's remarks would lead an objective third party to conclude there was a lack of impartiality or independence on the Tribunal's part.⁴⁴

2) Ground 2: Professor Park's Involvement as Arbitrator in a Related Arbitration

49. The Claimants recall that under Articles 57 and 58 of the ICSID Convention and ICSID Arbitration Rule 9, the Respondent must establish that Professor Park manifestly lacks independence and impartiality and must do so promptly.⁴⁵ The Claimants contend in that respect that the mere appearance of partiality or bias is not sufficient.⁴⁶
50. Referring to the unchallenged arbitrators' decision in the *Suez v. Argentina* cases, the Claimants submit that the Proposal only relies on the facts that Professor Park was an arbitrator in the TOTAL et al v. NNPC Arbitration and that he did not disclose such involvement. The Claimants note that the Proposal does not establish why this fact impairs

³⁸ Claimants' Response, para. 8.

³⁹ Claimants' Response, para. 9.

⁴⁰ Claimants' Response, para. 10.

⁴¹ Claimants' Response, para. 11.

⁴² Claimants' Response, para. 11.

⁴³ Claimants' Response, para. 12.

⁴⁴ Claimants' Response, para. 13.

⁴⁵ Claimants' Response, paras. 14-18.

⁴⁶ Claimants' Response, para. 21.

Professor Park's independence and impartiality. The Claimants recall that in the *Suez v. Argentina* decision, the unchallenged arbitrators had decided that:

*A finding of an arbitrator's or a judge's lack of impartiality requires far stronger evidence than that such arbitrator participated in a unanimous decision with two other arbitrators in a case in which a party in that case is currently a party in a case now being heard by that arbitrator or judge. To hold otherwise would have serious negative consequences for any adjudicatory system.*⁴⁷

51. The Claimants conclude that the Proposal relating to Prof. Park must fail in the same manner it failed in the *Suez v. Argentina* case, because it is based on the Respondent's subjective belief and therefore does not meet the objective third-party standard required by Article 57 of the ICSID Convention.⁴⁸
52. In addition, the Claimants submit that the Proposal was not filed promptly as required by Article 57 of the ICSID Convention. The Claimants indeed contend that as NNPC is the Nigerian State-owned oil company responsible for 90% of the Respondent's revenue, the Respondent must have been aware of commercial arbitration proceedings initiated against its national oil company. The Claimants add that the Respondent necessarily knew of and approved the appointment of Professor Park as president of the tribunal in the TOTAL et al v. NNPC Arbitration, and therefore it knew of such appointment on December 1, 2013, when it proposed the appointment of Professor Park as President of the Tribunal in ICSID Case No. ARB/13/20. The Claimants conclude that the Respondent became aware of the ground for disqualification at the latest on December 13, 2013 when the TOTAL et al v. NNPC award was issued and that the proposal for disqualification was filed over three years and seven months thereafter.⁴⁹

⁴⁷ *Suez, Sociedad General de Aguas de Barcelona SA. v. Argentine Republic and Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. The Argentine Republic* (ICSID Cases Nos. ARB/03/17 and ARB/03/19), Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal (October 22, 2007) ("**Suez**"), para. 36.

⁴⁸ Claimants' Response, para. 23.

⁴⁹ Claimants' Response, paras. 58-64.

3) Ground 3: Professor Park's and Professor Lew's Membership in a Task Force on Third Party Funding

53. The Claimants note that while Professor Fidelis Oditah is also a member of the task force, as recalled by the Respondent, he has not given any evidence on the issue of third-party funding.⁵⁰
54. The Claimants then submit that the Respondent has not provided any evidence establishing Professor Park's and Professor Lew's manifest lack of impartiality and independence, other than merely indicating that they are members of the same task force as Professor Oditah.⁵¹
55. The Claimants conclude that the Respondent has not met the legal standard required by Articles 14 and 57 of the ICSID Convention.⁵²
56. In addition, the Claimants submit that the Proposal was not filed promptly as required under Article 57 of the ICSID Convention. The Claimants argue that the membership of Professor Park and Professor Lew on the task force on third party funding had been public knowledge since 2014, two years before the third party funding issue arose in this case and three years before the Respondent filed its proposal.⁵³

4) Ground 4: The Tribunal's Numerous Procedural Irregularities Before and During the July 2017 Hearing

57. The Claimants address each of the procedural irregularities allegedly committed by the Tribunal as follows.

Procedural Irregularities Allegedly Committed Before the July 2017 Hearing

- (i) The Claimants submit that the reasons for the Tribunal's decision to defer its determination of the Respondent's objection based on the Claimants' registration with the NIPC are clearly explained in its Decision on Jurisdiction. In the Claimants' view, they are consistent with Procedural Order No. 1 on the submission of preliminary

⁵⁰ Claimants' Response, para. 25.

⁵¹ Claimants' Response, para. 25.

⁵² Claimants' Response, para. 25.

⁵³ Claimants' Response, paras. 65-67

- objections.⁵⁴ The Claimants contend that the Respondent has distorted the Tribunal's reasons and that the Tribunal did not grant the Claimants' an unfair advantage. The Claimants further submit that the Respondent has not provided any objective evidence to establish a manifest lack of impartiality and independence on the part of the Tribunal.⁵⁵ In addition, the Claimants assert that the proposal to disqualify the Tribunal on this ground was not filed promptly, as it was filed almost three years after the Decision on Jurisdiction.⁵⁶
- (ii) The Claimants submit that the Claimants' registration with the NIPC and the reliability of the NIPC register are both relevant issues in this case. The Claimants add that the Respondent confuses two issues: the registration of the Claimants themselves and the registration of their investment vehicle.⁵⁷ For the Claimants, the Respondent did not provide any evidence to establish the Tribunal's manifest lack of impartiality and independence, and an objective third party evaluating the Tribunal's inquiry into the NIPC register would not conclude that the Tribunal is biased against the Respondent.⁵⁸ In addition, the Claimants contend that the proposal to disqualify the Tribunal on this ground was not filed promptly, as it was filed over three years after the Tribunal raised the issue of the NIPC register.⁵⁹
- (iii) The Claimants submit that they filed their memorials with minimal delay, which did not cause any prejudice to the Respondent. They add that the Respondent has not established that the Tribunal's failure to sanction these minimally late filings was motivated by the wish to help the Claimants in the conduct of their case. The Claimants contend that the Respondent too has responded late to a Tribunal's request on at least one occasion, and that they have never thought of suggesting that the Tribunal's failure to sanction the Respondent's delay was indicative of bias on the Tribunal's part.⁶⁰ The Claimants further allege that the Respondent has also benefited from an overly generous extension of time granted by the Tribunal, over the

⁵⁴ Claimants' Response, paras. 29-30.

⁵⁵ Claimants' Response, para. 31.

⁵⁶ Claimants' Response, paras. 68-70.

⁵⁷ Claimants' Response, para. 32.

⁵⁸ Claimants' Response, para. 33.

⁵⁹ Claimants' Response, paras. 68-70.

⁶⁰ Claimants' Response, para. 34.

- Claimants' objections, when it retained a new counsel shortly before the filing of its first memorial. The Claimants consider that while the Respondent ought to have retained co-counsel much earlier than it did, the granting of the extension does not establish procedural unfairness or bias by the Tribunal. The Claimants conclude that the Respondent has not established a manifest lack of independence and impartiality on the Tribunal's part as required by Article 57 of the ICSID Convention.⁶¹ In addition, the Claimants contend that the proposal to disqualify the Tribunal on this ground was not filed promptly.⁶²
- (iv) The Claimants contend that the Tribunal's reasoning for each of the document production requests it granted was balanced and that the Respondent's contention that the Tribunal "*was prepared to go to any lengths to accommodate the whims and caprices of the Claimants even to the detriment of the Respondent*" is unfounded. The Claimants also submit that the Respondent is dissatisfied with the Tribunal's decision in Procedural Order No. 4 but has not furnished any evidence to indicate a manifest lack of impartiality and independence on the part of the Tribunal. The Claimants argue that the mere existence of an adverse ruling is insufficient to prove a manifest lack of impartiality as required by Articles 14 and 57 of the ICSID Convention.⁶³ In addition, the Claimants contend that the proposal to disqualify the Tribunal on this ground was not filed promptly, as it was filed over a year after the Tribunal ordered the second round of document production.⁶⁴
- (v) The Claimants submit that the Tribunal's decision in Procedural Order No. 5 to request a written confirmation of Volterra Fietta's representation from the Attorney-General was justified because the first written confirmation from the Attorney-General submitted voluntarily at the August 2016 Hearing did not mention the Volterra Fietta law firm by name.⁶⁵ The Claimants further contend that the Respondent has not provided evidence to establish the Tribunal's manifest lack of

⁶¹ Claimants' Response, paras. 35-36; Claimants' Further Observations, paras. 6-7.

⁶² Claimants' Response, paras. 68-70.

⁶³ Claimants' Response, paras. 37-40.

⁶⁴ Claimants' Response, paras. 68-70.

⁶⁵ Claimants' Response, paras. 41-43.

impartiality and independence.⁶⁶ In addition, the Claimants contend that the proposal to disqualify the Tribunal on this ground was not filed promptly, as it was filed over a year after the Claimants challenged the appearance of Volterra Fietta and Mrs. Rameau as Respondent's counsel.⁶⁷

Procedural Irregularities Allegedly Committed During the July 2017 Hearing

Expert conferencing

58. The Claimants assert that the Tribunal's proposal to hold a conferencing session with the legal experts was designed to directly confront the experts' diametrically opposed legal positions, not to grant an advantage to the Claimants.⁶⁸ The Claimants note that the Tribunal could not presume to know in advance whether the outcome of the expert conferencing sessions would favor one Party or the other. The Claimants affirm that the Respondent has not provided evidence to satisfy the standard set out in Article 57 of the ICSID Convention.⁶⁹

Admission into the Record of the June 11, 2017 Emails and the NIPC Letter

59. First, the Claimants state that they did not append the June 11, 2017 Emails to their application of June 19, 2017 in compliance with Procedural Order No. 1.⁷⁰ They also contend that these emails call into question the Respondent's position in these proceedings that its counsel Aare Afe Babalola is solely financing the Respondent's costs, including the legal fees and expenses of Volterra Fietta and Mrs. Rameau.⁷¹ As such, these emails go to the heart of the third-party funding issue and to the credibility of the Respondent's case.⁷² The Claimants further underline that the Tribunal provisionally admitted the June 11, 2017 Emails, without seeing them, after each Party had the opportunity to plead its case in writing and orally.⁷³ The Claimants also submit that the fact that the origin of these emails and

⁶⁶ Claimants' Response, para. 44.

⁶⁷ Claimants' Response, paras. 68-70.

⁶⁸ Claimants' Response, paras. 45-46.

⁶⁹ Claimants' Response, paras. 45-46.

⁷⁰ Claimants' Response, para. 47.

⁷¹ Claimants' Response, para. 48.

⁷² Claimants' Response, para. 48.

⁷³ Claimants' Response, para. 49.

annexed documents was unknown is not in and of itself a bar to their admission into the record.⁷⁴

60. Second, the Claimants contend that the different treatment by the Tribunal of the June 11, 2017 Emails and the NIPC Letter was justified because there is no equivalence between these documents. For the Claimants, the NIPC Letter, a document created by the Respondent, directly contradicted the written testimony of one of the Respondent's experts who was scheduled to testify on the first day of the July 2017 Hearing. As such, the document was highly relevant. The Claimants note nevertheless that the Tribunal also admitted the NIPC Letter on a provisional basis.⁷⁵
61. Third, the Claimants submit that the Respondent's contention that the Tribunal did not read its written submissions prior to provisionally admitting them is unfounded. For the Claimants, the President of the Tribunal only referred to the Parties' oral pleadings at the hearing, not their prior written submissions, when he noted that the issue of privilege had not been discussed by the Parties thus far. The Claimants note that the President partially misspoke on that point as the Claimants' counsel did orally address the Respondent's reliance on the notion of legal privilege.⁷⁶ The Claimants also note that Respondent's counsel made no direct mention of the issue of privilege during his oral presentation on the admission of the June 11, 2017 Emails.⁷⁷
62. The Claimants conclude that the Proposal is a disguised invitation to review the Tribunal's decisions that the Respondent is unhappy with. For the Claimants, the Respondent has once again failed to provide any evidence of the Tribunal's manifest lack of independence and impartiality.⁷⁸

⁷⁴ Claimants' Response, para. 50.

⁷⁵ Claimants' Response, para. 51.

⁷⁶ Claimants' Response, paras. 52-53.

⁷⁷ Claimants' Response, para. 54

⁷⁸ Claimants' Response, para. 55.

III. ANALYSIS

A. The Applicable Legal Standard

63. Article 57 of the ICSID Convention allows a party to propose the disqualification of any member of a tribunal. It reads as follows:

A party may propose to a Commission or Tribunal the disqualification of any of its members on account of any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14. A party to arbitration proceedings may, in addition, propose the disqualification of an arbitrator on the ground that he was ineligible for appointment to the Tribunal under Section 2 of Chapter IV.

64. The disqualifications proposed in this case allege that all three members of the Tribunal manifestly lack the qualities required by Article 14(1) of the ICSID Convention. Accordingly, it is unnecessary to address disqualification “*on the ground that [an arbitrator] was ineligible for appointment to the Tribunal under Section 2 of Chapter IV.*”
65. A number of decisions have concluded that the word “manifest” in Article 57 of the ICSID Convention means “evident” or “obvious,”⁷⁹ and that it relates to the ease with which the alleged lack of the required qualities can be perceived.⁸⁰

⁷⁹ See *Suez*, ¶ 34; *Alpha Projektholding GmbH v. Ukraine* (ICSID Case No. ARB/07/16), Decision on Respondent's Proposal to Disqualify Arbitrator Dr. Yoram Turbowicz, (March 19, 2010) (“*Alpha*”), ¶ 37; *Universal Compression International Holdings, S.L.U v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/10/9), Decision on the Proposal to Disqualify Prof. Brigitte Stern and Prof. Guido Santiago Tawil, Arbitrators (May 20, 2011), (“*Universal*”), ¶ 71; *Saint-Gobain Performance Plastics Europe v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/12/13), Decision on Claimant's Proposal to Disqualify Mr. Gabriel Bottini from the Tribunal under Article 57 of the ICSID Convention (February 27, 2013) (“*Saint-Gobain*”), ¶ 59; *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/12/20), Decision on the Parties' Proposals to Disqualify a Majority of the Tribunal (November 12, 2013) (“*Blue Bank*”), ¶ 47; *Burlington Resources Inc. v. Republic of Ecuador* (ICSID Case No. ARB/08/5), Decision on the Proposal for Disqualification of Professor Francisco Orrego Vicuña (December 13, 2013) (“*Burlington*”), ¶ 68; *Abaclat and others v. Argentine Republic* (ICSID Case No. ARB/07/5), Decision on the Proposal to Disqualify a Majority of the Tribunal (February 04, 2014) (“*Abaclat*”), ¶ 71; *Repsol, S.A. and Repsol Butano, S.A. v. Argentine Republic* (ICSID Case No. ARB/12/38), Decision on the Proposal for Disqualification of Arbitrators Francisco Orrego Vicuña and Claus von Wobeser (December 13, 2013) (“*Repsol*”), ¶ 73; *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/07/30) Decision on the Proposal to Disqualify a Majority of the Tribunal (May 05, 2014) (“*Conoco*”), ¶ 47; *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/07/30) Decision on the Proposal to Disqualify a Majority of the Tribunal (July 1, 2015) (“*Conoco et al.*”), ¶ 82; *BSG Resources Limited, BSG Resources (Guinea) Limited and BSG Resources (Guinea) SARL v. Republic of Guinea* (ICSID Case No. ARB/14/22), Decision on the Proposal to Disqualify All Members of the Arbitral Tribunal, (December 28, 2016) (“*BSGR*”), ¶ 54; Victor Pey Casado and Foundation “Presidente

66. Article 14(1) of the ICSID Convention provides:

Persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment. Competence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators.

67. While the English version of Article 14 of the ICSID Convention refers to “*independent judgment*,” and the French version to “*toute garantie d’indépendance dans l’exercice de leurs fonctions*” (guaranteed independence in exercising their functions), the Spanish version requires “*imparcialidad de juicio*” (impartiality of judgment). Given that all three versions are equally authentic, it is accepted that arbitrators must be both impartial and independent.⁸¹

68. Impartiality refers to the absence of bias or predisposition towards a party. Independence is characterized by the absence of external control.⁸² Independence and impartiality both “*protect parties against arbitrators being influenced by factors other than those related to the merits of the case.*”⁸³ Articles 57 and 14(1) of the ICSID Convention do not require

Allende” v. The Republic of Chile (ICSID Case No. ARB/98/2), Decision on the Proposals to Disqualify Mr. V.V. Veeder QC and Sir Franklin Berman QC (April 13, 2017) (“*Pey Casado*”), ¶ 41.

⁸⁰ C. Schreuer, *The ICSID Convention*, Second Edition (2009), page 1202 ¶¶134-154.

⁸¹ *Suez*, ¶ 28; *OPIC Karimum Corporation v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/10/ 14), Decision on the Proposal to Disqualify Professor Philippe Sands, Arbitrator (May 5, 2011), ¶ 44; *Getma International and others v. Republic of Guinea* (ICSID Case No. ARB/11 /29), Decision on the Proposal for Disqualification of Arbitrator Bernardo M. Cremades (June 28, 2012) (“*Getma*”), ¶ 59; *ConocoPhillips Company et al. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/07/30), Decision on the Proposal to Disqualify L. Yves Fortier, Q.C., Arbitrator (February 27, 2012) (“*ConocoPhillips*”), ¶ 54; *Alpha*, ¶ 36; *Tidewater Inc. et al. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/ 10/5), Decision on Claimant’s Proposal to Disqualify Professor Brigitte Stern, Arbitrator (December 23, 2010) (“*Tidewater*”), ¶ 37; *Saint-Gobain*, ¶ 55; *Burlington*, ¶ 65; *Abaclat*, ¶ 74; *Repsol*, ¶ 70; *Conoco*, ¶ 50; *Conoco et al.*, ¶ 80; *BSGR*, ¶ 56; *Pey Casado*, ¶ 43.

⁸² *Suez*, ¶ 29; *ConocoPhillips*, ¶ 54; *Burlington*, ¶ 66; *Abaclat*, ¶ 75; *Conoco*, ¶ 51; *Conoco et al.*, ¶ 81; *BSGR*, ¶ 57; *Pey Casado*, ¶ 44.

⁸³ *ConocoPhillips*, ¶ 55; *Universal*, ¶ 70; *Urbaser S.A. and others v. Argentine Republic*, Decision on Claimants’ Proposal to Disqualify Professor Campbell McLachlan, Arbitrator, ARB/07/26, August 12, 2010 (“*Urbaser*”), ¶ 43; *Burlington*, ¶ 66; *Abaclat*, ¶ 75; *Conoco*, ¶ 51; *Conoco et al.*, ¶ 81; *BSGR*, ¶ 57; *Pey Casado*, ¶ 44.

proof of actual dependence or bias; rather it is sufficient to establish the appearance of dependence or bias.⁸⁴

69. The legal standard applied to a proposal to disqualify an arbitrator is an “*objective standard based on a reasonable evaluation of the evidence by a third party.*”⁸⁵ As a consequence, the subjective belief of the party requesting the disqualification is not enough to satisfy the requirements of the Convention.⁸⁶

B. Timeliness

70. Arbitration Rule 9(1) reads as follows:

A party proposing the disqualification of an arbitrator pursuant to Article 57 of the Convention shall promptly, and in any event before the proceeding is declared closed, file its proposal with the Secretary-General, stating its reasons therefor.

71. The ICSID Convention and Rules do not specify a number of days within which a proposal for disqualification must be filed. Accordingly, the timeliness of a proposal must be determined on a case by case basis.⁸⁷ Previous tribunals have found that a proposal was timely when filed within 10 days of learning the underlying facts,⁸⁸ but untimely when filed after 53 days.⁸⁹
72. The Claimants have submitted that the proposals to disqualify Professor Park on Ground 2, Professor Park and Professor Lew on Ground 3 and the entire Tribunal on Ground 4 (i) to (v) were not filed promptly as required by ICSID Arbitration Rule 9(1).

⁸⁴ *Urbaser*, ¶ 43; *Blue Bank*, ¶ 59; *Burlington*, ¶ 66; *Abaclat*, ¶ 76; *Conoco*, ¶ 52; *Conoco et al.*, ¶ 83; *BSGR*, ¶ 57; *Pey Casado*, ¶ 44.

⁸⁵ *Suez*, ¶¶ 39-40; *Abaclat*, ¶ 77; *Burlington*, ¶ 67; *Conoco*, ¶ 53; *Conoco et al.*, ¶ 84; *BSGR*, ¶ 58; *Pey Casado*, ¶ 45.

⁸⁶ *Burlington*, ¶ 67; *Abaclat*, ¶ 77; *Blue Bank*, ¶ 60; *Repsol*, ¶ 72; *Conoco*, ¶ 53; *Conoco et al.*, ¶ 84; *BSGR*, ¶ 58; *Pey Casado*, ¶ 45.

⁸⁷ *Burlington*, ¶ 73; *Conoco*, ¶ 39; *Abaclat*, ¶ 68; *Conoco et al.*, ¶ 63.

⁸⁸ *Urbaser*, ¶ 19.

⁸⁹ *Suez*, ¶¶ 22-26.

Ground 2: Professor Park Failed to Disclose His Involvement as Arbitrator in a Related Arbitration

73. The Chairman notes from the record that the NNPC, the Nigerian National Petroleum Corporation, is “a statutory corporation created by the Nigerian National Petroleum Corporation Act, Cap N123, LFN, 2004.”⁹⁰ The Chairman also notes that the Respondent stated in the jurisdictional phase of this proceeding: “Oil prospecting and production in Nigeria is done through a joint venture contract between the NNPC and Oil Companies. The Federal Government of Nigeria participates in Oil industry through NNPC”.⁹¹ Furthermore, and as pointed out by the Respondent, the NNPC has been designated under Article 25(1) of the ICSID Convention as a constituent agency of the Respondent, competent to become a party to a dispute submitted to the Centre.⁹²
74. In addition, Professor Park noted in his explanations that the TOTAL et al v Nigeria Arbitration was highly publicized in Nigeria, given that one of the arbitrators had been kidnapped and held for ransom.⁹³
75. In the Chairman’s view, it is therefore reasonable to conclude that the Respondent knew or ought to have known that Nigeria’s national oil company was the named respondent in arbitration proceedings initiated by TOTAL and other major oil companies. For the same reasons, the Respondent also knew or ought to have known, when it proposed the appointment of Professor Park as President in the present case on December 1, 2013, that Professor Park was a member of the tribunal in the TOTAL et al v. NNPC Arbitration. Finally, the Respondent knew or ought to have known the content of the award rendered by the tribunal in the TOTAL et al v. NNPC Arbitration upon or shortly after its issuance on December 13, 2013.
76. The proposal to disqualify Professor Park on Ground 2 was filed on August 16, 2017, which was 1342 days after the latest of the dates on which the Respondent became aware of the facts on which its Proposal is based. The Proposal could have been filed much earlier in the proceedings and was not filed promptly for the purposes of Arbitration Rule 9(1).

⁹⁰ TOTAL et al. v. NNPC, Partial Award dated December 12, 2013, para. 7.

⁹¹ Respondent’s Memorial on Objections to Jurisdiction, March 12, 2014, para. 91

⁹² Respondent’s Memorial on Objections to Jurisdiction, March 12, 2014, para. 96.

⁹³ Prof. Park’s Explanations, para. 7.

Ground 3: Professor Park's and Professor Lew's Failure to Disclose Their Membership in the Task Force on Third Party Funding

77. For purposes of the Respondent's Proposal, the membership of Professor Park and Professor Lew in the Task Force on Third Party Funding became relevant when the issue of third party funding arose in this case. This was at the time of the August 2016 Hearing.
78. The Proposal was filed on August 16, 2017, which was 377 days after the Respondent became aware of the facts on which its Proposal is based. Even if the Respondent became aware of these facts when Procedural Order No. 5 was issued on October 15, 2016, the Proposal was still filed 305 days thereafter. The Proposal could have been filed much earlier in the proceedings and was not filed promptly for the purposes of Arbitration Rule 9(1).

Grounds 4 (i) to (v): The Tribunal's Procedural Irregularities Committed Before the July 2017 Hearing

Ground 4(i): The Tribunal decided to defer the determination of the Respondent's jurisdictional objection

79. The Tribunal decided to defer the determination of the Respondent's objection based on the Claimants' registration with the NIPC in its Decision on Jurisdiction issued on October, 29, 2014. The Proposal was filed on August 16, 2017, which was 1022 days after the Respondent became aware of the facts on which its Proposal rests. The Proposal could have been filed much earlier in the proceedings and was not filed promptly for the purposes of Arbitration Rule 9(1).

Ground 4(ii): The Tribunal raised the issue of the comprehensiveness of the NIPC register

80. The Tribunal raised the allegedly irrelevant issue of the comprehensiveness of the NIPC register during the hearing on jurisdiction held on June 26, 2014. The Proposal was filed on August 16, 2017, which was 1147 days after the Respondent became aware of the facts on which its Proposal is based. The Proposal could have been filed much earlier in the proceedings and was not filed promptly for the purposes of Arbitration Rule 9(1).

Ground 4(iii): The Tribunal has not sanctioned the Claimants' belated filings

81. The Respondent does not specify which of the Claimants' memorials were filed belatedly. The Claimants have filed four memorials in these proceedings: two on jurisdiction, on April

11, 2014 (Counter-Memorial) and May 9, 2014 (Rejoinder), and two on the merits, on June 18, 2015 (Memorial on the Merits) and May 25, 2016 (Reply). The Proposal was filed on August 16, 2017, which was between 1223 and 448 days after the Respondent became aware of the facts on which its Proposal is based. The Proposal could have been filed much earlier in the proceedings and was not filed promptly for the purposes of Arbitration Rule 9(1).

Ground 4(iv): The Tribunal ordered a second round of document production

82. The Tribunal ordered a second round of document production in its Procedural Order No. 4, which was issued on April 20, 2016. The Proposal was filed on August 16, 2017, which was 483 days after the Respondent became aware of the facts on which its Proposal is based. The Proposal could have been filed much earlier in the proceedings and was not filed promptly for the purposes of Arbitration Rule 9(1).

Ground 4(v): The Tribunal ordered the Respondent's Attorney-General to confirm the Respondent's legal representation in writing

83. Procedural Order No. 5, in which the Tribunal ordered the Respondent to produce a written confirmation from its Attorney-General that Volterra Fietta and Mrs. Rameau are part of the Respondents' legal team, was issued on October 15, 2016. The Proposal was filed on August 16, 2017, which was 305 days after the Respondent became aware of the facts on which its Proposal is based. The Proposal could have been filed much earlier in the proceedings and was not filed promptly for the purposes of Arbitration Rule 9(1).
84. The remaining grounds on which the Respondent's Proposal is based relate to facts that occurred at the hearing held on July 19-21, 2017. On August 4, 2017, the Respondent notified the Centre of its intention to file the Proposal. The Proposal was filed on August 16, 2107, which was 25 days after the July 2017 Hearing. The Proposal, with respect to these remaining grounds, was filed promptly for the purposes of Arbitration Rule 9(1).

C. Merits

85. The remaining grounds on which the Respondent's Proposal is based concern all three members of the Tribunal. They relate to the Tribunal's comments on the integrity of the

Respondent's counsel (Ground 1), and procedural irregularities allegedly committed during the July 2017 hearing (Ground 4 (*vi et seq.*)).

1) Ground 1: The Tribunal's Comments Touching on the Integrity of the Respondent's Counsel

86. The Chairman notes from the Parties' submissions and the Challenged Arbitrators' explanations that the Tribunal, through its President, expressed its disappointment at not being able to conduct a conferencing session with the Parties' legal experts.
87. The Chairman also notes that the Tribunal expressed its disappointment multiple times: the Claimants raised the issue afresh the day after the Tribunal made its initial comments, prompting a reaction from the Respondent's counsel and thus the Tribunal to reiterate and explain again its position; the Respondent then made further comments on the Tribunal's position, prompting the Tribunal to express and explain it a third time.
88. The Chairman further notes that the Tribunal's references to the private conversation between Respondent's legal expert and its counsel was to indicate that the conversation was held in private and that the Tribunal was therefore unaware of its content and unable to comment on it.
89. The Chairman notes in addition that the President of the Tribunal stated three times that no fault was found or allocated regarding the fact that a conferencing session with the legal experts was not possible. This has been underlined by the Challenged Arbitrators in their explanations.⁹⁴
90. The Chairman finally notes that the Tribunal confirmed at the hearing that there was no attempt on its part to impugn the conduct of the Respondent's counsel and that Mr. Adenipekun expressed his satisfaction over such confirmation.⁹⁵ The Challenged

⁹⁴ Prof. Park's Explanations, para. 4; Prof. Lew's Explanations, para. 3; Justice Torgbor's Explanations, sections 2.1.3 and 2.1.4.

⁹⁵ Tr. Day 3, 1029:6-12.

Arbitrators have confirmed in their explanations that they had and have no reason to question Mr. Adenipekun's integrity.⁹⁶

91. In these circumstances, the Chairman cannot agree with the Respondent's contention that "*the Tribunal's repeated comments were actuated by a belief or perception that its lead counsel lacks integrity*" nor that the Tribunal actually impugned the conduct and integrity of the Respondent's counsel.
92. In the Chairman's view, a third party undertaking a reasonable evaluation of the Tribunal's comments and surrounding facts relied upon in the Respondent's Proposal, would not find a manifest lack of the qualities required under Article 14(1) of the ICSID Convention. Accordingly, Ground 1 does not support the Proposal, which must be rejected.

2) Ground 4 (vi et seq.): The Tribunal's Procedural Irregularities Committed During the July 2017 Hearing

93. The procedural irregularities allegedly committed by the Tribunal during the July 2017 Hearing relate to the Tribunal's endeavors to hold a conferencing session with the legal experts, and to the admission into the record of the NIPC Letter and the June 11, 2017 Emails.

Expert conferencing

94. Having reviewed the Parties' submissions and the Tribunal's explanations, the Chairman finds that there is no basis to conclude that the Tribunal belatedly suggested a legal experts conferencing session for the sole purpose of assisting the Claimants.
95. First, the hearing schedule provided for a 90-minute expert conferencing session at the end of the second hearing day. The schedule did not specify whether the conferencing session concerned all experts appearing at the hearing or only the damage experts that were also scheduled to testify that day.
96. Second, the Chairman does not consider that the manner in which the Tribunal suggested the possibility of holding an expert conferencing session with the legal experts was

⁹⁶ Prof. Park's Explanations, para. 1; Prof. Lew's Explanations, para. 6; Justice Torgbor's Explanations, section 2.1.4.

inappropriate. The Tribunal simply explained the reasons why hearing the legal experts together could be useful to the Tribunal in this case. As noted by Professor Lew in his explanations, “*witness/expert conferencing is widely used in international arbitration.*”

97. Third, the Chairman finds the Tribunal’s expression of disappointment at not being able to hold a conferencing session with the legal experts to be a normal reaction in light of the Tribunal’s view on the usefulness of such a session.
98. Finally, the Chairman does not find the availability of the Claimants’ experts after their testimony at the hearing to be “inexplicable” and indicative of a hidden motive, as the Respondent submits. Expert witnesses are usually not sequestered. It is therefore quite common for them to attend hearings in full, both before and after their testimony. This is especially the case when their counterparts still have to testify before the Tribunal. Professor Oditah’s willingness and availability to participate in a possible expert conferencing session is, in the Chairman’s view, unsurprising.

Admission of the NIPC Letter and June 11, 2017 Emails into the record

99. Having reviewed the Parties’ submissions, the Tribunal’s explanations and the record of this case, the Chairman does not consider the Respondent’s grievances to be founded.
100. First, the Chairman notes that the Tribunal had not announced, as contended by the Respondent, that it would hear the Parties on the admission of both the NIPC Letter and the June 11, 2017 Emails. In its email to the Parties dated July 7, 2017, the Tribunal indeed indicated:

“[...] Also, the Parties will note that, without prejudice to the Tribunal’s final decision regarding the need for post-hearing submissions, time allocations for closing arguments have been reduced to 90 minutes, so as to allow one hour at the end of the Hearing for the Parties to present oral submissions regarding the admissibility into the record of the June 11, 2017 emails.”

In this respect, the Tribunal takes note of the Claimants’ email dated July 5, 2017 regarding the Respondent’s response to their application dated June 19, 2017. The Claimants may submit written observations on the Respondent’s response by July 14, 2017 at the latest. This issue will, as indicated above, be addressed on Day 3 of the Hearing.

*Finally, the Tribunal takes note of the Respondent's response regarding the NIPC letter dated September 26, 2016 and, without prejudice to its decision regarding the document's admission into the record, invites the Respondent to submit by July 17, 2017 any comments on the evidential value of the document at the latest. **As necessary, this issue will be addressed at the outset of Day 1 of the Hearing.**" (emphasis added)*

101. Second, the Chairman does not consider that the President's remark as to when the Respondent first raised the issue of privilege indicates that the Tribunal did not read the Respondent's prior written submissions. The President of the Tribunal clarified at the hearing that he was referring to the Parties' oral submissions on the third hearing day.⁹⁷ A review of the transcript confirms that counsel for the Respondent in its oral presentation on the admission of the June 11, 2017 Emails did not address the question of privilege. It is true that the issue of privilege was indeed addressed that morning by counsel for the Claimants in its presentation. However, this inaccuracy on the part of the President is insufficient ground for the Chairman to conclude that the Tribunal members did not read the Respondent's submissions.

102. Third, the Chairman does not view the different treatment of the NIPC Letter and the June 11, 2017 Emails by the Tribunal when it admitted them into the record to be a procedural irregularity. The Tribunal simply implemented the directions it had given the Parties in its email dated July 7, 2017. Per Professor Park's explanations, these directions were meant to allow the Parties adequate time to address the matters and to ensure completion of the examination of all experts scheduled to testify at the hearing. The President recalls in that respect that as the August 2016 had been adjourned without completing experts examination, neither side wished the July 2017 Hearing not to follow the established scheduled.⁹⁸

103. Finally, the Chairman rejects the Respondent's contention that the Tribunal circumvented the need for "exceptional circumstances" prescribed by paragraph 16.3 of Procedural Order No. 1 in provisionally admitting the June 11, 2017 Emails. As made clear by the President of the Tribunal at the hearing, the Tribunal found "exceptional circumstances" because the

⁹⁷ Tr. Day 3, 1001:10-20.

⁹⁸ Prof. Park's Explanations, para. 13.

June 11, 2017 Emails came to light shortly before the July 2017 hearing and relate to some of the issues decided in Procedural Order No. 5.⁹⁹

104. In the Chairman's view, a third party undertaking a reasonable evaluation of the Tribunal's conduct and decisions at the July 2017 Hearing would not find a manifest lack of the qualities required under Article 14(1) of the ICSID Convention. Accordingly, Grounds 4 *vi. et seq.* do not support the Proposal, which must be rejected.

IV. DECISION

105. Having considered all the facts alleged and the arguments submitted by the Parties, and for the reasons stated above, the Chairman rejects the Respondent's Proposal in its entirety.

[SIGNED]

Chairman of the ICSID Administrative Council

Dr. Jim Yong Kim

⁹⁹ Tr. Day 3, 999:3-9. In that respect, the Chairman notes that Judge's Torgbor indicated in his explanations that "*the emails came into the Claimants' possession some 9 months before their transmission to the Tribunal's secretary.*" (p. 6). The Chairman understands this reference to "*the emails*" to be to a reference "*the NIPC Letter*", which was dated September 26, 2016, i.e. 9 months before the emails were received on June 11, 2017.