UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ESSO EXPLORATION AND PRODUCTION NIGERIA LIMITED and SHELL NIGERIA EXPLORATION AND PRODUCTION COMPANY LIMITED, Petitioners, – against – NIGERIAN NATIONAL PETROLEUM CORPORATION, Respondent.	Case No. 14-cv-08445 (WHP)

SECOND AMENDED AND SUPPLEMENTAL PETITION TO CONFIRM FOREIGN ARBITRAL AWARD AND REQUEST FOR PRE-JUDGMENT SECURITY

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GLOSSARY

Arbitration	*Esso Exploration and Production Nigeria Limited and Shell Nigeria Exploration and Production Company Limited v. Nigerian National Petroleum Corporation*, an Ad Hoc Arbitration pursuant to the Nigerian Arbitration and Conciliation Act.
Award	The final award issued by the arbitral tribunal in the Arbitration, dated October 24, 2011.
Board	Nigerian National Petroleum Corporation's Board of Directors.
Bonga Court of Appeal Decision	The Nigerian Court of Appeal decision in the case *Shell Nigeria Exploration & Production et al. v. Federal Inland Revenue Service & Nigerian National Petroleum Corp.*, No. CA/A/208/2012.
EEPNL	Esso Exploration and Production Nigeria Limited.
Erha	The Erha deep-water oil field in Nigeria.
Esso U.S.	Esso Exploration Inc.
FAA	The United States Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*
FIRS	Nigeria's tax authority, the Federal Inland Revenue Service.
FIRS Action	The Nigerian Federal High Court proceeding captioned *Federal Inland Revenue Service v. Nigeria National Petroleum Corp. et al.*, No. FHC/ABJ/CS/764/11.
FIRS Decision	The Nigerian Federal High Court's decision in *Federal Inland Revenue Service v. Nigeria National Petroleum Corp. et al.*, No. FHC/ABJ/CS/764/11.
FSIA	The United States Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1391(f), 1441(d), 1602-11.
High Court	Nigeria's Federal High Court, in Abuja, Nigeria.
New York Convention	The Convention on the Recognition and Enforcement of Arbitral Awards, June 10, 1958, 21 U.S.T. 2517.
Nigeria	The Federal Republic of Nigeria.
NNPC Act	The Nigerian National Petroleum and Corporation Act, Cap. N123.

NNPC or Respondent	Nigerian National Petroleum Corporation, Nigeria's State-owned oil company.
Overlift Disputes	The contractual disputes between NNPC and various international oil companies that operate deep-water oil fields in Nigeria.
Overlifting	The lifting of oil to which a party was not contractually entitled.
Pemex	*Corporación Mexicana De Mantenimiento Integral, S. De R.L. De C.V. v. Pemex-Exploración Y Producción*, 832 F.3d 92 (2d Cir. 2016).
PSC	The Production Sharing Contract for Oil Prospecting License 209.
Set Aside Action	The Nigerian Federal High Court Proceeding captioned *Nigeria National Petroleum Corp. v. Esso Exploration and Production Nigeria Ltd. et al.*, No. FHC/ABJ/CS/923/11.
Set Aside Appeal	The Nigerian Court of Appeal's decision in *Esso Exploration and Production Nigeria Ltd. et al. v. Nigeria National Petroleum Corp.*, No. CA/A/507/2012.
Set Aside Decision	The Nigerian Federal High Court's decision in *Nigeria National Petroleum Corp. v. Esso Exploration and Production Nigeria Ltd. et al.*, No. FHC/ABJ/CS/923/11.
SNEPCO	Shell Nigeria Exploration and Production Company Limited.
Substantive Decision	The Nigerian Federal High Court's decision in *Esso Exploration and Production Nigeria Ltd. v. Nigerian National Petroleum Corp.*, No. FHC/ABJ/CS/459/2013.
Substantive Proceedings	The Nigerian Federal High Court proceeding captioned *Esso Exploration and Production Nigeria Ltd. v. Nigerian National Petroleum Corp.*, No. FHC/ABJ/CS/459/2013.
TAT	The Nigerian Tax Appeal Tribunal, where disputes between FIRS and taxpayers are heard.
Tribunal	The arbitral tribunal in the Arbitration *Esso Exploration and Production Nigeria Limited and Shell Nigeria Exploration and Production Company Limited v. Nigerian National Petroleum Corporation*, an Ad Hoc Arbitration pursuant to the Nigerian Arbitration and Conciliation Act.

Esso Exploration and Production Nigeria Limited ("EEPNL") and Shell Nigeria Exploration and Production Company Limited ("SNEPCO," and, with EEPNL, "Petitioners"), by and through their attorneys, allege as follows in support of their second amended and supplemental petition ("Second Amended Petition") for entry of an order confirming and recognizing, pursuant to the Convention on the Recognition and Enforcement of Arbitral Awards, June 10, 1958, 21 U.S.T. 2517 (the "New York Convention"), as codified by the Federal Arbitration Act, 9 U.S.C. §§ 201, 202, and 207, the final arbitral award (the "Award") in the arbitration between Petitioners and Respondent Nigerian National Petroleum Corporation ("NNPC" or "Respondent"), an agency or instrumentality and alter ego of the Federal Republic of Nigeria ("Nigeria"). That arbitration was captioned *Esso Exploration and Production Nigeria Limited and Shell Nigeria Exploration and Production Company Limited v. Nigerian National Petroleum Corporation* and conducted in Abuja, Nigeria under the rules of the Nigerian Arbitration and Conciliation Act (the "Arbitration"). In addition, Petitioners seek an order: (i) entering judgment in Petitioners' favor against NNPC in the amount of the Award, with interest and costs as provided therein, plus the costs of this proceeding; (ii) requiring NNPC to post a bond in the amount of its outstanding obligation to Petitioners under the Award—US$2,465,596,823—pending the Court's resolution of the Second Amended Petition, pursuant to Article VI of the New York Convention; and (iii) awarding Petitioners such further relief as the Court deems just and proper.

PRELIMINARY STATEMENT

Petitioners bring this action under the Federal Arbitration Act and the New York Convention to confirm and recognize an international arbitral award rendered by an international arbitral tribunal (the "Tribunal").

The underlying dispute arose out of a contractual relationship between Petitioners and NNPC governed by a Production Sharing Contract for Oil Prospecting License 209 ("PSC"). The PSC regulates how any oil lifted from the Erha deep-water oil field in Nigeria ("Erha") would be shared between the parties. Under the PSC, Petitioners were responsible for investing billions of dollars over the course of more than a decade to explore for and develop any commercially viable petroleum deposits within Erha. In exchange, the PSC provided that, if the exploration were successful and oil production from Erha commenced, Petitioners would obtain certain quantities of oil, and would also have the sole right to determine how much oil was to be "lifted" by Petitioners and NNPC under the contractual framework.

Once production began, however, NNPC unilaterally lifted quantities of oil far in excess of its contractually binding lifting allocation and its contractual entitlements, depriving Petitioners of billions of dollars' worth of oil to which they were entitled. Unable to resolve their dispute through negotiations, Petitioners commenced arbitration in 2009. After a two-year arbitration before a panel of three highly respected arbitrators—in which the parties submitted voluminous briefs, witness statements, and reports from some of the world's leading experts on Nigerian law, and attended evidentiary hearings—the Tribunal awarded Petitioners US$1.8 billion, compensating Petitioners for NNPC's breaches of the PSC.

Petitioners seek in this Court precisely the relief contemplated by the Federal Arbitration Act and the New York Convention: the recognition and enforcement of a final and binding arbitration award. Under the New York Convention, a foreign arbitral award must be confirmed absent egregious departures from the parties' agreed-upon arbitration or extreme arbitral misconduct. None of those circumstances is even claimed to be present here, and the Award should therefore be confirmed. Failure to do so would undermine the dispute resolution

mechanism bargained for by the parties, and contravene the strong federal policy in favor of arbitral dispute resolution—a policy that applies with particular force to international disputes such as this.

Indeed, the Second Circuit's recent decision in *Corporación Mexicana De Mantenimiento Integral, S. De R.L. De C.V. v. Pemex-Exploración Y Producción* ("*Pemex*"), 832 F.3d 92 (2d Cir. 2016), mandates confirmation because, without it, Petitioners will be left with "no sure forum in which to bring [their] contract claims." *Id.* at 109. Rather than comply with its contractual obligations and satisfy the Award, NNPC has sought to escape the Award by waging a no-holds-barred litigation campaign in its home courts in Nigeria. The result has been predictable. Faced with a highly politicized dispute in which two international oil companies seek enforcement of a multi-billion dollar award against a Nigerian State-owned entity, the Nigerian courts have taken unprecedented steps to block Petitioners from recovering on the Award. To that end, the Nigerian courts have abruptly abandoned well-established precedent, applied Nigerian law retroactively to nullify Petitioners' bargained-for contractual rights, and sought to deny Petitioners any forum to vindicate their rights. In particular, thus far, the Nigerian courts have:

- allowed a Nigerian governmental entity to enjoin Petitioners from enforcing the Award, despite the fact that the public entity was a stranger to the underlying contractual dispute and to the Arbitration;
- confirmed that the arbitral Tribunal had jurisdiction to find that NNPC *breached* its contractual obligations to Petitioners, but then abruptly deviated from well-established precedent to find that the 1999 Nigerian Constitution divested the Tribunal of jurisdiction to *award* Petitioners US$1.8 billion in damages for those very same (and acknowledged) breaches; and
- dismissed with prejudice Petitioners' fallback attempt to have their damages claims heard in the Nigerian courts, on the basis that Petitioners' refusal to forego their right to have the Award confirmed constituted an "abuse of process."

Petitioners' experience in the Nigerian courts is consistent with the treatment received by other international oil companies. A number of other international oil companies commenced disputes against Respondent for similar contractual violations: *each one* of them prevailed and obtained binding arbitration awards against Respondent, collectively worth more than US$10 billion; but *not one of them* has had an award enforced by the Nigerian courts. Petitioners (and the other similarly situated international oil companies) have been the victims of a highly politicized dispute being adjudicated by a judiciary that has refused, on pretextual grounds, to enforce against a State-owned entity an arbitration award of significant value. In light of the Nigerian courts' actions, Petitioners face the real risk that the prospect of a judicial remedy in Nigeria is so remote as to be no remedy at all.

The Federal Arbitration Act and the New York Convention direct the enforcement of the Award. Any argument that the Award should not be enforced because it has been vacated in part by the courts of Nigeria would be unavailing. In the particular circumstances present here, the Second Circuit's recent decision in *Pemex* compels enforcement. Failure to enforce would permit NNPC to renege on its contractual commitment to arbitrate, sanction retroactive application of the law, and result in Petitioners having no forum in which to litigate their contractual claims against NNPC. As in *Pemex*, giving effect to a foreign decision partially setting aside an arbitral award would "run counter to United States public policy" and be "repugnant to fundamental notions of what is decent and just." *Pemex*, 832 F.3d at 97.

Accordingly, in light of these extraordinary circumstances, this Court should follow the Second Circuit's instruction and recognize and enforce the Award pursuant to the Federal Arbitration Act and the New York Convention, in accordance with the strong and long-standing United States policy in favor of arbitral dispute resolution.

PARTIES[1]

1. Petitioner EEPNL is a corporation organized and existing under the laws of Nigeria, with its principal place of business in Lagos, Nigeria. EEPNL has its main office at Mobil House, 1 Lekki Expressway, Victoria Island, PMB 12054, Lagos, Nigeria. EEPNL is a wholly owned, indirect subsidiary of Exxon Mobil Corporation, a corporation organized and existing under the laws of the United States, with its principal executive offices at 5959 Las Colinas Boulevard, Irving, Texas, 75039-2298.

2. EEPNL is an affiliate of Esso Exploration Inc. ("Esso U.S."), which negotiated the PSC and which NNPC knew to be a U.S.-domiciled affiliate of Exxon Mobil Corporation. EEPNL was formed to comply with the condition that a petroleum exploration and development concession in Nigeria can only be awarded to a Nigerian entity.

3. Petitioner SNEPCO is a corporation organized and existing under the laws of Nigeria, with its principal place of business in Lagos, Nigeria. SNEPCO has its main office at Freeman House, 21/22 Marina, PMB 2418, Lagos, Nigeria. SNEPCO is a wholly owned, indirect subsidiary of Royal Dutch Shell plc, a corporation organized and existing under the laws of the United Kingdom, with its principal executive offices at 30, Carel van Bylandtlaan, 2596 HR The Hague, The Netherlands.

4. Respondent NNPC is a corporation headquartered at NNPC Towers, Central District, Herbert Macaulay Way PMB 190, Garki, Abuja, Nigeria. NNPC, as an agency or instrumentality of Nigeria and as an alter ego of Nigeria, is a foreign State as defined under 28

[1] References to "Atake Decl." refer to the Declaration of Adewale Atake in Support of Petitioners' Second Amended Petition, dated October 21, 2016. References to "Oguntade Decl." refer to the Declaration of Justice George Adesola Oguntade in Support of Petitioners' Second Amended Petition, dated October 21, 2016. References to "Leitner Decl." refer to the Declaration of Shannon M. Leitner in Support of Petitioners' Second Amended Petition, dated October 21, 2016.

U.S.C. § 1603(a). *See Caribbean Trading & Fid. Corp. v. Nigerian Nat'l Petrol. Corp.*, 948 F.2d 111, 112 (2d Cir. 1991) (recognizing NNPC as a foreign State for purposes of the Foreign Sovereign Immunities Act (the "FSIA"), 28 U.S.C. §§ 1602-11).

5. For all purposes in this action, NNPC should be deemed an alter ego of Nigeria. NNPC has conceded as much: it repeatedly represented during the course of the Arbitration that it is merely an agent of Nigeria.[2] Because NNPC is Nigeria's alter ego, this Court need not conduct a minimum contacts analysis under any theory of jurisdiction because Nigeria, as a State, is not entitled to due process protections. *See Frontera Res. Azerbaijan Corp. v. State Oil Co. of Azerbaijan Republic*, 582 F.3d 393, 400 (2d Cir. 2009) ("[F]oreign states are not 'persons' entitled to rights under the Due Process Clause . . . .").

6. A corporate instrumentality of a foreign State is considered an alter ego of the State when it is controlled so extensively by the State that a principal-agent relationship is created between them. *See First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 628-30 (1983). A corporate instrumentality also may be considered an alter ego of the foreign State when failing to treat it as an alter ego "would work fraud or injustice." *Id.* at 629 (internal quotation marks and citation omitted).

7. Here, Nigeria wholly owns NNPC and exercises complete domination and control over NNPC's activities and finances. Upon information and belief, Nigeria exercises exclusive control over NNPC, including over NNPC's Board of Directors (the "Board"). Specifically,

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[2] *See* Atake Decl. Ex. 11, Arbitration Hr'g Tr. vol. 1, 125:17-20, Feb. 28, 2011 ("We were just agents of Government in collecting royalty oil and in collecting tax oil. Once we collect the oil, we sell them and we carry the money back to Government coffers."); Atake Decl. Ex. 12, Arbitration Hr'g Tr. vol. 3, 228:9-21, Mar. 2, 2011 ("We only took the money, sold the oil and remitted the money to Government. We were just an agent of government. . . . You know we are only an agent of Government, and the law is clear. . . . It is very clear we are just an agent.").

Nigeria's Minister of Petroleum Resources acts as the Chairperson of the Board, and Nigeria's President appoints NNPC's Group Managing Director (the title given to NNPC's CEO) and at least three additional members of the Board, thereby giving Nigeria effective, and indeed complete, control over NNPC. *See* Atake Decl. Ex. 16, Nigerian National Petroleum and Corporation Act, Cap. N123 (the "NNPC Act"), §§ 1, 3. Moreover, as set forth in the NNPC Act, the President of Nigeria plays a dominant role in NNPC's activities. Not only does the President of Nigeria appoint NNPC's Group Managing Director and other members of the Board, over the past several years the President has hired and fired NNPC's Group Managing Directors on numerous occasions.[3] In addition, the President must personally approve all contracts entered into by NNPC in excess of 5 million Naira (approximately US$25,000). Atake Decl. Ex. 16 (NNPC Act), § 6(2). Upon information and belief, the President personally approved the PSC at issue in this action. *See id.* Finally, Nigeria exercises control over NNPC's budget, which must be reviewed and approved annually by Nigeria's President. *Id.* §§ 7-8.

8. Not surprisingly given these facts, NNPC has represented repeatedly (in the Arbitration that underlies this action) that Nigeria's control over it is so extensive that it renders NNPC a mere "agent" of Nigeria, and, for financial purposes, nothing more than a conduit for Nigeria.[4] For purposes of this proceeding, NNPC is bound by its prior admission in the underlying Arbitration. *See Synergy Adv. Pharms., Inc. v. CapeBio, LLC*, 797 F. Supp. 2d 276,

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[3] *See, e.g.*, Bassey Udo, *Exclusive: Real Reasons President Jonathan Fired NNPC GMD, Andrew Yakubu*, Premium Times (Sept. 11, 2014), http://www.premiumtimesng.com/news/headlines/168012-exclusive-real-reasons-president-jonathan-fired-nnpc-gmd-andrew-yakubu.html; *Buhari Sacks Heads of NNPC, NCC; Appoints Replacements*, Premium Times (Aug. 4, 2015), http://www.premiumtimesng.com/news/ headlines/187814-breaking-buhari-sacks-heads-of-nnpc-ncc-appoints-replacements.html; Gbenga Bada, *President Replaces Kachikwu with Maikanti Baru as NNPC Boss*, Pulse (July 4, 2016), http://pulse.ng/local/buhari-president-replaces-kachikwu-with-maikanti-baru-as-nnpc-boss-id5226132.html.

[4] *See supra* ¶ 5; *see also* Atake Decl. Exs. 11-12.

287 n.84 (S.D.N.Y. 2011) ("Facts admitted by a party are judicial admissions that bind that party throughout the litigation." (internal quotation marks and citation omitted)).

9. Accordingly, NNPC should, for all purposes, be considered the alter ego of Nigeria and thus indistinguishable, jurisdictionally and for purposes of confirmation and enforcement, from Nigeria.

JURISDICTION AND VENUE

A. Subject Matter Jurisdiction

10. This Court has subject matter jurisdiction over the Second Amended Petition pursuant to 9 U.S.C. § 203, which provides that the United States District Courts shall have original subject matter jurisdiction over a proceeding governed by the New York Convention, implemented by the Federal Arbitration Act (the "FAA"), 9 U.S.C. §§ 201-208. Both Nigeria and the United States are signatories to the New York Convention, which calls for the recognition and confirmation of the Award in favor of Petitioners.

11. This Court also has subject matter jurisdiction pursuant to 28 U.S.C. § 1330(a), which provides that the United States District Courts shall have original subject matter jurisdiction over any nonjury civil action against a foreign State, as defined in 28 U.S.C. § 1603(a), unless the foreign State is entitled to immunity under 28 U.S.C. §§ 1605-1607 or an applicable international agreement. NNPC is a "foreign State" within the meaning of this provision, 28 U.S.C. § 1603(b), and the FSIA denies immunity to a foreign State in an action to enforce an international commercial arbitration award, 28 U.S.C. § 1605(a)(6). Therefore, NNPC is not immune from this suit, and this court has subject matter jurisdiction.

B. Personal Jurisdiction

12. This Court has personal jurisdiction over NNPC pursuant to 28 U.S.C. § 1330(b), which provides that a United States District Court shall have personal jurisdiction over a foreign State, including an agency or instrumentality of a foreign State such as NNPC, that is not immune from suit, provided that service of process is effected in accordance with 28 U.S.C. § 1608. Petitioners have served process on NNPC pursuant to 28 U.S.C. § 1608(b), and this Court therefore has personal jurisdiction over NNPC.

13. Because Petitioners have satisfied the requirements of the FSIA, the Court has, and can exercise, personal jurisdiction over NNPC—which is an alter ego of Nigeria or, alternatively, is an agency or instrumentality of Nigeria—without conducting any due process analysis that would be applicable to "persons." *See Frontera Res.*, 582 F.3d at 400 ("[F]oreign states are not 'persons' entitled to rights under the Due Process Clause . . . ."); *TMR Energy Ltd. v. State Prop. Fund of Ukraine*, 411 F.3d 296, 301-02 (D.C. Cir. 2005) (an instrumentality of a sovereign State "is not a 'person' for purposes of the due process clause and cannot invoke the minimum contacts test to avoid the personal jurisdiction of the district court").

14. Alternatively, satisfying the requirements of the FSIA itself satisfies the constitutional due process requirement necessary to exercise personal jurisdiction over a party, and the Court accordingly has personal jurisdiction over NNPC. *See Shapiro v. Republic of Bolivia*, 930 F.2d 1013, 1020 (2d Cir. 1991) (satisfying the FSIA's nexus requirement is more than sufficient to satisfy the requirements of the Due Process Clause); *Sachs v. Republic of Austria*, 737 F.3d 584, 598-99 (9th Cir. 2013) (en banc) (same), *rev'd on other grounds OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390 (2015).

15. Moreover, and in the further alternative, to the extent that the Court concludes that a minimum contacts analysis is warranted—and Petitioners submit that such an analysis is

not required here—more than adequate contacts exist. NNPC has evidenced, and/or presently maintains, substantial contacts with the United States, including that NNPC:

- entered into a contract with EEPNL, an affiliate of a United States corporation, which provided that any dispute arising under the contract would be arbitrated. At that time, NNPC knew or should have known that because Nigeria and the United States were both signatories to the New York Convention, any arbitral award obtained by Petitioners could be enforced in the United States. *Cf. Seetransport Wiking Trader Schiffarhtsgesellschaft MbH & Co. v. Navimpex Centrala Navala*, 989 F.2d 572, 578 (2d Cir. 1993) ("[W]hen a country becomes a signatory to the [New York] Convention, . . . the signatory State must have contemplated enforcement actions in other signatory States."); *S & Davis Int'l, Inc. v. Republic of Yemen*, 218 F.3d 1292, 1304-05 (11th Cir. 2000);

- affirmatively solicited, in the United States, American oil companies, including Esso U.S., which NNPC knew to be a U.S.-domiciled affiliate of Exxon Mobil Corporation, to participate in the tender process for deep-water oil exploration in Nigeria that resulted in the contract underlying this action;

- negotiated with Esso U.S. concerning the contract underlying this action. During the pendency of those negotiations, NNPC purposefully directed its conduct at Esso U.S. and its representatives in Houston;

- communicated with Petitioners' United States-based employees concerning the contract underlying the Award and this action;

- upon information and belief, owns assets, including ships, charters, and petroleum products that are regularly present in the United States;

- regularly ships oil and gas to the United States, including 19 shipments to United States ports (12 of which were shipped to the Port of New York) in 2014 alone;[5]

- registered its website, which NNPC uses to solicit business from, and market its services to, *inter alia*, United States counterparties, in the United States to the address P.O. Box 234, San Ramon, CA 94583;

- upon information and belief, regularly maintains, controls, or uses bank accounts in the United States, including accounts held in the name of NNPC, the Department of Petroleum Resources, and the Central Bank of Nigeria (both organs of NNPC's alter ego, Nigeria); and

[5] For example, NNPC shipped approximately 155,000 barrels of Naphta crude oil from Port Harcourt, Nigeria, which arrived in the port of New York on April 6, 2014. And, on May 13, 2014, approximately 154,000 barrels of NNPC's natural gas arrived in the port of New York.

- avails itself of the protections of United States courts by commencing litigation in the United States.[6]

16. Thus, even if the Court considers NNPC's jurisdictional contacts—which is not necessary as NNPC is a "foreign State" for purposes of 28 U.S.C. § 1330(b)—NNPC's contacts with the United States are more than sufficient to warrant the Court's exercise of personal jurisdiction over NNPC. *See Eades v. Kennedy, PC Law Offices*, 799 F.3d 161, 169 (2d Cir. 2015) (finding that sending two documents to and calling one person in New York were sufficient to establish "minimum contacts" under the Due Process Clause).

C. *In Rem* Jurisdiction

17. In addition, and as a further, independent basis for the exercise of personal jurisdiction over NNPC, this Court has *in rem* jurisdiction over NNPC's assets located in New York, including, but not limited to, the contents of all bank accounts located in New York and used by NNPC for commercial activity. *See CME Media Enters. B.V. v. Zelezny*, No. 01 CIV. 1733(DC), 2001 WL 1035138, at *3 (S.D.N.Y. Sept. 10, 2001); *Frontera Res.*, 582 F.3d at 396-98.

D. Venue

18. Venue in this Court is proper pursuant to 9 U.S.C. § 204 and 28 U.S.C. § 1391(c), (d), and (f).

FACTUAL BACKGROUND

A. EEPNL Enters into the PSC and Invests Billions of Dollars to Develop Erha

19. On May 21, 1993, Petitioner EEPNL and Respondent NNPC entered into the PSC, a contract pursuant to which EEPNL was obligated to explore and develop Erha and which

[6] *See, e.g., Nigerian Nat'l Petrol. Corp. v. Citibank N.A.*, No. 98 Civ. 4960(MBM), 1999 WL 558141, at *1 (S.D.N.Y. July 30, 1999).

regulated the parties' respective rights to Erha's oil once the field became operational. Atake Decl. Ex. 1 (Award), at ¶¶ 1, 5, 54; Atake Decl. Ex. 2 (PSC), at Clause 2.3. Several assignments of EEPNL's interest in the PSC have resulted in EEPNL holding 56.25% of the contractor's interest in the PSC and SNEPCO holding the remaining 43.75% interest. Atake Decl. Ex. 1 (Award), at ¶ 83.

20. Under the PSC, Petitioners were solely responsible for the risk and cost of exploring for, developing, and extracting oil from Erha, which lies more than 3,000 feet below sea level. *See id.* at ¶¶ 61, 70. At the time, this was one of the most technologically challenging operations in the oil industry. *Id.* at ¶ 61. In order to attract this massive and highly risky investment, the PSC provided for certain fiscal incentives designed to compensate Petitioners adequately for the financial and technical risks undertaken. Further, the PSC provided that Petitioners were solely responsible for allocating the oil produced from Erha into four tranches:

- Royalty Oil, allocated to NNPC to cover concession and royalty payments to the Nigerian government, Atake Decl. Ex. 1 (Award), at ¶ 73; Atake Decl. Ex. 2 (PSC), at Clause 8.1;
- Cost Oil, allocated to Petitioners to cover Petitioners' operating costs, Atake Decl. Ex. 1 (Award), at ¶ 73; Atake Decl. Ex. 2 (PSC), at Clause 8.1;
- Tax Oil, allocated to cover tax payments to the Nigerian government, Atake Decl. Ex. 1 (Award), at ¶ 73; Atake Decl. Ex. 2 (PSC), at Clause 8.1; and
- Profit Oil, which is derived by subtracting Royalty Oil, Cost Oil, and Tax Oil from the oil extracted at Erha, and is split between Petitioners and NNPC pursuant to a contractual formula, Atake Decl. Ex. 1 (Award), at ¶ 73; Atake Decl. Ex. 2 (PSC), at Clause 8.1.

21. Notably, under the PSC, Petitioners had the *exclusive* right to calculate the oil allocated between these categories and to prepare tax returns to be filed with the Nigerian government. Atake Decl. Ex.1 (Award), at ¶ 76; Atake Decl. Ex. 2 (PSC), at Annex B, Article III. By contrast, under the PSC, NNPC had no role in calculating the allocations and was only permitted to lift the oil that Petitioners had allocated to it. Atake Decl. Ex. 2 (PSC), at

Article 8.3. NNPC was also obliged to file the tax returns prepared by Petitioners. *Id.* at Annex B, Article III.

22. When it negotiated the PSC, Esso U.S. was aware that it was dealing with a State-owned entity and that Nigeria's rules, regulations and policies could change over the lifetime of the contract. To ensure that no such change could adversely affect the economic bargain that it struck with NNPC, Esso U.S. sought, and NNPC agreed, to insert into the PSC a "Stabilization Clause." *See id.* at Clause 19.2. The Stabilization Clause provided that should there ever be a change in, for example, Nigerian tax policy that adversely affected Petitioners' economic rights under the PSC (including their rights as to the allocation of oil), the parties would be required to modify the PSC to compensate Petitioners for any such changes. Atake Decl. Ex. 1 (Award), at ¶ 78; Atake Decl. Ex. 2 (PSC), at Clause 19.2.

23. Finally, the parties agreed that any dispute arising out of the PSC would be submitted to binding arbitration. Atake Decl. Ex. 1 (Award), at ¶ 53; Atake Decl. Ex. 2 (PSC), at Clause 21. The arbitration clause was a fundamental term of the PSC. Arbitration clauses are common in contracts concerning the extraction of natural resources, especially where, as here, critical fiscal incentives are embodied in the contract and an international oil company is contracting with a powerful State-owned entity and does not wish to subject its substantial investment to the vagaries of the local courts of that same State. The PSC was no different: the proposed deal would not have been attractive to Petitioners without the assurance that any contractual dispute over lifting rights (which was the economic heart of the PSC) would be resolved by independent arbitration.

24. Indeed, NNPC's initial draft of the PSC contained a clause that provided for the submission of disputes to the Nigerian courts, but Esso U.S. categorically rejected that term,

insisting that any dispute be resolved by binding, independent arbitration. Esso U.S. also rejected NNPC's further proposal that the Nigerian courts be empowered to appoint the third arbitrator in certain circumstances. Instead, Esso U.S. demanded, and NNPC agreed, that consistent with standard international arbitral practice, the Petitioners and NNPC would each appoint one arbitrator who would then jointly appoint the third, and in the event they could not agree on the selection of the third arbitrator, the International Chamber of Commerce would make the appointment. *See* Atake Decl. Ex. 2 (PSC), at Clause 19.2. In short, it was of critical importance to Petitioners that any dispute arising out of the PSC would be determined by an independent arbitral tribunal empowered to award damages, and *not* by the Nigerian courts. NNPC ultimately agreed to this requirement.[7]

25. In reliance on the contractual promises set out in the PSC, including EEPNL's contractual right to arbitrate contractual lifting disputes with NNPC, EEPNL then invested billions of dollars and over a decade of effort to explore and develop Erha. EEPNL began its work on the field in 1993, but it was not until 2006 that production finally began. *See* Atake Decl. Ex. 1 (Award), at ¶ 84. By December 31, 2009, Petitioners had invested approximately US$6.1 billion in the Erha field. Atake Decl. Ex. 9 (Petitioners' Statement of Claim), at ¶ 80. In accordance with the terms of the PSC, Petitioners calculated the proper allocation of oil between Petitioners and NNPC every month and timely prepared tax returns and submitted these to NNPC for onward filing. Atake Decl. ¶ 14.

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[7] Notably, at no point during the months of negotiations surrounding the PSC did NNPC take the position that a dispute about the amount of oil, including Tax Oil, that it could lift, or a dispute which would impact the amount of oil to which Nigeria was entitled, was non-arbitrable as a matter of Nigerian law. To the contrary, NNPC agreed to arbitrate all such disputes. *See* Atake Decl. Ex. 2 (PSC), at Clause 19.2.

B. NNPC's Overlifting and Other Breaches of the PSC

26. However, before Petitioners' investments really started to bear fruit, NNPC began to breach the PSC in multiple respects. In September 2007, NNPC began to insist that it was entitled to more oil than was provided for under Petitioners' calculations. *Id.* at ¶ 15. NNPC appeared to contend that Petitioners (i) owed NNPC more Royalty Oil, (ii) owed the Nigerian government more Tax Oil, and (iii) were taking too much Cost Oil for themselves. Even though Petitioners had the exclusive contractual right to calculate the lifting allocations (with any dispute to be resolved in arbitration pursuant to the PSC), NNPC demanded to lift oil in excess of the amount it was allocated. Petitioners disagreed, maintaining that their allocations were correct. In addition, and in the alternative, Petitioners argued that to the extent Nigerian tax policy had changed so as to require them to allocate additional Royalty or Tax Oil to NNPC, such changes triggered the Stabilization Clause and, therefore, the PSC should be modified to compensate Petitioners for such changes.

27. In response, Nigeria (NNPC's alter ego) threatened to shut down all production unless Petitioners accepted NNPC's extra-contractual demands, effectively holding Petitioners' multi-billion dollar and thirteen-year investment hostage. *Id.* at ¶ 16. Moreover, rather than follow the agreed contractual process to resolve this dispute—which required NNPC to commence arbitration against Petitioners under the PSC—NNPC engaged in self-help and started lifting oil to which it was not contractually entitled ("overlifting"). Atake Decl. Ex. 1 (Award), at ¶¶ 54, 84-104, 232, 378. NNPC also refused to transmit the tax returns prepared by Petitioners to Nigeria's tax authority, the Federal Inland Revenue Service ("FIRS"), instead

unilaterally preparing and submitting its own version of the return, thereby further breaching its obligations under the PSC. *See* Atake Decl. ¶ 18.[8]

C. Petitioners Commence Arbitration to Vindicate Their Contractual Rights

28. Because the dispute between Petitioners and NNPC was contractual in nature—concerning Petitioners' exclusive rights under the PSC to determine lifting allocations and to prepare tax returns, and NNPC's contractual obligations to comply with such allocations and to file tax returns as prepared by Petitioners—on July 31, 2009, Petitioners invoked Clause 21 of the PSC and commenced arbitration seeking compensation for NNPC's various contractual breaches. Atake Decl. Ex. 1 (Award), at ¶¶ 5, 155, 163, 385.

29. The Tribunal was duly constituted in January 2010, and was comprised of three eminent jurists with expertise in energy disputes and arbitration.

30. Petitioners appointed the Honorable Charles N. Brower, a U.S. national and a U.S.-appointed Judge on the Iran-United States Claims Tribunal. *Id.* at ¶ 6; Atake Decl. Ex. 13 (Judge Brower's CV). Judge Brower is one of the world's most prominent international arbitrators and international lawyers. In addition to his service on the Iran-United States Claims

[8] NNPC's unilateral tax returns gave rise to inflated tax assessments levied by the FIRS against the Petitioners. These assessments have been separately challenged by Petitioners in the Tax Appeal Tribunal ("TAT"), which Nigeria established in 2007, at around the same time that several disputes over Nigeria's overlifting arose. The TAT proceedings and subsequent appeals of those proceedings to the Nigerian Federal High Court involved *different* parties (Petitioners and Respondent as taxpayers, on the one hand, and the FIRS, on the other) seeking *different* relief (an amended assessment of tax and eventual refund) than was, or could have been, at issue in the Arbitration and have proceeded in parallel to the Arbitration and related litigation in the Nigerian courts. One critical area differentiating the Arbitration from the TAT proceedings is that the Arbitration concerned not only the appropriate allocation of Tax Oil, but also the appropriate amounts Petitioners could lift in Cost Oil and had to pay Nigeria in Royalty Oil and Petitioners' claim under the Stabilization Clause—topics that were far beyond the TAT's jurisdiction. Nevertheless, once Petitioners initiated arbitration, both NNPC and FIRS worked hand-in-glove to block Petitioners from arbitrating the dispute and recovering damages for NNPC's contractual breaches.

Tribunal, he has served in the White House as a Deputy Special Counsellor to President Reagan and as a judge *ad hoc* on the International Court of Justice and the Inter-American Court of Human Rights. Atake Decl. Ex. 13 (Judge Brower's CV), at 2-3. As recently as 2013, he was described by The American Lawyer as "the reigning king of international arbitrators." *Id.* at 17.

31. NNPC appointed Professor Paul Obo Idornigie, a Nigerian national and Professor of Law at the Nigerian Institute of Advanced Legal Studies. Atake Decl. Ex. 1 (Award), at ¶ 6; Atake Decl. Ex. 14 (Professor Idornigie's CV).

32. The President of the Tribunal, appointed jointly by Professor Idornigie and Judge Brower, was L. Yves Fortier, C.C., Q.C., Canada's former Ambassador to the United Nations. Atake Decl. Ex. 1 (Award), at ¶ 6; Atake Decl. Ex. 15 (Ambassador Fortier's CV). Ambassador Fortier has served on more than 200 arbitral tribunals and is recognized as one of the top arbitrators in the world.[9] Ambassador Fortier is currently serving as the Chair of the enforcement committee at the European Bank of Reconstruction and Development and on the Canadian Security Panel. *Id.*

33. The Arbitration proceedings were extensive. Prior to the hearing, the parties submitted a combined seven substantive briefs (totaling 403 pages), eight factual witness statements (totaling 88 pages), and two expert reports (totaling 36 pages) as well as nearly 500 pages of exhibits. Atake Decl. ¶ 24. The experts, from the Nigerian judiciary and KPMG, provided testimony on (i) whether the PSC was valid under Nigerian law and (ii) the proper methodology for calculating the lifting allocations under Nigerian law and the PSC.

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[9] Alison Ross, *Fortier Takes Lead in Development Bank's Corruption Battle*, Global Arbitration Review (Sept. 20, 2016), http://globalarbitrationreview.com/article/1068603/fortier-takes-lead-in-development-bank's-corruption-battle.

34. The Arbitration hearings were held in Nigeria from February 28 to March 2, 2011. Atake Decl. Ex. 1 (Award), at ¶ 43. During the Arbitration, Petitioners called five fact witnesses and two expert witnesses, who provided testimony about the terms of the PSC and NNPC's contractual breaches. *Id.* at ¶¶ 44, 46; Atake Decl. ¶ 40. NNPC called four fact witnesses to testify regarding the administration of petroleum profit taxes and the FIRS's tax policies with respect to petroleum operations and production sharing contracts. Atake Decl. Ex. 1 (Award), at ¶ 44; Atake Decl. ¶ 41.

35. Apparently recognizing that it was likely to lose a dispute adjudicated by an impartial tribunal, NNPC sought to escape its obligation to arbitrate in the first place, arguing that:

- the dispute between the parties arose "from the operation of the [PSC] and the application of the Petroleum Profits Tax Act" and therefore was not a contractual dispute, but a tax dispute subject to the exclusive jurisdiction of the TAT;[10]
- the TAT had exclusive jurisdiction over any dispute which required consideration of the PPT Act; and
- the Arbitration had the potential to affect the amount of money that FIRS would eventually receive, and, therefore, the Tribunal had no jurisdiction over it.

See Atake Decl. Ex. 10 (NNPC's Statement of Defence), at ¶¶ 1.2-1.3.

36. Petitioners disagreed, arguing that the gravamen of several of their claims—such as, for example, the method of calculating Cost Oil—had nothing to do with taxation and, therefore, the Parties' dispute was not a tax dispute and could not in fact be litigated before the TAT, but must be submitted to arbitration. Moreover, Petitioners argued that even those of

[10] One of the experts called by Petitioners (who had over 30 years' experience in the Nigerian judiciary, including six years on the Nigerian Supreme Court), testified that NNPC was incorrect that lifting allocation disputes had to be litigated before the TAT: "TAT will not be able to settle disputes arising from contractual obligations and entitlements. It has no jurisdiction to dabble into and resolve such disputes." *See* Atake Decl. ¶ 40.

Petitioners' claims that did relate to Tax Oil turned not on the *amount* of tax assessed, but on NNPC's failure to comply with its *contractual* obligations, such as its obligation only to lift the quantities of oil allocated by Petitioners and to submit, as written, the tax returns prepared by Petitioners. *See* Atake Decl. Ex. 1 (Award), at ¶ 1.

37. It was only after the hearing concluded, having not gone well from NNPC's perspective, that NNPC raised a new (and equally groundless) jurisdictional objection: that Nigeria's 1999 Constitution purportedly prevented the Tribunal from exercising jurisdiction over the dispute. NNPC argued that Section 251 of the 1999 Constitution, which provides a list of matters subject to the exclusive jurisdiction of Nigerian federal, as opposed to state, courts, also prohibited the arbitration of any disputes concerning those matters, including disputes concerning taxation. *See* Atake Decl. ¶ 42-43. NNPC's belated invocation of the 1999 Constitution, which turned on a previously unheard-of interpretation of Section 251 and was devoid of any precedential support whatsoever (*see* Oguntade Decl. ¶¶ 41-49), resulted in substantial additional briefing. In all, after the hearings concluded, the parties filed nine additional written submissions (totaling more than one hundred pages) addressing, *inter alia*, NNPC's new jurisdictional argument based on Section 251 of the 1999 Constitution. Atake Decl. Ex. 1 (Award), at ¶¶ 48-52.

D. The Tribunal Awards Petitioners US$1.8 Billion in Contractual Damages

38. In a lengthy, well-reasoned Award dated October 24, 2011, the Tribunal rejected NNPC's arguments and found for Petitioners. A majority of the Tribunal, made up of Ambassador Fortier and Judge Brower, found that the Tribunal had jurisdiction over the dispute because the dispute was contractual in nature and related to the interpretation and performance of the PSC, and thus was not, as NNPC had claimed, a "tax dispute" subject to the exclusive jurisdiction of the Nigerian courts. *Id.* at ¶ 180.

39. The Tribunal examined Nigerian law and determined that it had jurisdiction to adjudicate Petitioners' contractual claims and to award damages if NNPC had breached its contractual obligations. The Tribunal specifically cited the fact that

> [e]ach of the allegations made by the [Petitioners] in their Statement of Claim is anchored in a provision of the PSC. . . . The fact that elements of the dispute relate to tax matters and require some consideration of Nigerian tax legislation does not transform the dispute from a contractual dispute into a tax dispute.

Id. at ¶¶ 156, 158.

40. Turning to the constitutional argument, the Tribunal concluded that

> Section 251(1)(b) of the Constitution of Nigeria confers jurisdiction to the Federal High Court "*to the exclusion of any other court*" over matters "*connected with or pertaining to the taxation of companies*". It does not, by its terms, preclude this arbitral Tribunal from assuming jurisdiction over the present *contractual* dispute.

Id. at ¶ 160 (internal citation omitted and last emphasis added). Even the sole dissenting arbitrator, NNPC's appointee, expressly agreed that the Tribunal had the jurisdiction to interpret the PSC and resolve contractual disputes thereunder. *See id.* at ¶ 299 (dissent).

41. As to liability, the Tribunal concluded that "the PSC vests in [Petitioners] the exclusive right (and duty) to determine Lifting Allocations," that "NNPC has breached the PSC and that [Petitioners are] entitled to damages representing the difference between what NNPC actually lifted and what it was entitled to lift pursuant to the Contractor's allocations." *Id.* at ¶¶ 231-32. Specifically, the Tribunal found that NNPC had breached the PSC by (i) overlifting Royalty Oil, (ii) overlifting Tax Oil, (iii) reducing the Cost Oil due to Petitioners, and (iv) as a result of the foregoing breaches, had improperly reduced the Profit Oil available to the Petitioners (resulting in yet another breach). *Id.* at ¶¶ 254-55, 268-71, 301, 305.[11] The Tribunal quantified Petitioners' damages at US$1.799 billion, a figure to which NNPC never objected.

[11] With respect to Petitioners' claims regarding their sole right to prepare tax returns, the Tribunal concluded that the PSC "does not give NNPC the right to alter the returns or to

42. Having found in favor of Petitioners across the board, the Tribunal ordered NNPC to pay US$1.799 billion, plus interest, in addition to ordering declaratory and injunctive relief. *Id.* at 115-17. The current value of the Award is US$2,465,596,823. Leitner Decl. ¶ 9.

E. Nigeria and NNPC Commence a Multi-Pronged, No-Holds-Barred Litigation Campaign to Prevent Petitioners from Enforcing the Award in Nigeria

43. As noted earlier, the dispute between Petitioners and NNPC is part of a broader dispute between Nigeria and various oil companies that are operating deep-water oil fields in Nigeria (the "Overlift Disputes"). In those Overlift Disputes, the international oil companies have secured arbitral awards worth as much as US$10.8 billion. *See* Atake Decl. ¶ 80.

44. Seeking to escape its obligations to Petitioners (and companies holding similar awards), Nigeria—acting through its various agencies and instrumentalities, including NNPC and the FIRS—has chosen to wage a no-holds-barred litigation campaign to frustrate the enforcement of the Award.[12] The centerpiece of NNPC's effort to escape its contractual liability is a refreshingly candid argument to the Nigerian courts: because enforcing the Award (and the others like it) will affect Nigeria's bottom line, the contractual disputes submitted to arbitration should be reclassified as "tax disputes" and deemed non-arbitrable. Neither NNPC's arguments as to the classification of the underlying disputes nor its arguments concerning arbitrability are supported by a proper application of Nigerian law, whether as it existed when the PSC was

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submit its own returns in place of the ones prepared by the [Petitioners]" and that NNPC had further breached the PSC by doing so. *Id.* at ¶ 323. The Tribunal also found that the elements of a Stabilization Clause claim had been met and exercised its powers under the PSC to order a modification of the PSC to compensate Petitioners for any future overlifting of oil by NNPC. *See id.* at ¶¶ 367, 370.

[12] *See* Dr. Ngozi Okonjo-Iweala, Coordinating Minister for the Economy and Minster of Finance, Federal Republic of Nigeria, Overview of the 2015 Budget Proposal ¶¶ 14-15 (Dec. 17, 2014), http://www.budgetoffice.gov.ng/pdfs/CME%20Budget%20Speech%202015.pdf; *Jonathan Told to Publish Forensic Audit Report of Missing $20bn in NNPC*, Vanguard (Feb. 23, 2015, 5:55 p.m.), http://www.vanguardngr.com/2015/02/jonathan-told-to-publish-forensic-audit-report-of-missing-20bn-in-nnpc.

entered into or at present (*see* Oguntade Decl. ¶¶ 23-24, 39, 49), yet they have found favor with the Nigerian courts.

45. In pursuit of its strategy to frustrate enforcement of the Award, NNPC, in concert with the FIRS, commenced not one, but two actions in Nigeria seeking to set aside the Award and, if that failed, to have the High Court prevent Petitioners from enforcing it. During the five years of litigation that have now followed (and which will likely continue for many more years), NNPC has missed no opportunity to extend and delay Nigerian court proceedings while steadfastly refusing to comply with its contractual obligations or the Award. *See* Atake Decl. ¶ 52. In the meantime, Petitioners have not seen one cent of the US$1.8 billion they have been owed since 2011.

1. Nigeria's Tax Authority Seeks to Prevent the Enforcement of the Award

46. Even before the Tribunal had issued its Award, Nigeria's tax authority, FIRS, initiated a suit designed to prevent Petitioners from enforcing the Award (the "FIRS Action"). *Id.* at ¶ 54. To do so, FIRS, which is neither a party to the PSC nor the Arbitration, commenced a legal proceeding in Nigeria's court of first instance, the Federal High Court, in Abuja, Nigeria (the "High Court"), seeking a declaration that the Tribunal lacked jurisdiction to adjudicate the contractual lifting dispute, because doing so could indirectly impact the amount of revenue FIRS would receive. *Id.* FIRS further demanded an order enjoining all further arbitrations of all Overlift Disputes, including but not limited to the Arbitration. *Id.* NNPC supported FIRS's argument in the High Court. *Id.*

47. Disregarding the fact that FIRS was not a party to the PSC or the Arbitration and therefore lacked standing to challenge the Award under applicable Nigerian law, the High Court granted FIRS's request (the "FIRS Decision"). Atake Decl. Ex. 3 (FIRS Decision), at 28. In so doing, the High Court erroneously concluded that the relief Petitioners sought in the Arbitration

was "in effect" a tax refund (because it would result in Nigeria, via NNPC, paying damages to Petitioners) and held that the entire dispute was therefore a tax dispute subject to the exclusive jurisdiction of the Nigerian courts and the TAT. *Id.* at 24-25.[13]

48. In holding that the parties' dispute was a tax dispute, the High Court "applied" a decision it had reached previously in a "sister" case, and saw "no need" to review—or to consider or engage with—Petitioners' arguments as to why their specific dispute with NNPC was not a tax dispute. *Id.* at 20. Rather, the High Court reached its decision by analyzing arguments made in a *different* litigation. Thus, the High Court never considered—indeed, did not even mention—that a significant portion of the parties' dispute did not concern taxes or Tax Oil at all, but concerned the parties' dispute about Royalty Oil, Cost Oil, and the Stabilization Clause. And, because the Tribunal never considered these parts of the dispute, at no point did it explain how Petitioners could possibly ever vindicate their non-tax contract claims before the TAT, which was the forum the High Court said should adjudicate the tax dispute in the first instance, but which was powerless to resolve non-tax-related claims. Similarly, without considering Petitioners' arguments to the contrary, the High Court simply adopted Nigeria's argument that Section 251 of the Constitution precludes private arbitral tribunals from adjudicating any disputes implicating tax issues. Thus, in reaching the FIRS Decision, the High Court ignored Petitioners' case-specific arguments and, in so doing, violated Petitioners' due process rights. *See* Oguntade Decl. ¶¶ 52-60.

49. Petitioners appealed the FIRS Decision on June 4, 2012. Since then, more than four years have passed without the Nigerian Court of Appeal holding a hearing on Petitioners'

[13] This reasoning leads to the illogical conclusion that any liability assessment against the State, including over something such as an unpaid invoice, is a "tax dispute" since it affects Nigeria's bottom line. This simply cannot be correct.

appeal. Petitioners' appeal is currently scheduled to be heard in November 2016, but many previously-scheduled hearing dates have been vacated, and this one may be no different. *See* Atake Decl. ¶ 61.

2. Nigerian Courts Set Aside the Award

(i) *The High Court Proceedings*

50. FIRS, a Nigerian government agency, commenced the FIRS Action before the Tribunal issued its Award. Apparently, however, that was not sufficient protection for NNPC and Nigeria. Thus, once the Award was issued and Petitioners had applied to the High Court to enforce it, NNPC cross-applied to have the Award set aside (the "Set Aside Action"). Atake Decl. ¶ 62.

51. On May 22, 2012, the High Court set aside the Award (the "Set Aside Decision"). Atake Decl. Ex. 4 (Set Aside Decision). The High Court conducted *no analysis whatsoever* of the parties' respective positions on the issues submitted. *See* Oguntade Decl. ¶¶ 62-63; Atake Decl. ¶¶ 64-65. For example, the High Court did not consider Petitioners' arguments as to (i) why the Tribunal had jurisdiction over the purely contractual dispute between Petitioners and NNPC, (ii) why Section 251 of the 1999 Constitution did not bar the arbitration of these claims, or (iii) why the Petitioners' claims—which only partially concerned the amount of Tax Oil lifted—could not have been brought before the TAT. *See* Atake Decl. ¶ 65. Indeed, nowhere in the High Court's 145-page decision is there any discussion of the various arguments put forth by Petitioners. Rather, the High Court physically cut and pasted pages from the FIRS Decision into its judgment, and then found that, because the dispute could reduce the amount of money ultimately received by Nigeria (NNPC's alter ego), the dispute was not arbitrable. *See* Atake Decl. Ex. 4 (Set Aside Decision), at 143-44; *compare id.*, *with* Atake Decl. Ex. 3 (FIRS Decision), at 24-25. Importantly, because the High Court adopted the FIRS Decision without

conducting an analysis of its own, it also adopted the procedural deficiencies inherent in the FIRS Decision—including its failure to consider Petitioners' arguments.

52. The High Court's decision was as substantively erroneous as it was procedurally deficient. In finding that Petitioners could not arbitrate their contractual claims, the High Court adopted a hitherto unprecedented, and unsupportable, interpretation of Section 251 of the 1999 Constitution, holding that Section 251 prohibited arbitration concerning any of the subjects identified in that section, including disputes concerning taxation. *See* Oguntade Decl. ¶ 68; Atake Decl. Ex. 4 (Set Aside Decision), at 144 ("[Section 251] precludes any other Court in Nigeria not to talk of an inferior Arbitration Tribunal, from exercising jurisdiction over tax related matters relating to the Federal Government's revenue." (quoting the FIRS Decision)).

53. Prior to the Overlift Disputes, Section 251 had been interpreted as regulating which Nigerian *courts*—federal or state—had jurisdiction to decide a dispute over certain subjects. *See* Oguntade Decl. ¶¶ 43-44. Section 251 had never been interpreted to say anything about whether disputes could validly be *arbitrated*, nor that it prohibited arbitration of the subjects listed in Section 251. *See* Oguntade Decl. ¶¶ 43-44. In fact, arbitrability as a matter of Nigerian law is the subject of a different legal framework, to which Section 251 is irrelevant. *See* Oguntade Decl. ¶¶ 34-35, 44. And disputes relating to the subject matters listed in Section 251, which include, for example, maritime disputes, have been arbitrated for many years without any jurisdictional objections from the parties or adverse findings by Nigerian courts. *See* Oguntade Decl. ¶ 45. The High Court did not even engage with, distinguish, or ever discuss this well-established precedent—it simply dispensed with it. Indeed, the High Court chose to rule against Petitioners without ever addressing any of their arguments. *See* Oguntade Decl. ¶¶ 62-63.

54. The High Court's ruling effectively tore up the PSC and destroyed the parties' bargain.

(ii) *The Nigerian Court of Appeal Proceedings*

55. On July 25, 2012, Petitioners appealed the Set Aside Decision to the Nigerian Court of Appeal. Atake Decl. ¶ 66. Almost four years later, on July 22, 2016, the Court of Appeal issued a decision granting in part and denying in part Petitioners' appeal (the "Set Aside Appeal"). Atake Decl. Ex. 5 (Set Aside Appeal).

56. The Court of Appeal's decision is a paradigm of results-oriented reasoning. The Court of Appeal reinstated part of the Award, finding that the Tribunal had jurisdiction to conclude, as it did, that NNPC had breached its contractual obligations under the PSC by (i) lifting oil in excess of the allocations determined by the Petitioners and (ii) failing to submit the tax returns prepared by Petitioners as the PSC requires. *Id.* at 20 (ordering that "the final award of the arbitral tribunal be restored in respect of Petroleum Profit Tax returns preparations and calculation of lifting allocation by [Petitioners]"). Therefore, and importantly, the Nigerian Court of Appeal accepted that the dispute submitted to the Arbitration was a contractual dispute that could properly be arbitrated. Accordingly, the portion of the Award finding Respondent liable for breach of contract has been confirmed in Nigeria and thus can be recognized and enforced in the United States. *See infra* ¶¶ 76-79.

57. However, the court simultaneously adopted the position—which lacked any legal basis, and for which the Court of Appeal offered no explanation whatsoever—that even though the Tribunal had jurisdiction to find NNPC in *breach* of its contractual obligations to Petitioners, the Tribunal lacked jurisdiction to *award damages* for such breaches because doing so was akin to giving Petitioners a tax refund, and thus the exclusive domain of the TAT and Nigerian courts. *See* Atake Decl. Ex. 5 (Set Aside Appeal), at 15. Thus, despite finding that the Tribunal had

properly adjudicated Petitioners' claims, and that those claims were plainly contractual in nature, the Court of Appeal nevertheless denied Petitioners any remedy for those contractual breaches and declared that the Tribunal had no ability to remedy Petitioners' wrongs. *Id.* at 15, 20. In reaching its decision, the Court of Appeal, as the High Court before it, wholly ignored previously applicable precedent as well as Petitioners' arguments, as described above. *See* Oguntade Decl. ¶ 71.

58. The Court of Appeal's results-oriented reasoning, and clear intention to deny Petitioners any opportunity to recover their damages, is also evident from its treatment of Petitioners' alternative claim under the Stabilization Clause. Specifically, Petitioners argued in the Arbitration that to the extent that NNPC believed Petitioners were entitled to lift less oil based on changes in Nigerian tax policy, the Stabilization Clause required a modification of the PSC in order to preserve the Petitioners' economic bargain. Apparently unable to deny the force of Petitioners' legal argument, the Court of Appeal resorted to a procedural pretext as to why the Petitioners could also not recover on their Stabilization Clause claim. Ignoring long-established arbitration rules and procedures, as well as the Tribunal's judgment on this very issue (which was well within the Tribunal's competence), the Court of Appeal ruled that because Petitioners had purportedly not included the Stabilization Clause claim in their initial submission to the Tribunal and had not formally amended the initial submission, their Stabilization Clause claim could not be adjudicated in the Arbitration. Atake Decl. Ex. 5 (Set Aside Appeal), at 29 ("[The] stabilization claim is liable to be set aside for being beyond the scope of the dispute submitted for arbitration."). The Court of Appeal's decision in this regard was surprising to say the least, including because the Petitioners *had* in their initial submission in the Arbitration reserved the right to assert the Stabilization Clause claim in their subsequent submissions (as an alternative

basis for liability); because the Tribunal *had* specifically ruled that the Stabilization Clause claim should be admitted without any need for formal amendment of the pleadings; and because Respondent *had*, in any event, responded to the argument both in written submissions and during the arbitral hearings. *See* Atake Decl. ¶ 69.

59. Petitioners are appealing those aspects of the Set Aside Appeal quashing (only) the award of damages to the Nigerian Supreme Court on October 21, 2016. *Id.* at ¶ 70. However, any such appeal may not be fully adjudicated for at least three to five years. *Id.*; *see also* Oguntade Decl. ¶¶ 80-87. Indeed, counsel for NNPC has recognized the pervasive delays in the Nigerian proceedings, which both Petitioners and NNPC agree are likely to continue for many years, and which render any chance of Petitioners vindicating their rights illusory and therefore intrinsically amount to a substantial denial of due process. *See* Leitner Decl. Ex. 1, Hr'g Tr. 7:17-20, Mar. 20, 2015 (NNPC's counsel: "I also understand that the Nigerian Supreme Court today is hearing appeals that were filed in 2005. We are talking about the possibility of ten, 12, 15 years."); *see also* Oguntade Decl. ¶¶ 80-87.

3. Nigerian Courts Bar Petitioners from Seeking Relief for Their Contractual Breaches in Nigerian Courts

60. In the FIRS and Set Aside Decisions, the Nigerian courts ruled that for Petitioners to recover on their contractual claims, they would have to commence an action in the Nigerian courts. Atake Decl. Ex. 3 (FIRS Decision), at 27; Atake Decl. Ex. 4 (Set Aside Decision), at 144-45. Thus, in June 2013, Petitioners commenced an action in the High Court seeking compensation for NNPC's violations of the PSC (the "Substantive Proceedings"). Petitioners did so while their efforts to confirm the Award in Nigeria were still pending, in order to avoid a

situation in which their contractual claims became barred by the statute of limitations. Atake Decl. ¶¶ 72-74. [14]

61. The High Court wasted little time foreclosing this avenue to justice for Petitioners. The High Court dismissed Petitioners' claim with prejudice (the "Substantive Decision"), finding that because Petitioners would not abandon their attempt to confirm the Award, it was an abuse of process for Petitioners to file the Substantive Proceeding:

> Let me also observe that what the Plaintiffs have done by filing this present suit is an attempt to circumvent the Court of Appeal in whatever decision that could be reached in the [Set Aside Appeal]. That is to say that, if the decision of the Court of Appeal goes in favour of the Plaintiffs, then they can fall back on this suit to seek the enforcement of the arbitration award. If, on the other hand, the decision of the Court of Appeal goes against the Plaintiffs, perhaps, they may further go on to appeal to the Supreme Court and leave the present matter still pending. How preposterous! In any of the two situations, it would mean that this suit and the appeal could be existing side by side, and there lies the abuse. This Court has an inherent power to stop the abuse of its process.

Atake Decl. Ex. 6 (Substantive Decision), at 5. This holding patently mischaracterizes the situation, as Petitioners were in no way seeking double recovery, and expressly stated so. Rather, faced with the running of the limitations period, Petitioners were simply preserving as a fallback the very forum Nigeria has claimed all along was the proper venue to adjudicate the substantive claims. The Nigerian courts have now slammed the door on this final forum for substantive redress. Petitioners' appeal is pending but is not expected to be resolved for several years. Atake Decl. ¶ 77.

62. If the result in the Substantive Proceedings stands, even though an arbitral tribunal has held NNPC liable, and the Nigerian Court of Appeal has upheld that finding,

[14] In order to prevent any appearance that they were seeking double recovery, Petitioners immediately moved for a stay of the Substantive Proceedings pending resolution of the appeal of the Set Aside Decision. Only in the event of an adverse ruling from the Court of Appeal in the Set Aside Action would Petitioners move forward with their contractual claims in the High Court. *See* Atake Decl. ¶ 74.

Petitioners will not see any compensation for NNPC's breach of the PSC from a Nigerian court. And, if this Court "recognize[s] and implement[s] the nullification" of the Award by recognizing the Set Aside Decision, Petitioners will have "no sure forum in which to bring their contract claims. . . . Absent confirmation of the [Award, Petitioners will] lose the opportunity to bring their claims" because the Award will have been nullified as to damages and their contractual claims dismissed with prejudice by the Nigerian courts. *Pemex*, 832 F.3d at 109, 110; *see also* Atake Decl. Ex. 5 (Set Aside Appeal), at 15, 27; Oguntade Decl. ¶ 79.

4. Nigerian Courts Refuse to Recognize Other Arbitral Awards Rendered Against NNPC

63. While regrettable, and contrary to basic due process protections, the treatment Petitioners received in the Nigerian courts is hardly surprising. As noted above, the dispute between Petitioners and NNPC is part of a broader series of Overlift Disputes between international oil companies and NNPC. In each Overlift Dispute, NNPC unilaterally demanded to lift additional oil, in each case the international oil companies commenced arbitration against NNPC, and in each case the international oil companies prevailed in arbitration, securing awards in the aggregate amount of US$10.8 billion.

64. Given the potential economic impact of the Overlift Disputes on the Nigerian economy—in which the oil industry plays a dominant role, accounting for 90% of total exports[15] and approximately 70% of total revenues[16]—the Nigerian government and its institutions have acted predictably: they have thwarted, at every turn, the attempts of international oil companies to enforce awards duly rendered against NNPC by independent international arbitral tribunals. Thus, while *every* oil company that commenced arbitration against NNPC prevailed before an

[15] World Bank, *Nigeria Overview*, http://www.worldbank.org/en/country/nigeria/overview (last updated Sept. 30, 2015).

[16] IMF, *Nigeria: Selected Issues Paper*, Country Report No. 15/85, 20 (Mar. 2015).

independent arbitration tribunal, *no* oil company has been able to obtain the confirmation of an award in Nigerian courts. Atake Decl. ¶ 81.[17]

65. The Nigerian courts have refused to confirm these Awards on various "novel" procedural grounds. To take one representative example, in another Overlift Dispute, brought by SNEPCO, EEPNL, and others concerning the Bonga oil field, the Court of Appeal affirmed the set aside of an arbitral award because the oil companies' notice of arbitration—the initial *pro forma* document filed in the dispute—had not been signed by an attorney admitted in Nigeria but instead by that attorney's Nigerian law firm (the "Bonga Court of Appeal Decision"). *See* Atake Decl. Ex. 7 (Bonga Court of Appeal Decision). That represents an unprecedented interpretation of law by the Nigerian courts, which relies on statutory provisions relating to court proceedings that had never before been applied to set aside an award in Nigeria. *See id.* at 20; Oguntade Decl. ¶ 89-90. Similar positions have been advanced by and found favor with the Nigerian courts in connection with efforts to enforce an award issued in a third Overlift Dispute, relating to the Abo deep-water oil field. Atake Decl. ¶ 84.

66. Meanwhile, the Nigerian press has praised the setting aside of awards rendered in the Overlift Disputes because "the chairpersons/umpires were white," a fact that (it was claimed) made "the outcome of the arbitration[s] predictable."[18]

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[17] These observations are consistent with the U.S. State Department's finding that Nigeria's judiciary is heavily influenced and controlled by Nigeria's executive branch. *See* Leitner Decl. Ex. 2 (U.S. Dep't of State, Bureau of Democracy, H.R. and Lab., Nigeria 2015 Human Rights Report), at 14 ("The constitution and law provide for an independent judiciary in civil matters, but the executive and legislative branches, as well as business interests, exerted influence and pressure in civil cases."). Just last week, the Nigerian government arrested at least seven Nigerian judges, including judges on the Nigerian Supreme Court, based on allegations of corruption. *See* Leitner Decl. Ex. 3 (*Press Release: DSS Official Statement on Arrested Alleged Corrupt Judges in Nigeria*); *id.* Ex. 4 (*Chief Judge of Federal High Court Implicated in $1.3m Bribery Arrest*); *id.* Ex. 5 (*Names of Nigerian Judges Under Investigation Revealed*).

F. Petitioners Are Forced to Commence an Enforcement Action in the United States

67. On October 22, 2014, faced with the expiration of the FAA's three-year limitation period to confirm the Award in the United States, and realizing that their ability to obtain redress in Nigeria will almost certainly be illusory, Petitioners filed the instant action (the "US Enforcement Action"). ECF No. 2.[19] Petitioners now respectfully submit this Second Amended Petition.

* * *

68. Nigeria and NNPC's sustained and multi-pronged efforts to prevent Petitioners from obtaining relief in Nigeria will, if successful, mean that Petitioners have no forum in which to pursue their substantive contractual rights. This outcome is directly contrary to the PSC, which enshrined in contract Petitioners' fiscal rights and their right to arbitrate disputes with NNPC. In these circumstances, giving effect to the judgment of the Nigerian court nullifying the Award would also be contrary to the strong federal policy promoting the binding nature of arbitration. *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (recognizing and stressing the "liberal federal policy favoring arbitration") (internal citations and quotations omitted); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985) (recognizing an "emphatic federal policy in favor of arbitral dispute resolution," particularly "in the field of international commerce"). Indeed, denying Petitioners any forum in which to seek

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[18] Innocent Anaba & Ikechukwu Nnochiri, *Court Voids Two Arbitration Awards worth N840bn against NNPC*, Vanguard (Apr. 23, 2012), http://www.vanguardngr.com/2012/04/court-voids-two-arbitration-awards-worth-n840bn-against-nnpc.

[19] Pursuant to the Court's Scheduling Order of March 20, 2015 (ECF No. 32), Petitioners filed an Amended Petition on April 17, 2015 (ECF No. 35). This action was then stayed by the Court, pursuant to the stipulation and agreement of the parties dated May 18, 2015 (ECF No. 39), pending a decision by the United States Court of Appeals for the Second Circuit in *Pemex*. In accordance with the Court's order, the stay was lifted on August 12, 2016, and on September 21, 2016, the Court entered a new scheduling Order. ECF No. 51.

compensation for admitted wrongs runs contrary to the most basic notions of justice in the United States. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 147 (1803) ("It is a settled and invariable principle, that every right, when withheld, must have a remedy, and every injury its proper redress.").

69. In Nigeria, NNPC has spared no effort in seeking to escape its responsibility to comply with the Award. And, in light of the sheer length of time required for Petitioners' Nigerian appeals to conclude, no matter the outcome, Petitioners face a real risk that the prospect of a judicial remedy in Nigeria is so temporally remote as to be no remedy at all.

70. Moreover, in the unlikely event that Petitioners eventually overcome the pretextual hurdles erected by Nigeria and prevail in persuading the Nigerian courts both to recognize the Award and to reject the FIRS Action, Petitioners will nevertheless face an additional bar to recovery on the Award. Nigerian law prohibits the execution of a judgment against NNPC's commercial assets, or attachment of its property, which would leave Petitioners without any remedy within Nigeria, even if the Award were ultimately confirmed there. *See* Oguntade Decl. ¶¶ 91-97.

71. NNPC has declared its intent to seek the dismissal of this petition so that it can, once again, escape its liability under the Award. NNPC is expected to argue that the Court should recognize an obviously flawed decision of the Nigerian Court of Appeal, rather than a decision reached by an eminent and *independent* international arbitration tribunal that was the parties' chosen contractual decision maker. If NNPC is successful, Nigeria will not only have eviscerated the arbitration agreement Petitioners bargained for, but it will have also foreclosed another judicial route to the recovery of damages.

72. NNPC should not be permitted to do so. It has enjoyed substantial economic rewards and benefits from Petitioners' investments in the Erha field, and it is only fair that it pay Petitioners for them, as the PSC contemplated and the Award requires. On the facts of this case, the Court should recognize and enforce the Award.

ARGUMENT

A. The Court Should Recognize and Enforce the Award

73. The Award was rendered in Nigeria, and both the United States and Nigeria are Contracting States to the New York Convention, implemented in the United States by the FAA, 9 U.S.C. §§ 201-208. Article III of the New York Convention speaks in peremptory terms and requires that "[e]ach Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon . . . ." Section 207 of the FAA therefore requires that "[t]he court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the [New York Convention]."

74. The New York Convention provides no basis to refuse or defer recognition or enforcement here. As stated above, the Nigerian courts have not reached a final decision on the Award, and any application of Nigerian law that comports with notions of due process and substantial justice will result in the confirmation of the Award in full. Even if the Nigerian Supreme Court renders a decision adverse to the Petitioners and contrary to previously well-settled Nigerian law, Article V of the New York Convention and Section 207 of the FAA vest this Court with discretion to enforce the Award, and that discretion should be exercised here. *See Pemex*, 832 F.3d at 92.

B. The Nigerian Set Aside Decision is Not a Basis to Deny Confirmation of the Award

75. Petitioners anticipate that NNPC will argue that the Nigerian Court of Appeal decision partially confirming and partially setting aside the Award requires this Court to refuse to confirm the Award. That argument would fail for at least three reasons. First, the Nigerian Court of Appeal "restored" the Award, *confirming the Tribunal's finding of liability*—that NNPC breached its contractual obligations to Petitioners—as a result of which Petitioners suffered damages in the amount of approximately US$1.8 billion. Therefore, this Court can confirm the Award and give effect to its decree that NNPC pay US$1.8 billion in damages. *See Pemex*, 832 F.3d at 111-12. Second, even if the Award had been set aside in Nigeria—and it has not—this Court need not give recognition to such a decision because doing so would be counter to United States public policy. *See id.* Third, because it will likely take Petitioners a decade or more to have their claims finally adjudicated in the Nigerian courts, the delay endemic to the Nigerian court system provides this Court with an independent basis on which the Award can and should be confirmed.

1. This Court Can Recognize and Enforce the Award Because the Tribunal's Finding of Liability Has Been Reinstated by the Nigerian Court of Appeal

76. The Court should recognize and enforce the Award under the New York Convention because it is a final and enforceable award. The Nigerian Court of Appeal has reinstated and affirmed the Tribunal's jurisdiction and liability findings, holding, in particular, that the Tribunal had jurisdiction to conclude, and properly did conclude, that NNPC breached its contractual obligations to Petitioners. See Atake Decl. Ex. 5 (Set Aside Appeal), at 20. As the Court of Appeal held:

> There is no doubt in my mind that the claims before the arbitral tribunal as to the Petroleum Profit Tax returns preparation and calculation of lifting allocations can be severed from the tax dispute. This is because they are strictly based on the Production Sharing Contract. . . . [T]he final award of the arbitral tribunal *[shall]*

> *be restored* in respect of Petroleum Profit Tax returns preparations and calculation of lifting allocation by [Petitioners].

Id. (emphasis added). Accordingly, the Award's holding that NNPC breached its contractual obligations to Petitioners, as a result of which Petitioners suffered damages in the amount of US$1.8 billion, remains in effect and should be recognized. *See id.*; *see also Zurich Am. Ins. Co. v. Team Tankers A.S.*, 811 F.3d 584, 588 (2d Cir. 2016) (under the New York Convention, a valid arbitral award must be confirmed).

77. Accordingly, this Court should recognize and confirm the Award and enter judgment in Petitioners' favor. This would allow Petitioners to obtain redress for contractual breaches that even the Nigerian Court of Appeal agrees have occurred and would give effect to the Tribunal's intent in issuing the Award. Failing to do so, however, would "exalt form over substance, undermine the award that [is being enforced,] and diminish it . . . ." Hr'g Tr. at 14, *Corporación Mexicana De Mantenimiento Integral, S. De R.L. De C.V. v. Pemex-Exploración Y Producción*, No. 10 Civ. 206 (AKH) (S.D.N.Y. Sept. 12, 2013), ECF No. 163 (exercising the court's inherent authority to supplement damages to effectuate an arbitral award), *aff'd* 832 F.3d at 111-12; *see also Seed Holdings, Inc. v. Jiffy Int'l AS*, 5 F. Supp. 3d 565, 591 (S.D.N.Y. 2014) (augmenting arbitral damages award to provide interest, where arbitral award provided none); *Perfect Fit Indus., Inc. v. Acme Quilting Co.*, 646 F.2d 800 (2d Cir. 1981) (federal courts have broad powers to fashion judicial relief); *cf.* 9 U.S.C. § 11 (recognizing the FAA's policy of giving effect to the intent of the arbitral award). Moreover, allowing Petitioners to recover the damages they have suffered, and which have been quantified by the Tribunal, is mandated by one of the oldest principles of common law jurisprudence: that where there is a right, the court must provide a remedy for its violation. *See Marbury*, 5 U.S. at 163 ("It is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at

law, whenever that right is invaded. . . . every right, when withheld, must have a remedy, and every injury its proper redress." (quoting 3 William Blackstone, Commentaries 23, 109)); *Streck v. Bd. of Educ. of the E. Greenbush Cent. Sch. Dist.*, 408 F. App'x 411 (2d Cir. 2010).[20]

78. Petitioners are unaware of any case in which a United States court has refused to confirm an arbitral award where, as here, the liability findings of the arbitral tribunal were endorsed by the courts at the seat of arbitration, and this Court should decline any invitation to become the first to do so.

79. The authorities on which NNPC may rely are not to the contrary. In each of those cases, the court was faced with inapposite circumstances, as there the courts at the seat of the arbitration had set aside the award *in its entirety*. *See, e.g.*, *TermoRio S.A. E.S.P. v. Electranta S.P.*, 487 F.3d 928 (D.C. Cir. 2007); *Baker Marine (Nig.) Ltd. v. Chevron (Nig.) Ltd.*, 191 F.3d 194 (2d Cir. 1999). In *TermoRio*, for example, the Court of Appeals for the District of Columbia considered an action to confirm an arbitral award that had been set aside in Colombia, the seat of the arbitration. *TermoRio*, 487 F.3d at 935-40. The D.C. Circuit concluded that except where, as here, recognizing a decision of a foreign judgment annulling an arbitral award conflicts with American public policy, a court in the United States should ordinarily decline to enforce an annulled award. *See id.* However, the D.C. Circuit reached this conclusion by applying the "principle" that "an arbitration award does not exist to be enforced . . . if it has been lawfully 'set aside' . . . in the State in which the award was made." *Id.* at 936.[21] By contrast, here, the

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[20] Nigerian courts have also recognized this principle. *See* Thomas v. Olufosoye [1986] 1 NWLR (PT.18) 669 at 689 (Nigeria).

[21] In the decade since the D.C. Circuit decided *TermoRio*, the "principle" announced by that court has largely been rejected by the international legal community, as courts around the world have concluded that it is, in certain circumstances, appropriate to confirm and enforce arbitral awards annulled at the seat of arbitration. *See, e.g.*, HR 25 juni 2010, NJ 2012/55 m.nt. H.J. Snijders (OAO Rosneft/Yukos Capital s.a.r.l.) (Neth.), *available at*

Nigerian Court of Appeal has confirmed the Award and concluded that the Tribunal was well within its jurisdictional authority to find that NNPC had breached its contractual obligations and is therefore liable to Petitioners. Accordingly, because there can be no doubt that the Award exists, this Court should confirm it and issue a judgment in favor of Petitioners in its full amount. *See Pemex*, 832 F.3d at 107-11.

2. In the Alternative, this Court Should Not Recognize the Judgments of the Nigerian Courts, as Doing So Would Be Contrary to United States Public Policy

80. Even if the Nigerian Court of Appeal could be said to have set aside the Award, this Court should decline to recognize that decision as contrary to United States public policy. As the Second Circuit recently held, where, as here, enforcing a foreign decision vacating an arbitral award is contrary to United States public policy, the court should exercise its discretion and confirm the award. *Pemex*, 832 F.3d at 97; *Ackermann v. Levine*, 788 F.2d 830, 837 (2d Cir. 1986). In *Ackermann*, a decision accepted and endorsed by both *TermoRio* and *Baker Marine*, and heavily relied on by the Second Circuit in *Pemex*, the Second Circuit explained that a foreign judgment that "'tends clearly' to undermine the public interest, the public confidence in the administration of law, or security for individual rights . . . or of private property is against public policy." 788 F.2d at 841.

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http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2010:BM1679; Cour de cassation [Cass.] [Supreme Court for Judicial Matters] 1e civ., June 29, 2007, Bull. Civ. I, No. 250 (Fr.), *available at* http://newyorkconvention1958.org/index.php?lvl=notice_display &id=176. Similarly, this "principle" has also been rejected in this Circuit, where the *Pemex* court confirmed an award annulled at the seat of arbitration under circumstances similar to the present. *Pemex*, 832 F.3d at 107-11; *see also In re Arbitration between Chromalloy Aeroservices & Arab Republic of Egypt*, 939 F. Supp. 907, 914-15 (D.D.C. 1996); Jan Paulsson, *Enforcing Arbitral Awards Notwithstanding a Local Standard Annulment (LSA)*, 9 ICC Int'l Ct. Arb. Bull., No. 1, 1998.

81. As a threshold matter, the Set Aside Appeal is not entitled to comity and thus should not be recognized by this Court because, in rendering that decision, the Nigerian Court of Appeal ignored Petitioners' arguments and relied on incoherent legal reasoning. *See Hilton v. Guyot*, 159 U.S. 113, 202 (1895) (recognition of a foreign judgment is appropriate only where foreign proceedings were fair and likely to "secure an impartial administration of justice between citizens of its own country and those of other countries"); *Gordon & Breach Sci. Publrs. S.A. v. Am. Inst. of Physics*, 905 F. Supp. 169, 179 (S.D.N.Y. 1995) ("[I]t is primarily principles of fairness and reasonableness that should guide domestic courts" in determining whether to give effect to a foreign judgment); *see also* Restatement (Third) of the Foreign Relations Law of the United States, Section 482(c), cmt. b ("A court asked to recognize or enforce the judgment of a foreign court must satisfy itself of the essential fairness of the judicial system under which the judgment was rendered."). Where, as here, a foreign court refuses so much as to consider a party's arguments, the outcome is straightforward: that decision should not be recognized. *See Maersk, Inc. v. Neewra, Inc.*, No. 05-civ-4356 (CM), 2010 WL 2836134, at *14 (S.D.N.Y. July 9, 2010) (refusing to grant comity to a foreign judgment which, *inter alia*, failed to consider one party's arguments); *see also Asvesta v. Petroutsas*, 580 F.3d 1000, 1018-19 (9th Cir. 2009) (where, as here, foreign court's judgment is legally deficient, including because it "fail[s] to address" key legal arguments, comity is not warranted); *Estin v. Estin*, 334 U.S. 541 (1948) (New York court rightfully denied full faith and credit to Nevada court judgment affected by procedural infirmities); *Mantell v. Chassman*, 512 F. App'x 21 (2d Cir. 2013) (district court's failure to consider argument by party was reversible error).

82. Here, the Nigerian courts have systematically violated Petitioners' due process rights. *See, e.g.*, Oguntade Decl. ¶¶ 50-51, 62-63, 74-79. On the threshold question of whether

the dispute between the parties is a "tax dispute" or a "contractual dispute," no court in Nigeria has even considered Petitioners' arguments—including their argument that the instant dispute concerned a disagreement about not only Tax Oil, but also Royalty and Cost Oil, and as such could not on any view be considered a tax dispute. Indeed, in the FIRS Decision, the first decision to consider the question, the High Court expressly refused to consider Petitioners' argument and instead based its ruling on *different* arguments made in a *different* litigation. *See* Atake Decl. Ex. 3 (FIRS Decision), at 20 ("I see no need of reviewing the written addresses of the parties."). Compounding this obvious error, subsequent Nigerian courts to consider the issue have automatically adopted the conclusion of the FIRS Decision—that the dispute between the parties is a tax dispute—without considering the specific arguments raised by Petitioners as to why their particular dispute with NNPC was not a tax dispute. *See* Atake Decl. Ex. 4 (Set Aside Decision), at 144-45 (asserting that the Judge that issued the FIRS Decision "covered all the issues raised in the plaintiffs originating summons and also that of the defendant. The issue have [sic.] been decided, by the court."). *See also* Oguntade Decl. ¶¶ 62-64, 67, 70-71. The incoherence of these findings is only confirmed by the posture adopted by the Court of Appeal, which could not deny that the dispute submitted to Arbitration was in fact a contractual dispute, but determined to annul the damages award anyway on the basis that the award of compensation implicated matters of taxation. Principles of basic fairness dictate that these decisions—which violated Petitioners' basic due process rights—not be granted recognition. *See Gordon & Breach*, 905 F. Supp. at 179.

83. In a similar vein, while the Nigerian Court of Appeal held that Section 251 of the 1999 Constitution bars the arbitration of tax disputes, neither the Nigerian Court of Appeal nor the High Court in the Set Aside and FIRS Actions considered or addressed the arguments raised

by Petitioners as to why Section 251 is irrelevant to questions of arbitrability of the Overlift Disputes. *See* Oguntade Decl. ¶¶ 60, 68, 71; Atake Decl. ¶¶ 56-58, 64-65. The failure of Nigerian courts even to consider Petitioners' arguments lays bare the procedural infirmities of the Nigerian Proceedings and dictates that this Court decline to extend recognition to these decisions. *See Hilton*, 159 U.S. at 202; *Gordon & Breach*, 905 F. Supp. at 179.

84. Further, even if the Set Aside Decision could be recognized, this Court should decline to do so as it would be against United States public policy. In *Pemex*, the Second Circuit identified four principles—vindication of contractual rights, abhorrence of the retroactive application of the law, the need for the aggrieved party to have a remedy, and the prohibition on expropriation of a party's property rights—the violation of which is sufficiently repugnant to United States public policy to support refusal to recognize a foreign decision setting aside an arbitral award. *See Pemex*, 832 F.3d at 107-11. Indeed, the existence of *any one* of these factors is sufficient basis to refuse to recognize a foreign court decision vacating an award and to recognize the underlying award instead. Here, at least three of these factors are present, making the enforcement of the Award particularly warranted.

(i) *The Set Aside Appeal Destroys Petitioners' Contractual Rights*

85. NNPC voluntarily and knowingly entered into a contract whereby contractual disputes, including those concerning compliance with the contractual lifting allocations, would be subject to binding arbitration before an arbitral tribunal empowered to award damages to compensate the injured party.[22] Atake Decl. Ex. 1 (Award), at ¶ 53; Atake Decl. Ex. 2 (PSC), at

[22] Discovery should prove helpful in this respect. Specifically, at the appropriate time, Petitioners plan to seek discovery including, but not limited to, the negotiation of the PSC, the PSCs that Nigeria entered into with other international oil companies, representations made by Nigeria regarding the arbitration clauses, and Nigeria's expectations regarding dispute resolution mechanisms under the PSCs—both before the Overlift Disputes arose and thereafter.

Clause 21. At the time the parties signed the PSC, well-established precedent (as well as the clear terms of the PSC) supported Petitioners' expectation that a dispute concerning NNPC's compliance with the lifting allocations—the very heart of the contractual arrangement between the parties—was arbitrable. *See* Oguntade Decl. ¶¶ 26-40.

86. It was only after the dispute between Petitioners and NNPC developed, some thirteen years after the PSC was signed and after Petitioners invested billions of dollars to develop Erha, that NNPC reversed course and argued that Petitioners lacked the ability to arbitrate their breach of contract claims before an arbitral tribunal (an argument that even the Nigerian courts have now rejected). *See* Atake Decl. ¶¶ 42-43; Atake Decl. Ex. 5 (Set Aside Appeal), at 20. This argument was based on the 1999 Constitution, which of course was not in effect in 1993 when the PSC was entered into, and a statute enacted in 2007 to establish the TAT. Moreover, in siding initially with NNPC, the Nigerian courts abandoned—without any explanation or justification—the established understanding of the scope and impact of Section 251 of the 1999 Constitution and its irrelevance to arbitration. Oguntade Decl. ¶¶ 41-49. Even once that issue was resolved in favor of Petitioners by the Nigerian Court of Appeal, the Court of Appeal continued to thwart Petitioners' contractual rights by holding that the Tribunal was powerless to right the wrongs that even the Court of Appeal acknowledged had occurred. This is a clear evisceration of Petitioners' reasonable contractual expectation that any dispute between Petitioners and NNPC concerning the PSC would be subject to arbitration by a tribunal empowered to remedy NNPC's contractual breaches.

87. Accordingly, giving effect to the decision of the Nigerian courts, and therefore disregarding the findings in the Award, would "shatter[Petitioners'] investment-backed expectation in contracting, thereby impairing one of the core aims of contract law," and must

therefore be rejected as contrary to United States public policy. *See Pemex*, 832 F.3d at 108; *Hunt Constr. Grp. Inc. v. Brennan Beer Gorman/Architects, P.C.*, 607 F.3d 10, 14 (2d Cir. 2010) ("[C]ontract law . . . is designed to enforce parties' contractual expectations . . . ." (internal quotations and citations omitted)).

(ii) *The Set Aside Appeal is an Impermissible Retroactive Application of Law*

88. Giving effect to the Nigerian courts' decisions would also impair the closely-related concept of avoiding retroactive application of the law. *Pemex*, 832 F.3d at 108. As the Second Circuit has explained: "[r]etroactive legislation that cancels existing contract[ual] rights is *repugnant* to United States law. That repugnance is 'deeply rooted in [Supreme Court] jurisprudence, and embodies a legal doctrine centuries older than our Republic.'" *Pemex*, 832 F.3d at 108 (emphasis added); *see also PHH Corp. v. Consumer Fin. Prot. Bureau*, No. 15-1177 (BMK), 2016 WL 5898801, at *35 (D.C. Cir. Oct. 11, 2016) ("[A]nti-retroactivity principles are Rule of Law 101."). As noted above, at the time the parties entered into their contractual arrangement, it was understood by all parties that disputes concerning the interpretation and implementation of contractual rights—such as those at issue here—could and would be adjudicated by an independent arbitral tribunal empowered to award compensation to the injured party. In subscribing to the PSC, NNPC agreed that precisely such a dispute could be arbitrated. Atake Decl. Ex. 2 (PSC), at Clause 21.

89. It was only after years and billions of dollars of Petitioners' investment in the development of Erha that NNPC for the first time asserted that disputes related to the lifting of oil—the very heart of the PSC—were not arbitrable. The Nigerian courts then endorsed that argument through their retroactive application of law. *See* Oguntade Decl. ¶¶ 50-51. Indeed, the reasoning of the Nigerian Court of Appeal, in finding that the Tribunal lacked jurisdiction to award damages, is based on a provision of the Nigerian Constitution that was enacted after the

PSC entered into force, and which was, moreover, interpreted in a novel and unprecedented way to nullify Petitioners' vested contractual rights retroactively. *See id.*; *see also Landgraf v. USI Film Prods.*, 511 U.S. 244, 278 (1994) (refusing to apply laws retroactively because laws affecting vested substantive rights, liabilities, or duties are strongly disfavored). In adopting such an "abrupt" departure from past precedent, the Nigerian courts effectively "cancel[led Petitioners'] existing contractual rights" to arbitrate disputes concerning the PSC. *Pemex*, 832 F.3d at 108 (a retroactive application of the law is "repugnant to United States law"); *see also* Oguntade Decl. ¶ 51.

90. This Court should not give effect to such a retroactive application of Nigerian law and should instead preserve the parties' legitimate contractual expectations and confirm the Award. *See Pemex*, 832 F.3d at 107-08; *see also Landgraf*, 511 U.S. at 265 ("Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted."); *PHH Corp.*, 2016 WL 5898801, at *35; 2 J. Story, Commentaries on the Constitution § 1398 (5th ed. 1891) ("Retrospective laws are, indeed, generally unjust; and, as has been forcibly said, neither accord with sound legislation, nor with the fundamental principles of the social compact.").

(iii) *The Set Aside Appeal Denies Petitioners a Forum to Bring their Claims*

91. If this Court were to give effect to the Set Aside Decision and, on that basis, refuse to confirm the Award, Petitioners will be left with no forum at all in which to litigate their contractual claims. As noted above, Petitioners attempted to commence an action in Nigeria to do so, once the Award had initially been vacated on jurisdictional grounds. However, because Petitioners would not simultaneously waive their right to seek enforcement of the Award in Nigeria (in the event the Set Aside Decision is fully overturned), their action was dismissed, with

prejudice, as being an "abuse of process." Atake Decl. Ex. 6 (Substantive Decision), at 4-5. Thus, absent confirmation of the Award, Petitioners will be left with no forum in which to litigate their substantial damages claims, which is an independent basis supporting this Court's confirmation of the Award. *See Pemex*, 832 F.3d at 109-10.

92. Indeed, the present case is even more egregious than *Pemex*. In *Pemex*, the Mexican court never reached the merits of the petitioner's claims because it found that those claims were barred by the statute of limitations. *See Pemex*, 832 F.3d at 110. Here, by contrast, the Nigerian Court of Appeal has confirmed the Tribunal's holding in the Award that NNPC breached its contractual obligations to the Petitioners. Atake Decl. Ex. 5 (Set Aside Appeal), at 20. Thus, if Petitioners are left without a forum in which to pursue their damages, they will be left with a judicially acknowledged wrong, but no remedy. This cannot be. *See, e.g.*, *Streck*, 408 F. App'x at 411 (holding that where there is a right, the court must provide a remedy); *Marbury*, 5 U.S. at 147.

3. The Nigerian Courts' Endemic Delays Will Continue to Deny Petitioners a Judicial Remedy and is an Independent Violation of Petitioners' Due Process Rights

93. Finally, the significant delays that Petitioners have suffered, and indisputedly will continue to suffer, at the hands of the Nigerian court system is a further, independent basis to confirm the Award immediately. *See, e.g.*, *Bhatnagar v. Surrendra Overseas Ltd.*, 52 F.3d 1220, 1227-28 (3d Cir. 1995) (recognizing that "[a]t some point, . . . the prospect of judicial remedy becomes so temporally remote that it is no remedy at all"); *Weisel Partners LLC v. BNP Paribas*, No. C 07-6198 (MHP), 2008 WL 3977887, at *9 (N.D. Cal. Aug. 26, 2008) (same).[23] As noted

[23] *See also IPCO (Nigeria) Ltd. v. Nigerian Nat'l Petrol. Corp. (No. 3)* [2015] EWCA Civ 1144 & 1145, ¶ 170 (preserving a claimant's ability to pursue enforcement of a Nigeria-seated arbitral award in the English courts notwithstanding pending set aside proceedings in

above, Petitioners will be required to wait years, if not more than a decade, to obtain satisfaction of their Award in Nigeria. This delay is not accidental. Rather, it is the result of a carefully orchestrated campaign by NNPC, and its allies in the Nigerian government, to tie up the court system with multiple parallel proceedings, each with the goal of foreclosing Petitioners' ability to collect on their Award and vindicate their rights under the PSC. For this reason, too, the Award should be confirmed.

* * *

94. Given the extreme—and extremely unjust—circumstances of this case, the Court should recognize and enforce the Award. The Nigerian Court of Appeal has reinstated the portion of the Award finding NNPC liable for breaching the parties' contract and in these circumstances, this Court is authorized to, and should, enforce the Award. In the alternative, this Court should not afford any comity to the Set Aside Appeal, which is contrary to United States public policy as explained in *Pemex* and other applicable case law. Unless this Court grants Petitioners relief, they almost certainly will never receive any recovery for their injuries.

95. Insofar as the Court is not inclined to confirm the Award, Petitioners respectfully request that the Court stay these proceedings pending the resolution of Petitioners' appeal in the Nigerian Supreme Court. Courts have routinely granted such relief in similar circumstances. *See InterDigital Commc'ns, Inc. v. Huawei Inv. & Holding Co.*, 166 F. Supp. 3d 463, 473-74 (S.D.N.Y. 2016); *Hulley Enters. Ltd. v. Russian Fed'n*, No. 14-1996 (BAH), 2016 WL 5675348, at *7-13 (D.D.C. Sept. 30, 2016); *see also Europcar Italia, S.p.A. v. Maiellano Tours, Inc.*, 156 F.3d 310, 316-18 (2d Cir. 1998).

Nigeria, based on evidence that delays in the Nigerian legal system would prolong resolution of the set aside proceedings for a commercially "absurd" number of years).

REQUEST FOR PRE-JUDGMENT SECURITY

96. In light of the ongoing Nigerian proceedings and the concession of counsel for Respondent NNPC that those proceedings could last for "ten, 12, 15 years,"[24] Petitioners respectfully request that the Court issue an order requiring NNPC to post a bond in the amount of its outstanding obligation to Petitioners—US$2,465,596,823, the value of the Award as of October 21, 2016—pending the Court's resolution of the Second Amended Petition.

97. The Court has the authority to order pre-judgment security pursuant to Article VI of the New York Convention, which provides:

> If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V(1)(e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

98. The elements of Article VI are satisfied here. *See CONPROCA, S.A. de C.V. v. Petróleos Mexicanos*, No. 11 CIV. 9165 (LLS), 2014 WL 7028318, at *2 (S.D.N.Y. Dec. 12, 2014) (ordering Respondents to post security in the full amount of the arbitral award, including interest, while foreign nullification proceedings were ongoing); *Skandia Am. Reins. Corp. v. Caja Nacional de Ahorro y Segoro*, No. 96 CIV. 2301 (KMW), 1997 WL 278054, at *5 (S.D.N.Y. May 23, 1997) ("I find that Article VI of the New York Convention allows me to require sovereigns [viz. an alleged instrumentality of Argentina] to post pre-judgment security if they move to set aside or suspend an arbitration award . . . ."); *Banco de Seguros del Estado v. Mut. Marine Offices, Inc.*, 230 F. Supp. 2d 362, 372-75 (S.D.N.Y. 2002) ("Several courts have

[24] Leitner Decl. Ex. 1, Hr'g Tr. 7:17-20, Mar. 20, 2015.

held . . . that prejudgment security may be imposed on a foreign state in the context of arbitration.").

99. Indeed, this Court has previously ordered NNPC to do precisely what Petitioners request here: post security in the amount demanded in the petition to confirm an arbitral award. *Caribbean Trading & Fid. Corp. v. Nigerian Nat'l Petrol. Corp.*, No. 90 CIV. 4169 (JFK), 1990 WL 213030, at *8 (S.D.N.Y. Dec. 18, 1990). There, as Petitioners request here (as alternative relief), the confirmation proceedings were stayed while NNPC sought to nullify the arbitral award in parallel proceedings in Nigeria. *Id.* at *3-4.

100. The Court should exercise its discretion under Article VI of the New York Convention to grant this request. Absent an order requiring NNPC to post a bond in the amount of US$2,465,596,823 pending the determination of Petitioners' Second Amended Petition, there is substantial doubt that NNPC will satisfy the ultimate judgment should the Court confirm the Award. NNPC has given no indication that it intends to pay Petitioners upon eventual confirmation of the Award. Indeed, NNPC has steadfastly refused to pay the arbitral awards against it in *any* of the Overlift Disputes, seeking instead the set-aside of those awards before the Nigerian courts. Without the protection of a pre-judgment bond, Petitioners face the very real possibility that the Award, if confirmed, will go unpaid.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Court enter an order: (i) recognizing the Award pursuant to 9 U.S.C. §§ 201, 202, and 207; (ii) entering judgment in favor of Petitioners and against NNPC and in the amount of the Award, with the interest and costs as provided therein, plus the costs of this proceeding; (iii) pursuant to Article VI of the New York Convention, requiring NNPC to post a bond in the amount of its current outstanding

obligation to Petitioners under the Award—US$2,465,596,823—pending the Court's resolution of the Second Amended Petition; and (iv) awarding Petitioners such further relief as the Court deems just and proper. In the alternative, in the event the Court is disinclined to confirm the Award, Petitioners respectfully request that the Court stay these proceedings pending the resolution of Petitioners' appeal in the Nigerian Supreme Court.

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APPENDIX: SUMMARY OF ERHA ARBITRATION & NIGERIAN LITIGATIONS

Case	Date	Summary
Arbitral Award (Tribunal)	October 24, 2011	• Tribunal had jurisdiction over dispute, which was contractual. • NNPC breached the PSC by overlifting its oil allocation and refusing to file Petitioners' tax returns unchanged. • As a result of these contractual breaches, NNPC owed Petitioners US$1.799 billion plus interest. • Changes in Nigerian tax policy triggered Stabilization Clause and PSC was modified to account for future allocations.
Bonga Decision (High Court)	February 29, 2012	In a case concerning a different oil field and a different arbitration: • Found that arbitral tribunals have no jurisdiction to hear Overlift Disputes between international oil companies and NNPC because these disputes implicate taxes. • Section 251 of the 1999 Constitution prohibits arbitration of any dispute relating to tax.
FIRS Decision (High Court)	March 9, 2012	Without considering Petitioners' case-specific arguments, adopted the rulings of the Bonga Decision: • The Tribunal had no jurisdiction to decide the parties' dispute because the relief sought was essentially a tax refund. • Section 251 of the 1999 Constitution prohibits arbitration of any dispute relating to tax. • Petitioners should bring their *contractual* claims before the Tax Appeal Tribunal.
Set Aside Decision (High Court)	May 8, 2012	Copied the FIRS Decision without further analysis of Petitioners' arguments and held: • The Tribunal had no jurisdiction to decide the parties' dispute because the relief sought was essentially a tax refund. • Section 251 of the 1999 Constitution prohibits arbitration of any dispute relating to tax. • The Tribunal lacked jurisdiction to decide Petitioners' Stabilization Clause argument because it was not included in detail in the initial arbitral pleading.

Case	Date	Summary
Substantive Decision (High Court)	April 20, 2016	• Found that Petitioners' commencement of a fallback, preservatory action in Nigerian courts to recover their contractual damages from NNPC was an abuse of process because they were also appealing the Set Aside Decision.
Set Aside Appeal (Court of Appeal)	July 22, 2016	Reversing the High Court's Set Aside Decision: • The Tribunal had jurisdiction to decide contractual disputes, and that portion of the Award was reinstated. Affirming the High Court's Set Aside Decision: • Because awarding damages was akin to giving Petitioners a tax refund, the Tribunal had no jurisdiction to award damages for the breaches it identified. • Section 251 of the 1999 Constitution prohibits arbitration of any dispute relating to tax. • The Tribunal lacked jurisdiction to decide Petitioners' Stabilization Clause argument because it was not included in detail in the initial arbitral pleading.
Bonga Appeal (Court of Appeal)	August 31, 2016	Affirming the High Court's Bonga Decision: • Notwithstanding the High Court's rulings, the Bonga Award was invalid because the pro forma notice of arbitration was signed in the name of a Nigerian law firm and not by an individual Nigerian attorney. • Section 251 of the 1999 Constitution prohibits arbitration of any dispute involving tax.