

Of

**IN THE MATTER OF AN ARBITRATION BEFORE THE INTERNATIONAL
CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

SHELL NIGERIA ULTRA DEEP LIMITED

Claimant

and

THE FEDERAL REPUBLIC OF NIGERIA

Respondent

REQUEST FOR ARBITRATION

26 April 2007

CLIFFORD CHANCE LLP

UK/124597D/06

268072/70-40188822

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1. INTRODUCTION

- 1.1 This Request for Arbitration is served pursuant to Article 36(1) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "ICSID Convention"), Rule 1 of the Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings pursuant to the ICSID Convention (the "Institution Rules"), and Article 9 of the Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Federal Republic of Nigeria, which was executed by the parties thereto on 2 November 1992 and entered into force on 1 February 1994 (the "Netherlands-Nigeria BIT") (Exhibit 1).
- 1.2 Clifford Chance LLP is authorised to issue this Request for Arbitration on behalf of the Claimant, Shell Nigeria Ultra Deep Limited ("SNUD") (Exhibit 2).
- 1.3 The dispute referred to arbitration concerns breaches of the Netherlands-Nigeria BIT, including breaches of the following provisions of that BIT:
- 1.3.1 the Claimant's right not to be deprived, directly or indirectly, of its investments unless, in sum, any such measure of expropriation is taken in the public interest and under due process of law; is non-discriminatory; and is accompanied by provisions for the payment of just compensation representing the genuine value of the investments affected pursuant to Article 6;
 - 1.3.2 the right to fair and equitable treatment pursuant to Article 3(1);
 - 1.3.3 the right to the non-impairment by unreasonable or discriminatory measures of the operation, management, maintenance, use, enjoyment or disposal of investments pursuant to Article 3(1);
 - 1.3.4 the right to full protection pursuant to Article 3(2); and
 - 1.3.5 the right to require the observance by the Federal Republic of Nigeria of any obligation into which it has entered with regard to the Claimant's investments pursuant to Article 3(4).
- 1.4 The dispute arises out of the Claimant's investment in Nigeria, and, in particular, its investment and interest in the area offshore and in the territorial waters of the Federal Republic of Nigeria the subject of oil prospecting licence (OPL) No. 245.

2. THE PARTIES

- 2.1 In accordance with Institution Rule 2(1)(a), the Parties to the dispute are identified as follows:
- 2.1.1 The Claimant, SNUD, is a company incorporated in the Federal Republic of Nigeria, whose address for this arbitration is Freeman House, 21/22 Marina, Lagos, Federal Republic of Nigeria.

2.1.2 The Claimant is represented by:

Clifford Chance LLP
Droogbak 1A
1013 GE Amsterdam
The Netherlands

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2.1.3 The Respondent is the Federal Republic of Nigeria.

2.1.4 All communications with the Federal Republic of Nigeria to date have been addressed to:

His Excellency
Chief Olusegun O. Obasanjo, GCFR
President and Commander-in-Chief of the Armed Forces
Federal Republic of Nigeria
State House, Abuja
Federal Republic of Nigeria

and/or:

His Excellency
Dr. Edmund Daukoru
Honourable Minister of Energy
Federal Ministry of Energy
Federal Secretariat
Shehu Shagari Way
P.M.B. 449, Maitama, Abuja
Federal Republic of Nigeria

2.2 Neither of the Parties to this dispute is a constituent subdivision or agency of a Contracting State designated to the International Centre for Settlement of Investment Disputes (the "Centre") by that State pursuant to Article 25(1) of the Convention (Institution Rule 2(1)(b)). For the avoidance of doubt, and while it is not strictly relevant for the purpose of establishing the standing of the Parties to this dispute, the Claimant draws attention to the fact that the Production Sharing Contract (the "PSC") upon which it relies, see paragraph 5.1.1 below, was entered into by the Claimant and

Nigerian National Petroleum Corporation ("NNPC"). NNPC is a constituent subdivision or agency of the Federal Republic of Nigeria, registered as such with the Centre.

3. CONSENT TO ICSID JURISDICTION

3.1 The dispute arises out of and/or in relation to, *inter alia*, the Netherlands-Nigeria BIT.

3.2 For purposes of Institution Rule 2(1)(c):

3.2.1 The Respondent's consent in writing is recorded in the Netherlands-Nigeria BIT. Article 9 of that Treaty constitutes an offer of jurisdiction and provides, *inter alia*, that:

"Each Contracting Party hereby consents to submit any legal dispute arising between that Contracting Party and a national of the other Contracting Party concerning an investment of that national in the territory of the former Contracting Party to [the Centre] for settlement by conciliation or arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of other States..."

3.2.2 The Claimant's consent to ICSID jurisdiction is recorded in this Request for Arbitration, which constitutes the Claimant's acceptance of the Respondent's offer of jurisdiction.

3.2.3 Accordingly, the date of consent for the purposes of Institution Rule 2(3) is 26 April 2007.

3.3 The Claimant is entitled to rely on Article 9 of the Netherlands-Nigeria BIT and to commence arbitration under the ICSID Convention against the Respondent for the following reasons:

3.3.1 the dispute submitted to the jurisdiction of the Centre is of a legal nature, because it concerns the rights enjoyed by the Claimant pursuant to the Netherlands-Nigeria BIT.

3.3.2 The Respondent, the Federal Republic of Nigeria, is a Contracting Party pursuant to the Netherlands-Nigeria BIT.

3.3.3 The Claimant qualifies as a national of the other Contracting Party pursuant to the Netherlands-Nigeria BIT. The Claimant is, as to 99.99%, owned by Shell Petroleum NV, a company incorporated in the Netherlands (Exhibit 3). Article 1(b)(iii) of the Netherlands-Nigeria BIT includes within the definition of a "national" of either Contracting Party: *"legal persons not constituted under the law of that Contracting Party, but controlled, directly or indirectly, by ... legal persons [constituted under the law of that Contracting Party]"*.

3.3.4 The dispute concerns an investment of the Claimant in respect of the PSC which qualifies as an investment in accordance with the Netherlands-Nigeria

BIT. Article 1(a) of the Netherlands-Nigeria BIT defines "investments" as "every kind of asset and more particularly but not exclusively ... (iii) title to money, other assets or any performance having an economic value ... [and] (v) rights granted under public law, including rights to prospect, explore and extract natural resources."

3.3.5 The investment in question is located in the territory of the Respondent, which, pursuant to Article 1(c) of the Netherlands-Nigeria BIT, includes "the maritime areas adjacent to the coast of the State concerned to the extent to which that State exercises sovereign rights or jurisdiction in those areas according to international law".

3.4 The Claimant has Dutch nationality at the date of consent pursuant to the Netherlands-Nigeria BIT (Institution Rule 2(1)(d)(i)).

3.5 For the purposes of Institution Rule 2(1)(d)(iii), it is further submitted that Article 9 of the Netherlands-Nigeria BIT contains an agreement to treat the Claimant as a national of another Contracting State in accordance with Article 25(2)(b) of the ICSID Convention. Article 9 reads in relevant part as follows:

"A legal person which is a national of one Contracting Party and which before such a dispute arises is controlled by nationals of the other Contracting Party shall in accordance with Article 25(2)(b) of the Convention for the purpose of the Convention be treated as a national of the other Contracting Party".

4. CONTRACTING PARTIES TO ICSID

4.1 The Federal Republic of Nigeria signed the ICSID Convention on 13 July 1965. The Netherlands signed the ICSID Convention on 25 May 1966. The ICSID Convention entered into force for both countries on 14 October 1966.

4.2 Both the Federal Republic of Nigeria and the Netherlands qualify as Contracting States pursuant to Article 25(1) of the ICSID Convention.

5. LEGAL DISPUTE ARISING DIRECTLY OUT OF AN INVESTMENT

5.1 The Claimant's investment

5.1.1 On 22 December 2003, the NNPC, as holder of Oil Prospecting License 245 Offshore Nigeria ("OPL 245"), entered into the PSC with the Claimant, SNUD, in respect of OPL 245 (Exhibit 4).

5.1.2 The conclusion of the PSC between NNPC and SNUD followed SNUD's successful bid in a public offering process in respect of OPL 245, as confirmed in a letter from the Ministry of Petroleum Resources of the Federal Government of Nigeria to SNUD dated 23 May 2002 (Exhibit 5). This letter stated that Block OPL 245 had been awarded to SNUD and: "that the allocated block would be operated on a "Production Sharing Contract" (PSC) basis. The Nigerian national (sic) Petroleum Corporation shall be the

Concessionaire, while your company shall be the contractor." The letter lists a number of conditions, which have all been met. As is evidenced by his signature thereto, Dr Dankoro, in his then capacity as Presidential Adviser on Petroleum and Energy, approved the PSC on behalf of the Minister of Petroleum Resources.

- 5.1.3 Under the PSC, SNUD obtained the exclusive right for a period of 30 years to conduct the winning or obtaining and transportation of petroleum or chargeable oil in Nigeria by drilling, mining, extracting, or other like operations and all operations incidental thereto and any sale of or any disposal of dischargeable oil in the area of OPL 245.
- 5.1.4 The oil field within the area of OPL 245 is significant. It is provisionally estimated to contain about 500 million barrels of crude oil and is still subject to further appraisal. Following the acquisition of its rights in respect of OPL 245, SNUD made substantial investments. In addition to the payment of a signature bonus of US\$ 210 million, it has committed more than US\$ 250 million in connection with the drilling of four wells. SNUD has borne all of the risks attendant upon the exploration and appraisal to date of the OPL 245 area. Its activities have already resulted in two significant discoveries. SNUD's commitment of funds, its technical skills and know-how have led to a significant increase in the value of the OPL 245 area.
- 5.1.5 The Claimant's rights in respect of OPL 245 are an investment within the terms of Article 1(a) of the Netherlands-Nigeria BIT. The Claimant's rights also constitute an asset that qualifies as an investment pursuant to Article 25 of the ICSID Convention.

5.2 Summary of background information concerning the dispute

- 5.2.1 Following the acquisition and development by the Claimant of its rights in respect of OPL 245, and contrary to its legal rights and legitimate expectations and the Nigerian Federal Government's earlier commitments to it, on 30 November 2006, without any, or any prior, notice, the Federal Republic of Nigeria purported to re-allocate the block covered by OPL 245 "wholesale and completely" to Malabu Oil & Gas Limited ("Malabu"). It purported to do so under the terms of an agreement intended to settle a dispute between Malabu and the Federal Government of Nigeria to which the Claimant was not a party (the "Settlement Agreement") (Exhibit 6). A copy of the Settlement Agreement was provided to the Claimant's local Nigerian counsel, Messrs. T.J. Onomigbo Okpoko & Co, in the course of a hearing before the Court of Appeal in Abuja, Nigeria, on 24 January 2007.
- 5.2.2 By letters of 1 and 18 December 2006 (Exhibit 7), the Ministry of Petroleum Resources notified the Claimant of the purported unilateral "withdrawal" from SNUD of OPL 245. The terms of the aforementioned settlement agreement pursuant to which OPL 245 had been re-allocated to Malabu first became

known to the Claimant on 24 January 2007. (See paragraph 5.2.1 above). Under the Settlement Agreement, the Federal Government of Nigeria purported to reallocate the "oil block known as and covered by" OPL 245 to Malabu against payment by Malabu of a signature bonus of US\$ 210 million.

5.2.3 SNUD has sought to protect and preserve its rights in respect of OPL 245. On 26 January 2007, Mr Jeroen van der Veer, the Chief Executive Officer of Royal Dutch Shell plc, the ultimate parent company of the Claimant, wrote to the President of the Federal Republic of Nigeria protesting any such re-allocation of OPL 245 to Malabu and requesting the President's urgent intervention (Exhibit 8). On 7 February 2007, Mr Malcolm Brinded, Executive Director Exploration and Production and himself a Board member of Royal Dutch Shell plc, met with the Nigerian President to discuss the situation.

5.2.4 Nonetheless, and contrary to indications given to the Claimant in the course of, and on the basis of, these exchanges and meetings, by letter dated 11 April 2007 to the Claimant, the Nigerian Minister of Energy purported to confirm the re-allocation of OPL 245 to Malabu (Exhibit 9). In his letter, the Minister of Energy referred, inter alia, to a letter from the Nigerian Attorney-General and Minister of Justice addressed to the Minister of Energy dated 16 March 2007, which the Minister of Energy summarised as "explaining clearly that OPL 245 has been restored to Malabu Oil & Gas in its entirety and this remains the position of the Government of Nigeria." The Minister further asserted that: "Shell have told me that they will not interfere in the exercise by Malabu of its restored rights in and over OPL 245". No such assurance was ever given by the Claimant as the Claimant made clear in a letter to the Minister, with a copy to the President, dated 23 April 2007 (Exhibit 10).

5.3 Breaches of the Netherlands-Nigeria BIT

5.3.1 The actions on the part of the Federal Government of Nigeria amount to, or have an effect equivalent to, expropriation. Such expropriation does not fall within the ambit of any of the exceptions recognised in the Netherlands-Nigeria BIT. The apparent offer of: "a mutually acceptable substitute of comparable potential against the \$210 million, which Shell has already paid ... as signature Bonus" (letter: Minister of State, Petroleum Resources to SNUD dated 1 December 2006), subsequently reformulated as: "[the substitution of] another block of comparative prospectivity with OPL 245" (letter: Technical Assistant to the Honourable Minister of State for Petroleum Resources addressed to Shell Petroleum Development Company, dated 18 December 2006) - both in Exhibit 7 hereto - does not constitute an offer of compensation consistent with the requirements of Article 6(i) of the Netherlands-Nigeria BIT in any event.

5.3.2 By its actions, the Federal Government of Nigeria has failed to accord the Claimant fair and equitable treatment and full protection in breach of Articles

3(1) and 3(2) of the Netherlands-Nigeria BIT. Moreover, the actions of the Federal Government of Nigeria impair the operation, management, maintenance, use, enjoyment and disposal of the Claimant's investments in breach of Article 3.1 of the Netherlands-Nigeria BIT. The Federal Government of Nigeria is further in breach of the obligations into which it entered with regard to the Claimant's investment pursuant to Article 3(4) of the Netherlands-Nigeria BIT.

5.3.3 The full extent of damages remains to be determined. As to the calculation and eventual submission and substantiation of those damages, SNUD reserves all its rights. However, were the purported expropriation not to be revoked, those damages are likely to be substantially in excess of the sum of US\$ 460 million already committed by SNUD in its investment. Those damages suffered by the Claimant as a result of these breaches of the Netherlands-Nigeria BIT by the Federal Republic of Nigeria are attributable to the Federal Republic of Nigeria.

5.4 The dispute is a legal dispute

5.4.1 For the foregoing reasons, the dispute submitted by the Claimant is of a legal nature and arises directly out of an investment, as required by Article 25(1) of the ICSID Convention.

5.5 A dispute between the Claimant and the Federal Republic of Nigeria has arisen directly out of the Claimant's rights under the PSC in respect of OPL 245, which qualify as an investment, and the dispute is of a legal nature since it concerns the rights enjoyed by the Claimant pursuant to the Netherlands-Nigeria BIT (Institution Rule 2(1)(e)).

6. THE DISPUTE COMES WITHIN THE JURISDICTION OF THE CENTRE

6.1 The jurisdiction of the Centre has been properly invoked:

- The Respondent is a Contracting State to the ICSID Convention;
- The Claimant is a national of another Contracting State to the ICSID Convention and/or should be treated as a national of another Contracting State pursuant to Article 25(2)(b) of the ICSID Convention;
- The Claimant's claim concerns a legal dispute arising directly out of an investment; and
- The Parties have consented in writing to ICSID jurisdiction.

7. RELIEF SOUGHT

7.1 The Claimant seeks the following relief:

7.1.1 A declaration that the Respondent has breached the Netherlands-Nigeria BIT;

- 7.1.2 An award ordering the Federal Government of Nigeria to revoke, cancel and unconditionally withdraw its purported and wrongful reallocation of any and all rights in respect of OPL 245 to Malabu and to fully reinstate and thereafter honour in full the Claimant's rights in respect of OPL 245 with immediate effect;
- 7.1.3 A monetary award for damages suffered as a consequence of any and all breaches of the Netherlands-Nigeria BIT in an amount to be established by the Tribunal, to be increased with interest on all such amounts from the date that the Federal Republic of Nigeria incurred responsibility under international law until payment in full;
- 7.1.4 An award for the Claimant's costs of arbitration and legal assistance; and
- 7.1.5 Any such other relief as the Tribunal determines appropriate.
- 7.2 The Claimant reserves the right to amend and/or supplement the relief sought in its Memorial, and/or subsequently.
- 7.3 The Claimant reserves the right to apply to a court of competent jurisdiction and/or the Arbitral Tribunal for interim or interlocutory relief, should it consider such action necessary.
8. MISCELLANEOUS
- 8.1 Duly certified copies of the Claimant's Deed of Incorporation and its current Articles of Association are appended as Exhibit 11. Under the terms of the Articles, there is no requirement upon SNUD to pass a formal resolution evidencing its consent to submit the dispute to arbitration. However, notwithstanding the absence of any such requirement, SNUD will convene a Board meeting to pass a resolution to that effect.
- 8.2 In compliance with Institution Rule 2(2), the information provided herein pursuant to Institution Rules 2(1)(c), 2(1)(d)(iii) and 2(1)(f) is supported by documentation.
- 8.3 In accordance with Institution Rule 4, this Request of Arbitration is accompanied by 5 (five) additional signed copies.
- 8.4 The Claimant encloses with this Request its payment of US\$ 25,000 as the non-refundable filing fee under Regulation 16 of the Administrative and Financial Regulations (ICSID, Schedule of Fees of 6 July 2005).
- 8.5 The Claimant requests the registration of this Request for Arbitration in accordance with Article 36(3) of the ICSID Convention.

Clifford Chance LLP

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