

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
WASHINGTON, D.C.

In the arbitration proceeding between

INTEROCEAN OIL DEVELOPMENT COMPANY
AND
INTEROCEAN OIL EXPLORATION COMPANY

Claimants

v.

FEDERAL REPUBLIC OF NIGERIA

Respondent

ICSID Case No. ARB/13/20

DECISION ON PRELIMINARY OBJECTIONS

Members of the Tribunal

Professor William W. Park, President

Dr. Julian D. M. Lew, QC, Arbitrator

Justice Edward Torgbor, Arbitrator

Secretary of the Tribunal

Mr. James Claxton

Date: 29 October 2014

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TABLE OF ABBREVIATIONS

Centre/ICSID	International Centre for Settlement of Investment Disputes
Claimants	Interocean Oil Development Company and Interocean Oil Exploration Company
C-Register	Claimants' submissions in respect of the NIPC Register filed on 28 July 2014
C-Tracking	Claimants' submissions in respect of the courier tracking reports filed on 1 August 2014
Counter-Memorial	Claimants' Counter-Memorial filed on 11 April 2014
Exh. C-	Claimants' exhibits
Exh. CLA-	Claimants' legal exhibits
Exh. R-	Respondent's exhibits
Exh. RLA-	Respondent's legal exhibits
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States
JVA	Joint Operating Agreement between NNPC and Pan Ocean of 28 May 2002
Memorial	Respondent's Memorial on Objection to Jurisdiction filed on 14 March 2014
NIPC Act	Nigerian Investment Promotion Commission Act, Chapter N117 (Decree No. 16 of 1995)
NNPC	Nigerian National Petroleum Company
Parties	Claimants and Respondent
Pan Ocean	Pan Ocean Oil Corporation
Rejoinder	Claimants' Rejoinder to the Respondent's Reply in respect of the Respondent's Notice of Objection to Jurisdiction filed on 9 May 2014
Reply	Respondent's Reply Memorial filed on 25 April 2014
Respondent	Federal Republic of Nigeria
Responses	Letter from the Claimants to ICSID of 19 August 2013 responding to the ICSID Secretariat's questions about the Request for Arbitration
RfA	Claimants' Request for Arbitration filed on 30 July 2013
Tr. [page:line]	Transcript of the hearing on preliminary objections of 26 June 2014

I. THE PARTIES

A. The Claimants

1. The Claimants are Interocean Oil Development Company and Interocean Oil Exploration Company, both of which were incorporated under the laws of Delaware and maintain registered offices at 901 N. Market Street, Suite 705, Wilmington, Delaware 19801, U.S.A.
2. The Claimants are represented in this arbitration by Mr. Olasupo Shasore of Ajumogobia & Okeke, 2nd Floor, Sterling Towers, 20 Marina, Lagos, Nigeria; Prof. Oba Nsugbe of Pump Court Chambers, 3 Pump Court, Temple, London, EC4Y 7AJ, U.K.; Ms. Bimpe Nkontchou of Addie & Co., 44 Maiden Lane, Covent Garden, London WC2E 7LN, U.K.; and Mr. Bello Salihu, 13A, Sinari Daranijo Street, Victoria Island, Lagos, Nigeria.

B. The Respondent

3. The Respondent is the Federal Republic of Nigeria, with the request for arbitration notified to the Attorney General for the Federation and Minister for Justice, Federal Ministry of Justice, Shehu Shagari Way, Central Area, Abuja, Nigeria.
4. The Respondent is represented in this arbitration by Aare Afe Babalola, Mr. Adebayo Adenipekun, Mr. Olu Daramola, Mr. Oluwasina Ogungbade, Mr. Kehinde Ogunwumiju, Mr. Ola Faro, and Mrs. Esther Adenipekun, all of Emmanuel Chambers, Emmanuel House, Plot 1 Block 4, CMD/Jubilee Road, Behind Mobil Filling Station, Magodo GRA, Lagos, Nigeria.

II. OVERVIEW OF THE DISPUTE

5. This section summarizes the facts of this dispute as found by the Tribunal insofar as they bear relevance to the Respondent's objections to jurisdiction.
6. The Claimants state that they were incorporated by the Marathon Oil Company of the United States in 1970 in furtherance of investments in the oil and gas industry in

Nigeria.¹ They subsequently obtained an interest in Pan Ocean, a Nigerian company also incorporated in 1970, as a local vehicle for their investments.²

7. The Claimants state that their investment in Nigeria began with their acquisition of a “working interest” in an oil-prospecting license in Nigeria denominated “OPL 71.”³ They claim that crude oil was discovered on a field within the territory covered by their prospecting license in 1973.⁴ According to the Claimants, OPL 71 was transformed into an oil-mining lease denominated “OML 98,” and crude oil production began.⁵
8. The Claimants further claim ownership, through Pan Ocean, of a separate oil prospecting lease denominated “OPL 275.”⁶
9. In April 1977, the NNPC was established as the state oil corporation of Nigeria.⁷ According to the Claimants, the NNPC subsequently entered into an agreement with Pan Ocean in 1979 to obtain an ownership interest in OML 98, and this agreement culminated in the JVA being signed between the NNPC and Pan Ocean in 2002.⁸
10. In 1995, the NIPC Act was enacted in Nigeria to encourage, promote, and coordinate investments in Nigeria.⁹ The NIPC Act sets forth substantive protections for qualifying foreign investments as well as mechanisms for the resolution of investment disputes.
11. The Claimants contend that after 1998, their ownership and control of Pan Ocean were seized illegally. According to the Claimants, the seizure was allegedly made “with the connivance of the Respondent’s instrumentalities.”¹⁰ Specifically, the Claimants contend that the Minister for Petroleum Resources, the NNPC, the Corporate Affairs Commission and Pan Ocean Managing Director Mr. Festus Fadeyi purported to seize ownership of Pan Ocean from the Claimants.¹¹ The Claimants argue that this behavior

¹ Responses ¶ i; Exh. C-4 ¶ 2.

² Responses ¶ i; Exh. C-4 ¶ 3.

³ Exh. C-4 ¶ 3.

⁴ Responses ¶ i.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ Responses ¶ i; *See also* Exh. C-4 ¶ 5; Exh. R-11(1); Exh. R-11(1) PLUS.

⁹ Exh. RLA-001.

¹⁰ Rejoinder ¶ 6.

¹¹ RfA ¶ 16.

amounts to breaches by the Respondent of the NIPC Act and “international investment law.”¹²

12. Based on these events, the Claimants claim to have written to the Minister Petroleum Resources of Nigeria through their counsel to declare a dispute and to seek redress on 9 October 2012, 29 October 2012, 21 March 2013, and 3 May 2013.¹³ The Respondent denies that it received this correspondence.¹⁴
13. In addition to this arbitration, the Claimants assert that they have been engaged in a “protracted history of court based litigation in Nigeria” related to this dispute.¹⁵

III. PROCEDURAL HISTORY

14. The present arbitration is between Interocean Oil Development Company and Interocean Oil Exploration Company as the Claimants and the Federal Republic of Nigeria as the Respondent. Their dispute is brought before the International Centre for Settlement of Investment Disputes, under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States and the Nigerian Investment Promotion Commission Act.
15. The Claimants filed a request for arbitration with ICSID pursuant to Article 36 of the ICSID Convention in electronic copy on 31 July 2013 and in hard copy on 5 August 2013. In the RfA, the Claimants requested that the Tribunal render an award:
 - a) Declaring that Respondent has breached its obligations to the Claimants under NIPCA;
 - b) Directing the Respondent to restore only the nominees of the Claimants as representatives in the 40 % participating interest under the operations of all Joint Venture Agreements and in particular OML 98 and OPL 275;
 - c) Finding that any purported transfer or acquisition of the 100% interest of the Claimants or any part thereof in 40% of OML 98/OPL 275 or any other asset including its accumulated proceeds howsoever without the

¹² RfA ¶ 21.

¹³ RfA, Annexures 1-4.

¹⁴ Tr. 87: 9-11.

¹⁵ Rejoinder ¶ 47.

consent of the Claimants is an indirect expropriation of its participating interest in the leases;

- d) Directing the Respondent, its relevant privies and instrumentalities to pay damages in an amount to be proven at the hearing but which the Claimants presently estimate to be in excess of \$500,000,000 (Five Hundred Million United States Dollars);
- e) Directing the Respondent, its relevant privies and instrumentalities to pay aggravated damages in the sum of \$150,000,000 (One Hundred and Fifty Million United States Dollars) or such amount as may be proven by the Claimants at the hearing ;
- f) Restitution of the undiluted 40% participating interest in OML 98 and OPL 275 and all monies accruing thereto, by receiving the proceeds of unjust enrichment controlled in trust for the Claimants to date;
- g) Directing that the Claimants be reinstated as the beneficial owner of the 40% participating interest in OML 98;
- h) Directing the Respondent to pay the Claimants' interest and taxes on all sums awarded;
- i) Directing the Respondents to pay the Claimants' costs associated with these proceedings including professional fees and disbursements on a full indemnity basis; and
- j) Ordering such further or other relief(s) as the Tribunal deems appropriate in the circumstances."

16. On 9 September 2013, the Secretary-General of the Centre registered the RfA pursuant to Article 36(3) of the ICSID Convention.

17. On 11 November 2013, the Claimants requested that the Arbitral Tribunal in this case be constituted pursuant to the formula provided by Article 37(2)(b) of the ICSID Convention. On 9 December 2013, Professor Julian D. M. Lew, a national of the United Kingdom, accepted his appointment as arbitrator appointed by the Claimants, and Justice Edward Torgbor, a national of the United Kingdom and Ghana, accepted his appointment as arbitrator appointed by the Respondent. On 11 December 2013, Professor William W. Park, a national of the United States and Switzerland, accepted his appointment as President of the Tribunal appointed by the Parties. The Tribunal in

ICSID Case No. ARB/13/20 was accordingly constituted on 11 December 2013 in accordance with Article 37(2)(b), and the proceedings commenced on that day.

18. On 13 February 2014, the Tribunal and the Parties held a first session at the World Bank office in Paris. During that session, the Parties agreed on procedural issues and addressed outstanding issues that are outlined in more detail below.
19. On 27 February 2014, the Tribunal issued Procedural Order No. 1 containing a schedule of submissions on the following preliminary objections raised by the Respondent and set forth in Section 14:

“14.1.1. Respondent did not consent to submit this dispute to arbitration by ICSID;

14.1.2. Section 26 of the Nigerian Investment Protection Commission Act (“NIPC”) does not provide a basis for finding consent on the part of Respondent as it merely provides that disputes should be conducted in accordance with the ICSID Rules;

14.1.3. Claimants are not registered with the NIPC and therefore cannot rely on Section 26(3) of the NIPC Act to invoke the jurisdiction of ICSID, and Claimants misled the Secretariat of ICSID to register their Request for Arbitration when they falsely claimed that their enterprise was registered with the NIPC. Pleadings on this objection shall be limited to whether Claimants are registered and the bearing of registration on the Tribunal’s jurisdiction;

14.1.4. Respondent is not a competent party to this arbitration. Claimants’ pleadings on this objection should identify the law and legal authorities on which they intend to rely and the corresponding liability of Respondent;

14.1.5. Claimants’ claims are barred by statute; and

14.1.6. The request is premature in that Claimants failed to explore local remedies/conditions precedent contained in the NIPC Act.”

20. On 14 March 2014, the Respondent filed its Memorial with supporting exhibits and authorities.

21. On 11 April 2014, the Claimants filed their Counter-Memorial with supporting exhibits and authorities.
22. On 25 April 2014, the Respondent filed its Reply with supporting exhibits and authorities.
23. On 9 May 2014, the Claimants filed their Rejoinder with supporting exhibits and authorities.
24. On 26 June 2014, the Tribunal and the Parties held a hearing on preliminary objections at the International Dispute Resolution Centre in London. In attendance at the hearing were the members of the Arbitral Tribunal, ICSID Legal Counsel Mr. James Claxton, and the following party representatives:

i) On behalf of the Claimants:

- Mr. Olasupo Shasore, Ajumogobia & Okeke
- Prof. Oba Nsugbe, Pump Court Chambers
- Mrs. Bimpe Nkontchou, Addie & Co Advisory
- Mr. Bello Salihu, Legal Counsel
- Mr. Jacques Jones, Legal Counsel
- Mr. Richard Evans, Financial Advisor
- Mr. Patrizio Di Guevara Fabbri, Director of Interocean Oil Development Company & Interocean Oil Exploration Company
- Mr. Riccardo Di Guevara Fabbri, Director of Interocean Oil Development Company & Interocean Oil Exploration Company

ii) On behalf of the Respondent:

- Mr. Adebayo Adenipekun, Emmanuel House
- Mr. Olu Daramola, Emmanuel House.
- Ms. Ann Biodun Babalola, Emmanuel House
- Mr. Oluwasina Ogungbade, Emmanuel House
- Mr. Kehinde Ogunwumiju, Emmanuel House

- Mr. Ola Faro, Emmanuel House
 - Mrs. Esther Adenipekun, Emmanuel House
 - Mr. Taiwo Abidogun, Federal Ministry of Justice, Federal Republic of Nigeria
 - Mr. Rufai Khalid, NNPC
 - Mr. Tijani Alkali Gazali, Federal Ministry of Justice, Federal Republic of Nigeria
25. Prof. Nsugbe and Mr. Shasore presented oral arguments on behalf of the Claimants. Messrs. Adenipekun and Daramola presented oral arguments on behalf of the Respondent.
26. During the morning session, the Parties made submissions on procedural questions. During the afternoon session, the Parties concluded their submissions on procedural questions and made two rounds of pleadings on the preliminary objections, followed by questioning from the Tribunal.
27. At the hearing, the President of the Tribunal asked the Claimants if they sought relief on the basis that the Respondent submitted an affidavit of Mr. Taiwo Abidgun concerning the registration of Pan Ocean, which the Claimants claimed was a violation of Section 17.2 of Procedural Order No. 1 in their Rejoinder.¹⁶ Section 17.2 provides that “[n]o witness statements or expert reports will be submitted with the pleadings on the Preliminary Objections.” The Claimants stated that the matter should be addressed in the proceeding on the merits and did not otherwise request relief.¹⁷
28. At the hearing, the Tribunal requested that the Respondent submit documents related to the requirements for registration under the NIPC Act.¹⁸
29. The hearing was sound recorded. A verbatim transcript of the hearing on preliminary objections was produced and subsequently distributed to the Parties.
30. On 7 July 2014, the Respondent submitted documents related to the requirements for registration under the NIPC Act.

¹⁶ Rejoinder ¶¶ 17-19.

¹⁷ Tr. 16: 8-20; 26: 8-15.

¹⁸ Tr. 48: 18-23.

31. On 28 July 2014, the Claimants submitted comments on the documents related to the requirements for registration under the NIPC Act produced by the Respondent.
32. On 30 July 2014, without instruction from the Tribunal, the Claimants submitted purported proof of delivery for letters filed as exhibits with the RfA as Annexures 1-3.
33. On 1 August 2014, the Respondent wrote to the Tribunal requesting that it refuse to consider the purported proof of delivery submitted by the Claimants.
34. On 2 August 2014, the Tribunal invited the Claimants to comment on the Respondent's letter of 1 August 2014.
35. On 8 August 2014, the Claimants wrote to the Tribunal requesting that it disregard the letter of 1 August 2014 and authorize the Claimants to submit additional documents evidencing proof of delivery of the letters.

IV. THE PARTIES' POSITIONS

A. The Respondent's Position

36. In its written and oral submissions, the Respondent raised the preliminary objections set forth above.
37. On the basis of these arguments, the Respondent invites the Tribunal to:

- “a) Declare that the Claimants' claim does not fall within the jurisdiction of ICSID or the Arbitral Tribunal
- b) Order the Claimants to pay the Respondent all costs reasonably incurred by the latter in connection with these proceedings.”

B. The Claimants' Position

38. In its written and oral submissions, the Claimants put forward the following main arguments:
 - the Respondent consented to submit this dispute to arbitration by ICSID;
 - Section 26 of the NIPC Act provides for arbitration under the ICSID Convention and not merely arbitration in accordance with the “ICSID Rules”;

- ICSID has jurisdiction over this dispute whether or not Pan Ocean is registered under the NIPC Act, and the Claimants did not intentionally mislead the ICSID Secretariat by claiming that Pan Ocean is registered with the NIPC;
- the Respondent is a competent party to this arbitration;
- the Claimants are competent parties to this arbitration;
- the Claimants did not fail to explore local remedies/conditions precedent contained in the NIPC Act.

39. On the basis of these contentions, the Claimants request the Tribunal to:

- “1) declare that it has jurisdiction to decide the present dispute;
- 2) order the Respondent to pay the costs of this phase of the arbitration, including all expenses that the Claimants have incurred or will incur in respect of the fees and expenses of the arbitrators, legal counsel and experts;
- 3) to set further procedure for the merits phase of this arbitration.”

V. KEY PROVISIONS OF TREATY AND STATUTE

40. This section sets out the main legal provisions that bear on the Respondent’s preliminary objections.

41. ICSID Convention, Article 25(1) provides:

“The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.”

42. NIPC Act, Section 17 provides:

“Enterprises eligible for participation

Except as provided in Section 18 of this Act and subject to this Act, a non-Nigerian may invest and participate in the operation of any enterprise in Nigeria.”

43. NIPC Act, Section 20 provides:

“Registration of enterprise with the Commission

- 1) An enterprise in which foreign participation is permitted under Section 17 of this Act shall, before commencing business, apply to the Commission for registration.
- 2) The Commission shall, within fourteen working days from the date of receipt of completed registration forms, register the enterprise if it is satisfied that all relevant documents for registration have been duly completed and submitted or otherwise advise the applicant, accordingly.”

44. NIPC Act, Section 26 provides:

“Dispute settlement procedures

- 1) Where a dispute arises between an investor and any Government of the Federation in respect of an enterprise, all efforts shall be made through mutual discussion to reach an amicable settlement.
- 2) Any dispute between an investor and any Government of the Federation in respect of an enterprise to which this Act applies which is not amicably settled through mutual discussions, may be submitted at the option of the aggrieved party to arbitration as follows—
 - (a) in the case of a Nigerian investor, in accordance with the rules of procedure for arbitration as specified in the Arbitration and Conciliation Act; or
 - (b) in the case of a foreign investor, within the framework of any bilateral or multilateral agreement on investment protection to which the Federal Government and the country of which the investor is a national are parties; or
 - (c) in accordance with any other national or international machinery for the settlement of investment disputes agreed on by the parties.
- 3) Where in respect of any dispute, there is disagreement between the investor and the Federal Government as to the method of dispute settlement to be adopted, the International Centre for Settlement of Investment Disputes Rules shall apply.”

45. NIPC Act, Section 31

“In this Act, unless the context otherwise requires [...]

‘enterprise’ means an industry, project, undertaking or business to which this Act applies or an expansion of that industry, undertaking, project or business or any part of that industry, undertaking, project or business and, where there is foreign participation, means such an enterprise duly registered with the Commission”

VI. TRIBUNAL ANALYSIS

A. Overview

1. Summary Conclusions

46. The Tribunal addresses the preliminary objections in the order established in Procedural Order No. 1 dated 26 February 2014.
47. In this connection, the Tribunal notes that on occasion the Parties have presented their arguments in different orders and/or formats, sometimes grouping several topics within a single heading. In particular, the Respondent addresses the first objection (lack of consent) chiefly as related to the second objection (the effect of Section 26 of the NIPC Act) and the third objection (registration). Such an approach should not be surprising, given the interaction of these three items.
48. The Tribunal must decline jurisdiction in the event that any of the six objections presented by the Respondent prove justified in the sense of imposing limits on the arbitrators’ authority to decide the case. The Tribunal cannot arrogate authority to decide the case without consent by the Claimants and the Respondent alike.¹⁹
49. In some instances a tribunal might find that jurisdictional objections implicate questions which require findings of fact or which are closely intertwined with the substance of the controversy. It would then be appropriate that a determination of the tribunal’s authority be joined to the merits of the case in a separate phase permitting appropriate testimony.
50. As summarized below, the Tribunal has come to the conclusion that it must reject the Respondent’s objections with the exception of (i) those related to whether the Claimants properly accepted the Respondent’s offer of ICSID arbitration, which is necessary to

¹⁹ In this connection, the Tribunal notes that not all procedural preconditions to arbitration will preclude exercise of arbitral authority. Procedural flaws that may be cured during the arbitration are often characterized by reference to notions such as ripeness, *recevabilité* or admissibility, to serve as convenient labels to describe steps taken either before or after constitution of a tribunal which do not *per se* affect jurisdictional competence.

perfect consent (objection 1), (ii) the registration requirement (objection 3) and (iii) premature filing (objection 6). These three objections will be joined to proceedings on the merits of the controversy.

51. Complex questions of fact arise from objections with respect to (i) consent, (ii) the registration requirement and (iii) premature filing by reason of failure to enter into NIPC Act provisions on amicable settlement. Each matter remains intertwined with the merits of the controversy requiring further testimony.

2. Characterization of Preliminary Objections

52. As an initial matter, the Tribunal notes that the Respondent has collapsed a number of the objections which were identified at the first session on 13 February 2014. In part, the Respondent has accorded common treatment of the first three objections in its submissions. Moreover, some of the arguments with respect to consent have been developed under other objections.
53. For ease of reference, the Tribunal sets forth below its shorthand references to the six objections which were allowed as preliminary issues:

- Objection 1 : “Consent”
- Objection 2 : “Role of ICSID Rules”
- Objection 3 : “Registration”
- Objection 4 : “Proper Party”
- Objection 5 : “Time Bars”
- Objection 6 : “Premature Filing”

B. The Six Preliminary Issues

1. First Objection: Respondent did not consent to submit this dispute to arbitration by ICSID

a. The Parties’ Positions

54. The Respondent argues that it has not consented to arbitrate this dispute under ICSID auspices. This argument is primarily developed under the objections on the Role of the ICSID Rules, Registration, and the Proper Party, considered below.

55. The Respondent separately argues that the text of Section 26(2)(b) and (c) of the NIPC Act does not establish its consent to ICSID jurisdiction. It contends that the reference to ICSID in Section 26(3) shows that the general references to “multilateral agreements on investment protection” and “international machinery for the settlement of investment disputes” in Section 26(2)(b) and (c) were meant to exclude ICSID.²⁰ According to the Respondent, this is because “it is a settled canon of interpretation that a specific provision in an enactment will take precedence over a general provision.”²¹
56. The Respondent further argues that even if both of these provisions could be read to refer to ICSID arbitration, they could not confer jurisdiction over the dispute to ICSID. If this were the case, according to the Respondent, they “would be considered ambiguous and therefore incapable of conferring jurisdiction on ICSID.”²² As evidence of the ambiguity, the Respondent refers to the evocation of “multilateral agreements on investment protection” and “international machinery for the settlement of investment disputes” in Section 26(2).²³
57. The Claimants note that consent to ICSID can be conferred in national legislation.²⁴ In this connection, they argue that by Section 26(3) of NIPC Act, the “Respondent made an irrevocable offer and thereby unilaterally consented”²⁵ that disputes arising from NIPC Act could be submitted to ICSID. The Claimants further state that, arguably, Section 26(2) also establishes the Respondent’s offer of consent to ICSID jurisdiction in accordance with Article 25(1) of the ICSID Convention.²⁶ The Claimants contend that they accepted Nigeria’s offer to arbitrate under ICSID auspices in the request for arbitration filed in this case, thereby perfecting consent.²⁷

b. Tribunal Conclusion

58. The requirements for ICSID jurisdiction are found in Article 25(1) of the ICSID Convention, which provides as follows:

²⁰ Reply ¶ 27 vii.

²¹ *Id.*

²² Reply ¶ 27 viii.

²³ *Id.*

²⁴ Counter-Memorial ¶ 19.

²⁵ RfA ¶ 7.

²⁶ Counter-Memorial ¶ 22.

²⁷ RfA ¶ 7.

“The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre.”

59. The Claimants argue that Nigeria’s consent to arbitration is found in Section 26 of the NIPC Act of 1995. As set forth above in greater detail, the legislation provides that any dispute between an investor and any Government of the Federation “in respect of an enterprise to which this Act applies which is not amicably settled through mutual discussions, may be submitted at the option of the aggrieved party to arbitration [...]”
60. Such legislation further directs that where there is disagreement between the investor and the Federal Government “as to the method of dispute settlement to be adopted, the International Centre for Settlement of Investment Disputes Rules shall apply.”
61. Although the ICSID Convention requires consent in writing to submit to ICSID arbitration, the Convention contains no special requirements of form.
62. Section 26(2) is directed in pertinent part to non-Nigerian investors. That provision supplies potential mechanisms for resolution of disputes that have not been resolved amicably as provided for in Section 26(1). However, these provisions require further steps.
63. In this case Sections 26(2) and 26(3) of the NIPC Act clearly make a standing written offer to arbitrate to anyone with a claim under the Act.
64. This standing offer to arbitrate must be accepted pursuant to its terms, which, to the extent relevant, will be addressed below in connection with the Respondent’s other objections. The Claimants have *prima facie* accepted the Respondent’s standing offer by filing their request with ICSID. As discussed further, the Tribunal will need to examine whether this acceptance was tendered in a way which meets all of the conditions in Section 26 of the NIPC Act.
65. There is nothing novel about consent to ICSID being granted through national legislation. The nature of the instrument *per se* (a national investment statute) poses no

obstacle to jurisdiction, as confirmed by a long tradition of persuasive awards in this connection.²⁸

66. In light of the foregoing, and subject to the Tribunal’s analysis of the other objections as set forth below, the Tribunal must reject the contention that the Respondent did not consent to arbitration by reason of the standing offer contained in Section 26 of the NIPC Act.
67. However, this is not the end of the story. The Tribunal must make further inquiries into whether the Claimants accepted that standing offer in a fashion that comports with the terms of the NIPC Act. Consequently, the Tribunal joins to the merits questions related to the adequacy of the Claimants’ acceptance of the standing offer. These questions of adequacy relate principally to objections 3 (Registration) and 6 (Premature Filing), which are discussed below.

2. Second Objection: Section 26 of the NIPC Act does not provide a basis for finding consent on the part of Respondent as it merely provides that disputes should be conducted in accordance with the ICSID Rules

a. The Parties’ Positions

68. The Respondent claims that it did not consent to this proceeding on the basis that the reference to ICSID in Section 26(3) of the NIPC Act is merely the identification of rules to be used should there be arbitration under that section and not an expression of consent to proceedings administered by ICSID.²⁹ According to the Respondent, this is because Section 26(3) refers to the “ICSID Rules” and not to the ICSID Convention or to the Centre.³⁰
69. The Respondent adds that the Tribunal should adopt a cautious approach in interpreting Section 26(3) and that the language in Section 26(3) should be interpreted according to its ordinary meaning³¹ without the word “ICSID Convention” read into the provision.³²

²⁸ See, e.g., *Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt* (Decision on Jurisdiction), ICSID Case No. ARB/84/3 (14 Apr. 1988), ¶ 60; *Inceysa Vallisoletana S.L. v. Republic of El Salvador* (Award), ICSID Case No. ARB/03/26 (2 Aug. 2006), ¶¶ 212–213; *Zhinvali Development Ltd. v. Republic of Georgia* (Award), ICSID Case No. ARB/00/1 (24 Jan. 2003), ¶ 339.

²⁹ Memorial ¶ 53.

³⁰ Memorial ¶¶ 44; 56-59.

³¹ Memorial ¶ 49.

³² Memorial ¶ 54.

70. The Respondent concedes that some of the ICSID Rules, such as Arbitration Rule 1, make direct reference to the Centre. However, the Respondent contends that these provisions do not act as a bar to proceedings conducted under the ICSID Rules that are not administered by ICSID.³³
71. The Respondent also argues that the term “investor” in the phrase “[w]here a dispute arises between an investor and any Government of the Federation” in Section 26(1) refers to both foreign investors and Nigerian investors. According to the Respondent, this means that the subsequent reference to ICSID in Section 26(3) could not be a reference to the ICSID Convention because the jurisdiction of the Centre would not extend to proceedings between a Nigerian investor and Nigeria.³⁴
72. The Claimants reject the Respondent’s argument that Section 26(3) refers only to rules and not to arbitration administered by ICSID. They note that the ICSID Rules are replete with references to the Centre and contemplate the Centre’s involvement in the proceedings.³⁵
73. The Claimants also note that the Respondent does not cite any instance of arbitration under the “ICSID Rules” not administered by the Centre.³⁶

b. Tribunal Conclusion

74. It is not plausible, in law or in practice, to read Section 26(3) as merely providing a set of procedural rules to be applied.
75. Although Section 26(3) refers to “the International Centre for Settlement of Investment Disputes Rules,” there are no “ICSID Rules” of a stand-alone nature. Rather, each of the ICSID Convention, the ICSID Arbitration Rules, the ICSID Institution Rules, and the ICSID Administrative and Financial Regulations govern different stages and aspects of ICSID arbitration proceedings.
76. The language of the Convention, Rules and Regulations contemplate administration of arbitral proceedings by the Centre through the active involvement of the Secretary-General of ICSID or the Chairman of the Administrative Council, including the various

³³ Reply ¶ 38.

³⁴ Reply ¶¶ 39-40.

³⁵ Counter-Memorial ¶ 51.

³⁶ Rejoinder ¶ 41.

counsel who form part of the Secretariat. The Arbitration Rules provide *inter alia* for the involvement of the Centre in appointing arbitrators, constituting tribunals, fixing time limits, filling vacancies in the tribunal, and receiving correspondence and requests from the parties and arbitrators. Similarly, the Institution Rules, which the Respondent understands to be part of the “ICSID Rules,”³⁷ provide that the Centre will receive, evaluate and register requests for arbitration. Both the Arbitration Rules and the Institution Rules refer to provisions of the ICSID Convention. The Convention, Rules and Regulations were evidently drafted to operate together to provide a coherent regime for proceedings administered by ICSID.

77. The Respondent does not provide any example of the “ICSID Rules” being administered by a non-ICSID institution or *ad hoc* tribunal. This is consistent with substance of the Convention, Rules and Regulations as described above.
78. The Respondent’s interpretation of Section 26(3) is not supported by the text of that Section. Section 26(3) is found in the “Dispute Settlement Procedures” part of the NIPC Act, and Section 26(3) is said to be an alternative to the “method of dispute settlement” options in Section 26(2). This language suggests that Section 26(3) was meant to provide an alternate method of dispute resolution and not merely to proscribe arbitral rules to be administered *ad hoc* or by an unidentified arbitral institution. If the drafters of the NIPC Act had intended to limit Section 26(3) to proscribe rules, the text of Section 26(3) could have said so.
79. The Respondent argues that “you can apply the [ICSID] rules anywhere; it does not have to be before ICSID.”³⁸ This perspective ignores essential elements of ICSID arbitration, which require intervention of the Secretariat or the Administrative Council. For example, the constitution of the tribunal must be communicated by the Secretary-General under Rule 2(3). On request, the Chairman of the Administrative Council must intervene to constitute the tribunal if the parties fail to make appointments such as to constitute the tribunal in a relatively prompt fashion pursuant to Rule 4. Pursuant to Rule 9, applications to a challenge to an arbitrator must be filed with the Secretary-General.

³⁷ Reply ¶ 38.

³⁸ Tr. 74: 8-9.

80. Moreover, any request for annulment of the award must be made through a writing addressed to the Secretary-General, to be decided by an *ad hoc* committee constituted through the actions of the Chairman of the Administrative Council, on grounds set forth in Article 52 of the ICSID Convention.
81. In short, the ICSID Convention, along with its Rules and Regulations, contemplate active administration of arbitral proceedings by the Secretariat and Chairman of the Administrative Council, which will be closely involved in addressing requests from parties on various levels.
82. In light of the foregoing, the Tribunal rejects the objection that Section 26 of the NIPC Act does not provide a basis for finding consent on the part of Respondent as it merely provides that disputes should be conducted in accordance with the ICSID Rules.

3. Third Objection: the Claimants are not registered with the NIPC and therefore cannot rely on Section 26(3) of the NIPC Act to invoke the jurisdiction of ICSID, and the Claimants misled the Secretariat of ICSID to register their Request for Arbitration when they falsely claimed that their enterprise was registered with the NIPC

a. The Parties' Positions

83. The Respondent claims that the Tribunal does not have jurisdiction over this dispute because the Claimants' investment vehicle, Pan Ocean, was not registered with the NIPC as required by the NIPC Act. In this connection, the Respondent evokes Sections 20 and 31 of the NIPC Act as the evidence of the obligation to register.³⁹
84. According to the Respondent, these provisions have the effect of limiting consent to arbitration under Section 26 to those enterprises with foreign participation that have been registered with the NIPC.⁴⁰ The Respondent states that Pan Ocean is not registered with the NIPC and is therefore not "qualified for protection" under the NIPC Act.⁴¹ In support, the Respondent has submitted *inter alia* a copy of a document titled NIPC "Business Register by Sector" that purports to list NIPC registered enterprises between 2006 and 2014 and that does not list the Claimants as registered enterprises.⁴²

³⁹ Memorial ¶¶ 69-70.

⁴⁰ Memorial ¶ 71.

⁴¹ Memorial ¶¶ 75-76.

⁴² Exh. R-015.

85. The Respondent contends that the Claimants bore responsibility for assuring that Pan Ocean was registered because of their ownership of Pan Ocean.⁴³ According to the Respondent, this responsibility arose in 1995 when the NIPC Act was enacted, and even if the Claimants lost control of Pan Ocean in 1998 as they claim, they should have ensured that Pan Ocean was registered in the intervening period between 1995 and 1998.⁴⁴
86. The Respondent also contends that the Claimants misled the Secretariat of ICSID to register their request for arbitration by falsely claiming that their enterprise was registered with the NIPC.⁴⁵
87. The Claimants reject the Respondent's contention that an enterprise with foreign participation must be registered to benefit from protection under the NIPC Act in all cases. The Claimants contend that the stated purpose of the NIPC Act is to encourage and assist investment in Nigeria and to create a conducive environment for investment law in Nigeria.⁴⁶ According to the Claimants, these aims would be undermined if foreign investors were denied protections in the NIPC Act simply because they failed to register their "enterprise."
88. The Claimants observe that the definition of "enterprise" as being "duly registered with the Commission" in Section 31 of the NIPC Act is subject to the qualification "[i]n this Act, unless the context otherwise requires."⁴⁷ According to the Claimants, the relevant "context" in this case is that the Claimants made a "long-standing," significant, successful investment in Nigeria in partnership with the Respondent and that this investment benefitted the Respondent.⁴⁸ Against this backdrop, they argue that they should not automatically be deprived of the protections of the NIPC Act for the simple reason that the enterprise in which they invested was not registered.
89. The Claimants also argue that Pan Ocean is exempt from the registration requirement because the NIPC Act does not state that enterprises existing before its enactment, which

⁴³ Reply ¶ 42.

⁴⁴ *Id.*

⁴⁵ Memorial ¶ 1(c).

⁴⁶ Rejoinder ¶¶ 21-22.

⁴⁷ Rejoinder ¶ 27 citing Section 31 of the NIPC Act.

⁴⁸ Rejoinder ¶¶ 24, 28.

would include Pan Ocean, must be registered.⁴⁹ The Claimants refer to other investment instruments entered into by Nigeria that contain language providing for retroactive application to suggest that Nigeria would have done the same in the NIPC Act if that was its intention.⁵⁰ In the alternative, the Claimants contend that the absence of such language presents an ambiguity that should be resolved in favor of foreign investors in light of the stated purpose of the NIPC Act.⁵¹

90. The Claimants argue that by insisting on registration, the Respondent is relying on an artificial technicality. According to the Claimants, Pan Ocean complied “in every way with any reasonable categorization of an investment.”⁵² The Claimants add that the Respondent, though operating as a joint-venture partner with Pan Ocean, has not insisted that Pan Ocean be registered even though the Respondent’s own instrumentality “possesses and controls the register.”⁵³ In these circumstances, the Claimants question what registration could possibly have added given that all of the other jurisdictional requirements under the NIPC Act have been met.⁵⁴
91. The Claimants challenge the reliability of the NIPC “Business Register by Sector” filed by the Respondent for various reasons. According to the Claimants, the document is notably inconsistent with the requirements of the NIPC Act because it is not limited to enterprises with foreign participation⁵⁵ and because there is an 11 year-gap of time between the enactment of the NIPC Act and the first entry on the list.⁵⁶
92. The Claimants also argue that the Respondent should be estopped from rescinding its offer to arbitrate with investors at ICSID because of its collaboration with those who control Pan Ocean and its failure to complain to Claimants about the alleged lack of registration in the past.⁵⁷
93. The Claimants add that the Respondent’s failure to provide specific information about registration criteria and procedure undermines its case.⁵⁸ The Claimants contend that in

⁴⁹ Rejoinder ¶¶ 25-27.

⁵⁰ Rejoinder ¶ 26 citing Exh. C-7.

⁵¹ Rejoinder ¶ 29.

⁵² Rejoinder ¶ 30.

⁵³ Rejoinder ¶¶ 32-33.

⁵⁴ Rejoinder ¶ 31.

⁵⁵ C-Register ¶ 15.

⁵⁶ C-Register ¶ 9.

⁵⁷ Rejoinder ¶¶ 34-35.

⁵⁸ Rejoinder ¶ 37.

any event they do not have control of Pan Ocean. Furthermore, the Claimants assert that Respondent is aware of this fact and that the Claimants cannot register Pan Ocean under NIPC Act.

94. The Claimants argue that although the NIPC Act does not contain a guarantee of fair and equitable treatment to investors, the Respondent is nevertheless bound to extend fair and equitable treatment to investors under international law.⁵⁹
95. The Claimants contend that they did not seek to mislead the Secretariat by stating that Pan Ocean had been registered with the NIPC. They state that their request for proof of registration from the NIPC went unanswered and that they “genuinely believed that Pan Ocean would have registered its undertaking with the Commission.”⁶⁰
96. For these reasons, the Claimants reject the Respondent’s argument that the Tribunal does not have jurisdiction over this case because Pan Ocean was not registered. Alternatively, the Claimants argue that the issue of registration is linked to the merits of the case and should not be decided “without a full factual determination of the merits.”⁶¹

b. Tribunal Conclusion

97. As an initial matter, the Tribunal has attempted to disaggregate arguments made with respect to two different questions related to registration. The first concerns the need for registration in order to do business in Nigeria. The second pertains to the role registration plays as a predicate to arbitral jurisdiction pursuant to Section 26 of the NIPC Act.
98. At this stage of the proceedings, the Tribunal is concerned only with the second matter, registration as a precondition to arbitral authority. The question is whether the arbitration provisions of the NIPC Act may be triggered by persons who have not been “duly registered with the Commission” as that phrase has been used in Section 31 of the NIPC Act.
99. The Tribunal notes that Section 26 of the NIPC Act allows for arbitration “in respect of an enterprise to which this Act applies.”

⁵⁹ In this connection, the Tribunal notes that this seems to imply that the Respondent’s reliance on the registration requirement in the NIPC Act is a violation of the alleged obligation of “fair and equitable treatment.”

⁶⁰ Rejoinder ¶¶ 11-12.

⁶¹ Rejoinder ¶ 40.

100. Moreover, Section 31 of the NIPC Act defines “enterprise” to include a variety of business undertakings and “where there is foreign participation, means such an enterprise duly registered with the Commission.”

101. However, the Parties’ arguments raise serious issues that cannot be resolved as a preliminary matter. Lingering questions of fact and law require further elaboration with respect to the definition of “enterprise,” applicability of the registration requirements to entities existing before enactment of the NIPC Act, and the reliability of the NIPC business register. Moreover, it will be necessary to consider the Claimants’ assertion that they were unable to register Pan Ocean by reason of being outside the management. Furthermore, the Tribunal must consider arguments of estoppel related to the alleged lack of complaint by the Respondent during cooperation with Claimants.

102. The following matters remain intertwined with the merits of the case such that they must be considered during the merits phase of the proceeding:

- The definition of “enterprise”;
- Applicability of the registration requirement to entities existing before enactment of the NIPC Act;
- Reliability of the NIPC business register filed by the Respondent;
- The Claimants inability to register Pan Ocean, such inability allegedly deriving in part from the Respondent’s actions, as well as the fact that the Claimants are outside the management of the company; and
- Estoppel based on the Respondent’s alleged lack of complaint about registration during prior cooperation with the Claimants.

103. The Tribunal will consider these matters as they bear on its decision as to whether registration is required as a precondition to the Tribunal’s authority to hear and to adjudicate the Claimants’ claims.

104. In light of the foregoing, the Tribunal joins the issue of Pan Ocean’s registration to the merits phase of the case.

4. Fourth Objection: the Respondent is not a competent party to this arbitration

a. The Parties’ Positions

105. The Respondent argues that the Tribunal does not have jurisdiction over this dispute because the Claimants have named the wrong respondent.

106. The Respondent claims that it has designated the NNPC as “the competent agency/subdivision that is subject to the jurisdiction of ICSID” since 11 May 1978.⁶² According to the Respondent, the NNPC is the governmental agency responsible for oil exploration in Nigeria.⁶³ The Respondent notes that the NNPC has legal personality that is distinct from that of the Respondent.⁶⁴ The Respondent also observes that the NNPC, and not the Federal Republic of Nigeria, is the counter-party to the JVA that is at issue in this proceeding.⁶⁵ In these circumstances, the Respondent argues that the Republic of Nigeria is not a “proper party to these proceedings” and thus infers that if there had been a proper respondent, it could only have been the NNPC.⁶⁶
107. The Tribunal notes that in developing this argument the Respondent includes a separate but related set of contentions to the effect that the dispute settlement provisions of the NIPC Act cannot be invoked because the Tribunal is faced with a contractual dispute arising under the JVA.
108. The Respondent states that the dispute resolution provision in Section 14 of the JVA provides for *ad hoc* arbitration in Lagos, Nigeria and does not provide for ICSID arbitration.⁶⁷ According to the Respondent, the general dispute settlement provision of the NIPC Act is “overridden” by the dispute resolution provision in Section 14 of the JVA.⁶⁸
109. The Claimants argue that the Tribunal’s jurisdiction extends to the Federal Republic of Nigeria. They note that Article 25(1) of the ICSID Convention provides for jurisdiction over ICSID Contracting States, such as Nigeria, and that Nigeria’s designation of the NNPC as an agency opens up the possibility of naming the NNPC as a respondent in ICSID proceedings but does not exclude jurisdiction over Nigeria.⁶⁹
110. In response to the Respondent’s argument that the dispute resolution provision in the JVA overrides the dispute settlement provision of the NIPC Act, the Claimants argue

⁶² Memorial ¶ 96.

⁶³ Memorial ¶ 95.

⁶⁴ Memorial ¶ 102.

⁶⁵ Memorial ¶ 88.

⁶⁶ Memorial ¶ 113.

⁶⁷ Exh. RLA-11(1).

⁶⁸ Memorial ¶¶ 104-108.

⁶⁹ Counter-Memorial ¶ 55.

that their claims are not based on breaches of the JVA but rather are based on the NIPC Act and international law.⁷⁰

b. Tribunal Conclusion

111. As an initial matter, the Tribunal notes that the existence of contractual claims under the JVA does not preclude the Claimants from filing a separate set of claims pursuant to international law, which would be subject to the Tribunal's jurisdiction pursuant to Section 26 of the NIPC Act. The substantive claims in this arbitration are not for breach of the JVA *per se*.
112. These contract claims clearly do not fall within the adjudicatory authority of the Tribunal except to the extent that they might form part of the factual matrix to be considered in relation to the Claimants' arguments about violation of international law.
113. The Claimants have chosen to file their grievances against the government of Nigeria, alleging that the government conspired to seize ownership and control of Pan Ocean from the Claimants.
114. The Claimants may, or may not, be able to prove their allegations. In any event, however, it is not the prerogative of either the Respondent or the Tribunal to tell them how to plead their case. If it turns out that the complained-of conspiracy was not engaged in by the Respondent, then the Claimants will have been found to have filed unfounded claims.
115. The Tribunal notes that plain language of Section 26 limits arbitration claims to those resulting from disputes "between an investor and any Government of the Federation."⁷¹ The Claimants claim to have been harmed by actions of the Federal Republic of Nigeria. They have accordingly commenced this arbitration against the Federal Republic of Nigeria under the dispute settlement provisions of the NIPC Act, enacted by the Federal Republic of Nigeria.
116. The Respondent states that the NNPC was designated by the Federal Republic of Nigeria as the government agency responsible for oil exploration. Be that as it may, Nigeria

⁷⁰ Counter-Memorial ¶ 60.

⁷¹ It may be that the evidence shows that NNPC was a mere instrumentality of the government of Nigeria. Such a finding will have to be alleged and proved during the rest of the arbitration.

remains an ICSID Contracting State for the purposes of jurisdiction under Article 25 of the ICSID Convention.

117. In light of the foregoing, the Tribunal rejects the objection that the Respondent is not a competent party to this arbitration.

5. Fifth Objection: Claimants' claims are barred by statute

a. The Parties' Positions

118. The Respondent argues that the Tribunal does not have jurisdiction over the claims because they were not filed within the time limit legally permitted.⁷² The Respondent argues that Article 42(1) of the ICSID Convention, which authorizes tribunals to apply the law of the Contracting State party to a dispute where the parties have not agreed on the applicable law, leads to the application of the law of the Federal Republic of Nigeria in this case.⁷³

119. Section 7 of the Limitation Act of Nigeria enumerates actions that are barred after six years. The Respondent contends that the Claimants' claims are covered by this provision.⁷⁴ Further, the Respondent argues that the cause of action for this arbitration arose about eleven years ago. In support, it cites a letter from the Claimants to the Nigerian Minister of Petroleum Resources of 9 October 2012 in which they complain of being excluded from management of Pan Ocean for about ten years.⁷⁵ The Respondent also contends that the Claimants initiated court proceedings against Mr. Festus Fadeyi in the Federal High Court of Nigeria in 2002.⁷⁶ According to the Respondent, this shows that more than six years passed from the time the cause of action arose to the time the RfA was filed in this case and that, as a result, the claims are time barred.⁷⁷

120. The Claimants argue that there is no legal basis for the Respondent's objection because there is no limitation period in either the NIPC Act or in the ICSID Convention.⁷⁸ The

⁷² Memorial ¶¶ 141-142.

⁷³ Memorial ¶¶ 146-147.

⁷⁴ Memorial ¶¶ 149-150; 151.

⁷⁵ Memorial ¶ 155; Annexure 2 to the RfA.

⁷⁶ Memorial ¶ 155(2) citing RfA ¶ 15.

⁷⁷ Memorial ¶ 157.

⁷⁸ Rejoinder ¶ 46; In this connect, the Tribunal notes that the Claimants have relied on *Wena Hotels Ltd. v. Arab Republic of Egypt* (ICSID Case No. ARB/98/4) for this point.

Claimants also argue that there is a difference between a claim for breach of contract and a claim brought under international law principles relating to expropriation.⁷⁹

121. In this connection, the Claimants contend that they actively pursued their rights in the Nigerian courts and that this shows that they pursued their legal rights in good time.⁸⁰ The Claimants also argue that under international law the Respondent should be prevented from relying on its national laws to avoid its international obligations.⁸¹

b. Tribunal Conclusion

122. The Respondent has presented no evidence of any statute of limitations imposed on arbitration claims for violations of the provisions of the international law claims presented to the Tribunal in relation to its alleged jurisdiction under Section 26 of the NIPC Act.

123. The Tribunal has found nothing in the NIPC Act which indicates the time frame for bringing a claim for breach of that Act.⁸² Rather, the limits under Nigerian law which have been drawn to the Tribunal's attention address court actions related to contract claims or claims against the government.

124. Although limits under Nigerian law exist with respect to court actions related to contract claims and court actions against the government, none proves relevant to this arbitration, which relates to violation of international law. By their nature, the Claimants' requests sound in expropriation of property, alleging that the government conspired with Mr. Fadeyi to wrest control of Pan Ocean from its rightful owners.

125. Of course, no tribunal would look positively on a claim filed after the Claimants had waited unduly, sitting on its rights for an inordinate amount of time. Statutes of "limitation" and of "repose," which cut off certain legal rights if they are not acted on by a certain deadline, are common to many legal systems.

⁷⁹ Tr. 116: 15-17.

⁸⁰ Rejoinder ¶ 47.

⁸¹ *Id.*

⁸² The Respondent seems to accept that the NIPC Act contains no specific directions in this connection. Tr. 101: 23.

126. In this instance, however, the Claimants were anything but “in repose” about their rights. The Respondent does not deny that the Claimants attempted to rectify the perceived wrongs by litigation.

127. Consequently, the Tribunal finds no bar to hearing the claims based on any applicable statute of limitations.

128. In light of the foregoing, the Tribunal rejects the Respondent’s objection that the Claimants’ claims are barred by statute.

6. Sixth Objection: The request is premature in that the Claimants failed to explore local remedies/conditions precedent contained in the NIPC Act

a. The Parties’ Positions

129. The Respondent argues that the Tribunal lacks jurisdiction because the Claimants did not comply with the preconditions to arbitration in Section 26 of the NIPC Act.

130. Firstly, the Respondent argues that the Claimants did not notify the Respondent of the existence of a dispute as required by Section 26.⁸³ In this connection, the Respondent denies receiving letters from the Claimants’ counsel to the Minister of Petroleum Resources of Nigeria declaring the existence of a dispute and seeking redress.⁸⁴ The Respondent urges the Tribunal to reject tracking reports purportedly evidencing delivery because those documents were not filed in good time, and the Claimants did not seek leave to introduce them into evidence.⁸⁵ The Respondent also argues that there is no evidence that the Minister of Petroleum Resources received the letters, that the Claimants have not evidenced that the recipients identified in the tracking reports were officials of the Ministry of Petroleum Resources, and that there is no record of the tracking reports on the websites of the corresponding courier companies.⁸⁶ The Respondent equally rejects the Claimants’ contention that the Respondent refused to meet with the Claimants’ representatives about the dispute in 2004.⁸⁷

⁸³ Memorial ¶¶ 122-123.

⁸⁴ Tr. 87: 9-11.

⁸⁵ Letter from the Respondent to the Tribunal received on 1 August 2014 responding to the Claimants’ correspondence to the Tribunal received on 30 July 2014.

⁸⁶ *Id.*

⁸⁷ Reply ¶ 70.

131. Secondly, the Respondent argues that in addition to the notification requirement, Section 26 imposes a separate requirement that there be a disagreement between the parties as to the method of dispute resolution. According to the Respondent, there was no such disagreement in this case.⁸⁸
132. Thirdly, the Respondent argues that the Claimants made no attempt to amicably settle the dispute with the Respondent as required by Section 26(1) of the NIPC Act.⁸⁹
133. According to the Respondent, each of these failures prevents the Claimants from commencing arbitration in accordance with Section 26(3) of the NIPC Act.
134. The Claimants argue that they have fully complied with the requirements under Section 26 and were within their rights to commence this arbitration. Concerning the Respondent's knowledge of the dispute and amicable settlement, they contend that as early as 2004 representatives of their interests scheduled a meeting with an advisor to then President of Nigeria to seek a settlement of the dispute. According to the Claimants, the Presidential advisor subsequently refused to meet with the Claimants' representatives after they traveled from Geneva to Abuja for the meeting.⁹⁰
135. The Claimants state that they notified the Respondent of the dispute orally and in writing on numerous occasions. They refer to four letters from the Claimants' counsel to the Nigerian Minister of Petroleum Resources that were exhibited with the RfA as evidence.⁹¹ To evidence that these letters were received by the Respondent, the Claimants seek to rely on tracking reports from the associated courier companies. In response to the Respondent's arguments that the tracking reports were not filed in good time and are unreliable, the Claimants argue that the reports are formal documents that speak for themselves and will assist the Tribunal's analysis.⁹² They add that they are prepared to submit invoices issued by the courier companies for delivering the letters⁹³

⁸⁸ Memorial ¶ 123.

⁸⁹ Memorial ¶ 124.

⁹⁰ Counter-Memorial ¶ 63.

⁹¹ Counter-Memorial ¶ 64; Annexures 1-4 to the RfA.

⁹² C-Tracking ¶¶ 5-11.

⁹³ C-Tracking ¶ 14.

as well as evidence refuting the Respondent's argument that there is no record of the tracking reports on the websites of the courier companies.⁹⁴

b. Tribunal Conclusion

136. As an initial matter, the Tribunal notes that the Respondent's objections to premature filing of the claims often lump together failure to explore local remedies in the strict sense (as related to national court proceedings) with the absence of any genuine amicable settlement attempts.
137. The dispute settlement procedures in Section 26 of the NIPC Act mention amicable settlement in two provisions. First, Section 26(1) stipulates that where a dispute arises, "all efforts shall be made through mutual discussion to reach an amicable settlement." Second, Section 26(2) provides that any dispute between an investor and any Government of the Federation "in respect of an enterprise to which this Act applies which is not amicably settled through mutual discussions, may be submitted at the option of the aggrieved party to arbitration [...]"
138. The reading of the provisions pressed by the Respondent would have the amicable settlement efforts treated as a precondition to arbitration.
139. Setting aside the Parties' respective assertions of fact concerning efforts to resolve the dispute amicably (addressed in greater detail below), the Tribunal notes that the language of Section 26 does not easily lend itself to interpretation as a jurisdictional precondition. Section 26(1) provides that "all efforts shall be made through mutual discussion to reach an amicable settlement" but does not contain the formulation common to preconditions such as a specific injunction along the lines that an investor may file a claim only after six months have elapsed following failure to resolve the dispute through amicable settlement.
140. Just as significantly, Section 26(2) does not make attempts at amicable settlement a precondition to arbitration but rather provides that disputes that have not been amicably settled may be submitted to arbitration.
141. The Tribunal need not, and in the absence of evidence cannot, decide this matter right now, given that the Parties differ on what attempts were in fact made to resolve the

⁹⁴ C-Tracking ¶¶12-13.

dispute amicably. The Claimants contend that they sought to resolve amicably the dispute both orally and in writing. The Respondent rejects these contentions. The Claimants respond that their attempts to reach amicable settlement are evidenced by four unanswered letters and by the fact that representatives of the Respondent refused to attend a scheduled meeting to discuss settlement in Abuja. The Respondent says that the letters were not received and that there is no evidence of any such meeting to discuss settlement.

142. The Tribunal has decided to join this matter to the next stage of the arbitration to enable the Parties to submit their evidence. Accordingly, in their submissions on the merits, the Parties are invited to address the circumstances related to allegations that the Claimants' letters went unanswered and the meeting in Abuja was met with a refusal by Respondent, as well as how these circumstances bear on the amicable settlement provisions in the NIPC Act.
143. The Respondent also contends that the Tribunal lacks jurisdiction because there was no disagreement about the method of dispute settlement. The Tribunal invites the Parties to comment further on this argument in the submission on the merits if they wish.
144. Finally, the Tribunal observes that there is no justification for placing an obligation on the Claimants to exhaust local remedies before commencing arbitration. This is not a precondition to arbitration in either the ICSID Convention or the dispute resolution clause at Section 26 of the NIPC Act. Although some investment instruments contain such a requirement, the NIPC Act does not.
145. In light of the foregoing, the Tribunal joins to the merits of this case the issue of whether "the request is premature in that the Claimants failed to explore local remedies/conditions precedent contained in the NIPC Act" as formulated by the Respondent.
146. The Tribunal is mindful that the Parties disagree about the admissibility of tracking documents submitted on 30 July 2014, and that the Claimants have offered to produce invoices related to delivery of correspondence. The Tribunal will consider these matters further at the hearing on merits as well as the three jurisdiction arguments that have been joined to the merits.

VII. DECISION

147. For the reasons set forth above, the Arbitral Tribunal decides that:

- Objection 1 (Consent) is rejected insofar as it calls into question whether Section 26 of the NIPC Act constitutes a standing offer to arbitrate. The Tribunal finds that Section 26 does indeed constitute such a standing offer. However, questions related to the adequacy of the Claimants' acceptance of that offer are joined to the merits;
- Objections 2 (Role of the ICSID Rules), 4 (Proper Party) and 5 (Time Bars) are rejected; and
- Objections 3 (Registration) and 6 (Premature Filing) are joined to the merits.

148. Costs are reserved for a later decision.

149. Subsequently the Tribunal will invite the Parties to confer on directions for further proceedings.

[Signed]

Dr. Julian D. M. Lew, QC
Arbitrator

[Signed]

Justice Edward Torgbor
Arbitrator

[Signed]

Professor William W. Park
President of the Tribunal

[17 October 2014]