

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

**Korea National Oil Corporation, KNOC Nigerian West Oil Company Limited, and
KNOC Nigerian East Oil Company Limited**
Claimants

v.

Federal Republic of Nigeria
Respondent

ICSID Case No. ARB/23/19

PROCEDURAL ORDER NO. 2

Prof. Gabrielle Kaufmann-Kohler, President of the Tribunal
Ms. Loretta Malintoppi, Arbitrator
Prof. Dr. Klaus Sachs, Arbitrator

Assistant to the Tribunal
Mr. Lukas Montoya

Secretary of the Tribunal
Mr. Alex B. Kaplan

14 October 2024

I. PROCEDURAL BACKGROUND

1. On 7 November 2023, the Tribunal issued Procedural Order No. 1 (“**PO1**”).
2. On 23 August 2024, pursuant to Section 16 of PO1, the Parties submitted their Document Production Requests (“**Request(s)**”) in the form of Redfern Schedules.
3. On 13 September 2024, the Parties submitted their objections to the opposing Party’s Requests.
4. On 3 October 2024, after an extension agreed by the Parties and confirmed by the Tribunal, each Party replied to the opposing Party’s objections and provided the Tribunal with the corresponding Redfern Schedules for determination.
5. The present Order deals with the Parties’ Requests.¹ The Tribunal first determines the applicable legal framework and standards (**II**). On this basis, it then addresses certain general and recurrent objections raised against production (**III**), before deciding in the operative part on the Requests contained in the Redfern Schedules attached as Annex A (for the Claimants) and Annex B (for the Respondent) (**IV**).

II. APPLICABLE STANDARDS

6. This arbitration is governed by: (i) the Korea-Nigeria Bilateral Investment Treaty (“**BIT**” or “**Treaty**”); (ii) the ICSID Convention; (iii) the 2022 ICSID Arbitration Rules (“**Arbitration Rule(s)**”); and (iii) the procedural rules set out in PO1.
7. While the BIT contains no provisions on document production, the ICSID Convention and the Arbitration Rules accord the Parties and the Tribunal with ample discretion in this respect. Where the Parties have not agreed a rule on the taking of evidence, ICSID Convention Article 43(a) grants the Tribunal the power to order the Parties to produce documents in the following terms:

Except as the parties otherwise agree, the Tribunal may, if it deems it necessary at any stage of the proceedings, [...] call upon the parties to produce documents or other evidence[.]

8. Arbitration Rule 36(3) confirms this power as follows:

The Tribunal may call upon a party to produce documents or other evidence if it deems it necessary at any stage of the proceeding.

9. In addition, PO1 contains certain rules on document production, of which the following are relevant for the present Order:

- 1.3 The Tribunal may seek guidance from, but shall not be bound by, the 2020 IBA Rules on the Taking of Evidence in International Arbitration (“**IBA Rules**”),^[2] in particular with respect to [...] the exchange of documents (Article 3 of the IBA Rules); [and] the admissibility and assessment of evidence (Article 9 of the IBA Rules). [...]

- 16.3 Within the time limit set in [the Procedural Calendar], each Party may request from the other Party the production of documents or categories of documents

¹ All terms not specifically defined in this Order have the meaning used and commonly understood by the Parties either in their main scheduled submissions and/or in Annexes A and B attached to this Order.

² Emphasis added.

within the other Party's possession, custody or control, in the form of a Redfern Schedule [...], in both Word and .pdf format. [...]

16.4 Each request for production shall:

16.4.1 identify with specificity: (i) the type of documents or narrow category of documents whose production is sought (for example, letters, emails, minutes of meetings, memoranda, notes, reports). The Parties shall not use a generic formulation, such as "all documents" or "all records", or use such formulation and then define it to "include" specific types of documents; (ii) the author, sender, recipient, and/or custodian of the requested document or category of documents (i.e., by the name of the individual, department, entity, or organ, as the case may be); and (iii) a date for individual documents or a narrow and proportionate period for a category of documents. A Party asserting that the identification required either under (i) or (ii) is not possible must adequately substantiate such assertion;

16.4.2 describe the subject matter in sufficient detail and with necessary particulars to enable an effective search for responsive documents to be carried out;

16.4.3 specify that the documents requested are not in the possession, custody or control of the requesting Party (or explain why it would be unreasonably burdensome for the requesting Party to produce them), and that they are likely to exist and be in the possession, custody or control of the other Party; and

16.4.4 explain, with specific references to the record, why the document or category of documents sought is relevant to the case and material to its outcome and, more specifically, which fact alleged in the arbitration the document sought is intended to prove. [...]

16.6 Within the time limit set forth in [the Procedural Calendar], the other Party shall either produce the requested documents or, using the Redfern Schedule provided by the first Party, submit its reasons for its failure or refusal to produce responsive documents (objections).

16.7 Responsive documents containing privileged information are to be produced with the privileged information redacted. If the privileged information cannot be adequately protected through redaction, and a Party withholds the production of a document based on an assertion of privilege, that Party must produce to the other side a privilege log containing the following information about the document: (a) the type of document (e.g. email, letter, minutes of meeting) the title, subject line or subject-matter, as applicable; (b) the date of creation; (c) the author(s) and recipient(s); and (d) the privilege claimed and a brief explanation of the reason why the document is being withheld. To the extent that a Party asserts that the information corresponding to items (a) to (c) above is itself privileged, the Party may only withhold such information with the leave of the Tribunal, after identifying the privilege claimed and providing a brief explanation of why the information is being withheld to the other side and the Tribunal. [...]

16.8. Within the time limit set forth in [the Procedural Calendar], the requesting Party may seek an order for the production of the documents sought which the other Party does not agree to produce, in which case it shall reply to the other Party's objections in that same Redfern Schedule. At the same time, it shall submit the Word and .pdf copies of the Redfern Schedule to the Tribunal.

- 16.9. The Parties shall make no submissions in respect of the steps set out in §§16.3, 16.6, and 16.8 above other than those incorporated in the Redfern Schedules.
- 16.10. On or around the date set forth in [the Procedural Calendar], the Tribunal will, at its discretion, rule upon the production of the documents or categories of documents having regard to the requirements of §16.4, the legitimate interests of the Parties and all the relevant circumstances, including applicable privileges and if appropriate the burden of proof. If a request does not meet the requirements of §16.4, in particular if it is insufficiently specific, the Tribunal will in principle not narrow down the scope of the request on its own initiative.
- 16.11. Documents which the Tribunal orders to be produced shall be communicated directly to the requesting Party without copying the Tribunal, the Secretary, and the Assistant. Documents so communicated shall not be considered to be on record unless and until a Party subsequently files them as exhibits in accordance with §17 below. [...]
- 16.13. If a Party fails to produce documents ordered by the Tribunal, the Tribunal may draw the inferences it deems appropriate, in light of all circumstances and taking into account the reasons advanced by a Party to explain its inability to produce any given document
10. In view of Paragraph 1.3 of PO1, the Tribunal may look for guidance to the following provisions of the IBA Rules:
- i. Article 3.3
- A Request to Produce shall contain:
- (a) (i) a description of each requested Document sufficient to identify it, or
(ii) a description in sufficient detail (including subject matter) of a narrow and specific requested category of Documents that are reasonably believed to exist; in the case of Documents maintained in electronic form, the requesting Party may, or the Arbitral Tribunal may order that it shall be required to, identify specific files, search terms, individuals or other means of searching for such Documents in an efficient and economical manner;
- (b) a statement as to how the Documents requested are relevant to the case and material to its outcome; and
- (c) (i) a statement that the Documents requested are not in the possession, custody or control of the requesting Party or a statement of the reasons why it would be unreasonably burdensome for the requesting Party to produce such Documents, and
(ii) a statement of the reasons why the requesting Party assumes the Documents requested are in the possession, custody or control of another Party.
- ii. Article 3.4
- Within the time ordered by the Arbitral Tribunal, the Party to whom the Request to Produce is addressed shall produce to the other Parties and, if the Arbitral Tribunal so orders, to it, all the Documents requested in its possession, custody or control as to which it makes no objection.
- iii. Article 3.5
- If the Party to whom the Request to Produce is addressed has an objection to some or all of the Documents requested, it shall state the objection in writing to the Arbitral Tribunal and the other Parties within the time ordered by the Arbitral Tribunal. The reasons for such objection shall be any of those set forth in Articles 9.2 or 9.3, or a

failure to satisfy any of the requirements of Article 3.3. If so directed by the Arbitral Tribunal, and within the time so ordered, the requesting party may respond to the objection.

iv. Article 3.7

Either Party may, within the time ordered by the Arbitral Tribunal, request the Arbitral Tribunal to rule on the objection. The Arbitral Tribunal shall then, in timely fashion, consider the Request to Produce, the objection and any response thereto. The Arbitral Tribunal may order the Party to whom such Request is addressed to produce any requested Document in its possession, custody or control as to which the Arbitral Tribunal determines that (i) the issues that the requesting Party wishes to prove are relevant to the case and material to its outcome; (ii) none of the reasons for objection set forth in Articles 9.2 or 9.3 applies; and (iii) the requirements of Article 3.3 have been satisfied. Any such Document shall be produced to the other Parties and, if the Arbitral Tribunal so orders, to it.

v. Article 9.2

The Arbitral Tribunal shall, at the request of a Party or on its own motion, exclude from evidence or production any Document, statement, oral testimony or inspection, in whole or in part, for any of the following reasons:

- (a) lack of sufficient relevance to the case or materiality to its outcome;
- (b) legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable (see Article 9.4 below);
- (c) unreasonable burden to produce the requested evidence;
- (d) loss or destruction of the Document that has been shown with reasonable likelihood to have occurred;
- (e) grounds of commercial or technical confidentiality that the Arbitral Tribunal determines to be compelling;
- (f) grounds of special political or institutional sensitivity (including evidence that has been classified as secret by a government or a public international institution) that the Arbitral Tribunal determines to be compelling; or
- (g) considerations of procedural economy, proportionality, fairness or equality of the Parties that the Arbitral Tribunal determines to be compelling.

11. Accordingly, the Tribunal has applied the following standards when ruling on the Requests:

- i. **Specificity:** The Request must identify each document or category of documents with precision.
- ii. **Relevance:** The Request must establish the relevance of each document or category of documents to prove facts alleged in the submissions. For the purposes of this Order, the term “relevance” encompasses both relevance to the dispute and materiality to its outcome. At this stage of the proceedings, the Tribunal has only assessed the *prima facie* relevance of the documents requested, having regard to the factual allegations made so far. This *prima facie* assessment does not preclude a different assessment later in the arbitration with the benefit of a more developed record.
- iii. **Possession, custody or control:** The Request must show that it is more likely than not that the requested documents exist, that they are not within the possession, custody or control of the requesting Party, and that they are within the possession, power or control of the other Party. Otherwise, the requesting Party must explain why it would be unreasonably

burdensome for it to produce the requested documents despite these being in its possession, custody, or control.

- iv. **Balance of interests:** Where appropriate, the Tribunal has balanced the legitimate interests of the requesting Party with those of the requested Party, taking into account all relevant circumstances. This includes any legal privileges applicable to certain types of communications; the need to safeguard confidentiality when applicable; the proportionality between the convenience of revealing *prima facie* relevant facts and the burden imposed on the requested Party.
- v. **Burden of proof:** Where appropriate and to the extent the allocation of the burden of proof can be sufficiently ascertained at this stage of the proceedings, the Tribunal has taken into account whether the requesting Party bears the burden of proving the fact that the Request seeks to establish.

- 12. For the avoidance of doubt, the Tribunal has granted the Requests which it found to comply with the standards set out above. When denying a given Request, it has identified the standard(s) or the main standard which the Request did not meet.

III. GENERAL AND RECURRENT OBJECTIONS

- 13. Each Party has raised a number of general or recurrent objections to the opposing Party's Requests. While the Tribunal has considered all of the Parties' arguments to decide each Request, this section briefly addresses some issues that warrant particular attention.

A. Submissions outside the Redfern Schedule

- 14. In addition to its individual objections to the Claimants' Requests, the Respondent made a series of comments and general objections outside the body of the Claimants' Redfern Schedule.³ As the Claimants correctly stresses, this runs contrary to Paragraph 16.9 of PO1, which provides that the Parties "shall make no submissions [...] other than those incorporated in the Redfern Schedules".⁴
- 15. As the Claimants have nevertheless answered the unauthorized submissions, the Tribunal will take them into account, as well as the Claimants' answers, despite the non-compliance with PO1. In this context, it may be helpful to address here two main points discussed by the Parties.
- 16. First, each of the Claimants' Requests begins with seeking the production of "all Documents" concerning a given matter, and several of them continue with a list of "included" specific documents or categories of documents. In turn, as the Respondent rightly notes, these Requests breach Paragraph 16.4.1 of PO1, which provides that the Parties "shall not use a generic formulation, such as 'all documents' or 'all records', or use such formulation and then define it to 'include' specific types of documents".⁵
- 17. Indeed, irrespective of the definition of the term "Document", Paragraph 16.4.1 not only prohibits "generic terms and open-ended definitions", as the Claimants argue.⁶ It primarily aims at achieving cost-efficiency by avoiding that a Party must search for responsive documents across all categories

³ Annex A, Appendix 1.

⁴ PO1, ¶ 16.9.

⁵ PO1, ¶ 16.4.1.

⁶ Annex A, Claimants' Comments of 2 October 2024, ¶ 9.

listed in a given definition of “Document”, rather than focusing on the categories where the relevant information is most likely to be found, as identified by the requesting Party.

18. However, the Respondent has generally agreed to look for responsive documents notwithstanding the Claimants’ formulation of the Requests and where it has opposed a Request, it has not done so on the basis of broadness or undue burden. Therefore, the Tribunal will not deny the Requests based on their non-compliant formulation.
19. Second, the Respondent submits that, as part of the preparation of its defense in this arbitration, it has already conducted extensive document searches relating to the 2005, 2006, and 2007 Licensing Rounds, but was unable to retrieve a complete set of relevant documents.⁷ Yet, contrary to the Respondent’s suggestion, these initial searches cannot be deemed to fulfil a party’s document production obligations, which call for targeted searches. The Respondent must thus carry out new searches for documents responsive to the Claimants’ Requests against which it raised no objection or which the Tribunal has granted.

B. Likelihood of existence not established and no *prima facie* relevance and materiality of requested documents

20. [REDACTED]
21. [REDACTED]
22. [REDACTED]
23. [REDACTED]

⁷ Annex A, Appendix 1, ¶ g.

- 8 [REDACTED]
- 9 [REDACTED]
- 10 [REDACTED]
- 11 [REDACTED]
- 12 [REDACTED]
- 13 [REDACTED]
- 14 [REDACTED]

24.

[REDACTED]

25.

[REDACTED]

C. Possession, custody or control

26. The Claimants object to some of the Requests on the basis that the Respondent has failed to show that the requested documents are not already within Nigeria’s possession, custody, or control.¹⁶
27. The documents at issue broadly comprise two categories. First, documents prepared by the Claimants, such as memoranda, reports, notes, and similar. Second, documents exchanged between, or common to, the Claimants and Nigerian public officials, such as communications or minutes of meetings.
28. Regarding the first category, there is no reason to believe that the documents are more likely to be in the Respondent’s possession than in the Claimants’. Regarding the second category, the Tribunal accepts the Respondent’s representations that it conducted “extensive searches” and was unable to locate the requested documents.

¹⁵ [REDACTED]

¹⁶ Annex B, Requests 4-5, 12-14.

IV. ORDER

29. In light of the foregoing:

- i. Regarding the Claimants' Requests, the Tribunal decides the Requests in the manner set out in Annex A attached, which forms an integral part of this Order.
- ii. Regarding the Respondent's Requests, the Tribunal decides the Requests in the manner set out in Annex B attached, which forms an integral part of this Order.
- iii. Regarding both Annexes A and B:
 - a. The Parties shall produce ordered documents by **25 October 2024**.
 - b. Within the same time, in line with Paragraph 16.7 of PO1, if a Party objects against the production of a document or portions of it on the grounds of privilege, legal impediment, confidentiality, and/or institutional/political sensitivity (generally "**privilege**"), it shall:
 - (i) If the objection is limited to one or several passages of the document, produce a version of the document redacting the allegedly privileged information;
 - (ii) In all cases, identify the document in the privilege log template attached as Annex C;
 - (iii) If the opposing Party considers that the privilege claim is unfounded, it shall present reasoned objections no later than **1 November 2024**, after which the Party invoking the privilege may reply by **8 November 2024**. Both the objections and replies must be set out in the privilege log. Subsequently, the Tribunal will decide any disputed matter.
 - c. Excluding disputes regarding the assertion of privilege, if either Party considers that the opposing Party has failed to comply with its voluntary or ordered production of documents, it may raise its complaints latest by **4 November 2024**. The allegedly non-compliant Party may then answer by **11 November 2024**, after which the Tribunal will give directions if needed.

On behalf of the Tribunal,

[Signed]

Prof. Gabrielle Kaufmann-Kohler
President of the Tribunal