Commentary on Milan OPL 245 Judgment

The Judges' "alternative explanations"

Background

In 2017, Eni, Shell and other defendants were charged in Milan with international corruption relating to the acquisition of an offshore Nigerian oil bloc, known as OPL 245.[1] The companies were said to have paid $1.1 billion in bribes to government officials, including the then President of Nigeria, Goodluck Jonathan; the then oil Minister, Diezani Alison-Madueke; and the then Attorney General Mohamed Adoke. Two intermediaries – Nigerian Emeka Obi and Italian Gianluca Di Nardo – who had opted for a fast-track judgment were convicted in September 2018 and jailed for four years.[2] Their sentence has since been overturned on appeal, a decision that will not be taken to the higher Court of Cessation.

In March 2021, following a full trial, the Court of First Instance in Milan fully acquitted Eni, Shell and other defendants on the grounds that the underlying criminality was held not to have occurred. The judgment has been appealed by the Milan Prosecutor and the Federal Republic of Nigeria which is a victim and civil party to the case.

The Judges' "Alternative interpretations"

The judges in the Court of First Instance argued that there were "alternative explanations" for key elements of the bribery allegations. It is entirely proper that the judges should have subjected the evidence presented by the Prosecutor to such scrutiny. Justice demands such an exercise if the innocent are not to be convicted on the basis of evidence that fails to meet the test of establishing guilt beyond reasonable doubt.[3]

To carry legal weight, however, it is not enough that an "alternative interpretation" exists. In the words of the Milan judges, "merely alternative hypothetical reconstructions"[4] are impermissible. The Italian legal code, as interpreted by the judges, sets down that an alternative interpretation must be grounded in a "starting point" that is factually certain[5] and that any inferences that are drawn must be consistent with that starting point[6] and with other evidence.

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1 The case file is available at: https://aleph.occrp.org/datasets/3766

2 https://www.reuters.com/article/shell-eni-nigeria-trial-idINS8N1SI006

3 A case in point is the conviction of Derek Bentley in 1952 for killing a police officer during a burglary. Confronted by the police officer, Bentley is said to have instructed his companion Christopher Craig to "let him have it". Did he mean "Shoot him" (the slang meaning of "Let him have it") or did he mean the instruction literally, as in "Give him the gun"? The jury found Bentley guilty and he was hanged in 1953. He was posthumously pardoned in 1993.

4 Court of First Instance Judgment, "5.1 The reasoning based on evidence", p.210. Available at https://www.eni.com/assets/documents/documents-en/opl-245-full-decision.pdf.

5 Court of First Instance Judgment, Grounds for Decision, available at https://www.eni.com/assets/documents/documents-en/opl-245-full-decision.pdf. Para 5.1 The reasoning on evidence, p.210: ". . . it is important to emphasise first and foremost that the certainty of the starting point is the first requirement of reasoning based on indicia, given that the clue originates from a known fact. Seriousness,

The judges set out several examples where alternative explanations, in their view, cast doubt on the conclusions that the Prosecutor draws from the evidence presented to the trial.

Unfortunately, the judges fall far short of their own rules for establishing plausible alternatives. As detailed below, the alternatives they present are grounded on "starting points" that are far from certain or, worse still, the wrong "starting point"; key contradictory evidence is ignored, downplayed or dismissed without solid reasoning; and inferences are drawn that are entirely unwarranted.

Taken separately, the judges' "alternative explanations" might be excused as one off misreadings of the evidence. Taken together, they are strongly suggestive of a bias that calls into question the judges' acquittal of the defendants in the case.

Example 1: Robinson Briefings of 19 August 2010, 23 August 2010 and 29 August 2010 – "Political Contributions"

A key element of the Prosecutor's case is that the OPL 245 deal would result in illegal "political contributions" being made to President Jonathan from the monies that flowed to Malabu as a result of the OPL 245 deal.

In support of this allegation, the Prosecutor cited a Briefing note[7] sent on 23 August 2010 by Peter Robinson, a senior Shell manager, to Malcolm Brinded, the Shell executive who was negotiating directly with Eni's Claudio Descalzi. As recorded by the judges, Peter Robinson wrote: "In country view is that the President is motivated to see 245 closed quickly – driven by expectations about the proceeds that Malabu will receive and political contributions that will flow as a consequence – reinforces need for a solution quickly".[8]

The judges put forward the view that the quoted passage is open to an alternative interpretation to that claimed by the Prosecutor: namely that Robinson was merely passing on a rumour and that his reference to "political contributions" was, in any event, to the benefits that would flow to Nigeria from the OPL 245 deal.

The factual "starting point" for assessing the credibility of this "alternative explanation" must be a *plain English* reading of the words that Robinson wrote.

Such a reading renders the Judges' reinterpretation entirely implausible.

a) *Misinterpretation of "in country view"*

The judges dismiss the communication as a "rumour",[9] which is therefore unusable by itself as evidence. In fact, on a plain English reading, the use of the opening

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precision and consistency are instead the additional rules of reasoning based on indicia that link the known fact with the unknown fact that is to be proven".

6 Court of First Instance Judgment, Grounds for Decision, available at https://www.eni.com/assets/documents/documents-en/opl-245-full-decision.pdf. Para 5.1 The reasoning on evidence, p.211: "consistency imposes the unique direction of the indicia, with the consequence that the existence of just one contrary clue, which is obviously serious and precise, renders it impossible to achieve proof based on proper indicia-based reasoning".

7 Court documents from the OPL 245 Investigation, "Documenti RDS - dep. PM 22.3.2019.pdf", p.335, https://aleph.occrp.org/entities/63100307.ab2a2ce973ec870cf7a40e7bcb2e75a5c5cee324#mode=view&page=335

8 Court of First Instance Judgment, Grounds for Decision, available at https://www.eni.com/assets/documents/documents-en/opl-245-full-decision.pdf. Para 6.1.3 "The 'unlawful' agreements of August/October 2010", p.226.

Court documents from the OPL 245 Investigation, "Docc. dep. in ud. 30.9.2020.pdf", p.4, https://aleph.occrp.org/entities/63099575.388284529fb7dd51c7bb58166bf1c3a790fb6894#page=4

9 Court of First Instance Judgment, Grounds for Decision, available at https://www.eni.com/assets/documents/documents-en/opl-245-full-decision.pdf. Para 13.5 "Meetings with the President of Nigeria", p.357 (electronic paging).

phrase “in country view” clearly establishes that the information is anything but a rumour. Used adjectively, according to the Oxford English Dictionary, the phrase “in country” means “operating within a country rather than from outside of it”.[10] Since the Briefing is a Shell document, the “operating” entity is clearly Shell. The only possible interpretation is that Robinson is referring to the views of Shell’s OPL 245 team operating in Nigeria. To dismiss the information as “rumour”, the Judges would therefore need to provide evidence that the information provided by the team to senior management in The Netherlands was mere gossip - and, moreover, that the information was not taken seriously enough by Shell to act upon. This is clearly not the case.

b) *Unsubstantiated and erroneous reinterpretation of “political contributions”*

The plain English reading of the phrase “political contribution” is also unambiguous. A simple Google search reveals that the dictionary definition is “a contribution made to a politician or a political campaign or a political party”. [11] This is how the phrase is used both in common parlance and in commercial and legal texts. Indeed, legal dictionaries employ a similar definition.[12]

The evidence before the court establishes that Robinson was aware of his choice of words. In his covering email to Brinded of 23 August, he states: “Have tried to be brief - I hope not to the point of being too cryptic”.[13] To have legal weight, any sustainable reinterpretation of Robinson’s wording must therefore provide a plausible explanation as to why Robinson, a native English speaker, should have used the phrase “political contributions” if he intended it to mean something entirely different from the phrase’s commonly understood meaning.

The judges’ reinterpretation of “political contributions” references a further document of 29 August 2010, entitled “Shallow Water and 245”, which Robinson sent to a number of Shell executives (but, perhaps significantly, not Brinded).[14] In the document, Robinson repeats his previous statement word for word but with a rider: “In country view (reinforced by ENI comments above) is that the President is motivated to see 245 closed quickly - driven by expectations about the proceeds that Malabu will receive and political contributions that will flow as a consequence - reinforces need for a solution quickly” (emphasis added).

The referenced “comments by ENI” appear in a section of the document entitled “Market intelligence” and include Robinson’s summary of a telephone call between Brinded and Descalzi, the CEO of Eni. The summary includes the following statement: “CD stated that the P said he wants to see this resolved ASAP. Wants the production; (has been stalled since 1998-2000) and said that this was a “normal commercial issue

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10 https://www.lexico.com/definition/in-country

11 https://www.thefreedictionary.com/political+contribution. “Noun: 1. political contribution - a contribution made to a politician or a political campaign or a political party”.

12 A legal dictionary, citing *the usage pf “political contribution”* in a license agreement used by the Commonwealth of Pennsylvania, USA, defines the term as meaning “any payment, gift, subscription, assessment, contract, payment for services, dues, loan, forbearance, advance or deposit of money or any valuable thing, to a candidate for public office or to a political committee, including but not limited to a political action committee, made for the purpose of influencing any election . . . or for paying debts incurred by or for a candidate or committee before or after any election.” See: https://www.lawinsider.com/dictionary/political-contribution

13 Court documents from the OPL 245 Investigation, “Documenti RDS - dep. PM 22.3.2019.pdf”, p.336, https://aleph.occrp.org/entities/63100307.ab2a2ce973ec870cf7a40e7bcb2e75a5c5cee324#page=336&mode=view

14 Court documents from the OPL 245 Investigation, “Documenti RDS - dep. PM 22.3.2019.pdf”, p.339ff, https://aleph.occrp.org/entities/63100307.ab2a2ce973ec870cf7a40e7bcb2e75a5c5cee324#mode=view&page=339

between you (ENI), Malibu and Shell" (indicating he doesn't want to be involved directly)".[15] It is not disputed that CD is Descalzi and P is the President.

The judges argue that "the Eni comments help us settle even any uncertainties over the expression "political contributions" used by Peter Robinson".[16] According to the Judges, the phrase (in its 29 August iteration) should be read in the following way:

- "the Eni comments concern the fact that the Chairman wanted the block to become operational and that production be guaranteed;
- "those comments had reinforced the idea that the President expected 'political contributions' from the successful outcome of the affair;
- "then, according to a process of normal logical inference, the nature of the political contributions expected by the President was intimately tied up with the production and beneficial effects that would have ensued in employment and economic terms." [17]

The judges add that such an interpretation "was also confirmed" by testimony from "Ian Craig, one of Shell's top managers,"[18] and by Keith Ruddock, another Shell manager.[19]

Such an interpretation, however, follows neither logic nor a plain English reading of the 29 August version of Robinson's comment (the factual "starting point" of any analysis):

- First, the initial part of the sentence ("In country view (reinforced by ENI comments above) is that the President is motivated to see 245 closed quickly") is separated by a hyphen from the comment about the President's expectations. Grammatically, the phrase "reinforced by Eni's comments" applies only to this first part of the sentence, not to the part of the sentence that follows the hyphen. The use of the word "reinforce" is also critical: the dictionary definition (and common understanding) is "strengthen or support

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15 Court documents from the OPL 245 Investigation, "Docc. dep. in ud. 30.9.2020.pdf", p.3, https://aleph.occrp.org/entities/63099575.388284529fb7dd51c7bb58166bf1c3a790fb6894#page=3

Court of First Instance Judgment, Grounds for Decision, available at https://www.eni.com/assets/documents/documents-en/opl-245-full-decision.pdf. Para 6.1.3 "The 'unlawful' agreements of August/October 2010", p.227.

16 Court of First Instance Judgment, Grounds for Decision, available at https://www.eni.com/assets/documents/documents-en/opl-245-full-decision.pdf. Para 6.1.3 The "unlawful" agreements of August/October 2010, p.227.

17 Judgment, Official Translation, 6.1.3 The "unlawful" agreements of August/October 2010, p.227.

18 Craig told the Milan Court: "Peter is reporting rumours in Abuja about this. And with that we go back to the comments I made earlier about Jonathan being from the south, and therefore if he was able to facilitate a transaction, that would strengthen his re-election expectations because it would increase his acceptance among the southern population in the future. Because at that time he was facing elections, and it was the first time he was facing elections, in the next six months". *See*: Court of First Instance Judgment, Grounds for Decision, available at https://www.eni.com/assets/documents/documents-en/opl-245-full-decision.pdf. Para 6.1.3 The "unlawful" agreements of August/October 2010, p.227.

19 Keith Ruddock is quoted as stating: "In the southern states of Nigeria, which are among other things the oil-producing states, there had been a long history of violence and disorder that caused interruptions and violence in the oil production of Shell as well as the other oil companies. Vice President Jonathan, who came from the southern states, had proposed an amnesty as one of the key points of his policy and had followed through, I believe in 2009. Etete also came from the southern states, from the state of Bayelsa, and was considered a senior figure and very influential, so from the point of view of the Nigerian government it was important that Etete supported the amnesty". *See*: Court of First Instance Judgment, Grounds for Decision, available at https://www.eni.com/assets/documents/documents-en/opl-245-full-decision.pdf. Para 6.1.3 The "unlawful" agreements of August/October 2010, p.227.

(an object or substance), especially with additional material" [20](our emphasis). On a plain English reading, Robinson is therefore citing Eni's comments as additional reasons why the President wanted early closure of the deal – additional, that is, to Robinson's original cited reason, namely the expectation of 'political contributions' from Malabu. Precisely because the reasons raised by Eni are additional, they cannot logically be substituted for the original reason, as the Judges have sought to do.

- Second, the grammatical construction of Robinson's comment allows for only one interpretation of the source of the "political contributions": namely Malabu. The wording is precise and unequivocal: "driven by expectations about the proceeds that Malabu will receive and political contributions that will flow as a consequence". The phrase "as a consequence" is directly linked by "and" to "the proceeds that Malabu will receive": Malabu is thus clearly the President's expected political donor. If this were not the case, and Robinson intended to convey that the President was merely expecting 'political contributions' in the form of general benefits to flow from "the successful completion of the deal" (as claimed by the judges), there would be no need for Robinson to mention Malabu since Malabu would no longer be involved in the OPL 245 project and would not therefore be contributing in any way to the flow of beneficial employment and other benefits that the judges reference. The explanations by Craig and Ruddock fall apart for the same reason.

In sum, the judges "alternative explanation" of Robinson's use of the phrase "political contributions" fails to get beyond the proper starting point of an analysis, namely a plain English reading of the text. The only conclusion to draw is that the Prosecutor was correct in his reading: namely that the President expected Malabu to pay political contributions (that is contributions "to a politician or a political campaign or a political party") from the proceeds it received from the OPL 245 deal.

Example 2: "The OPL 245 Brief" of 25 September 2010 – the bribery formula

The judges also reinterpret a document entitled "OPL 245 Brief", [21] which the Prosecutor had argued was "the note that most directly deals with what can certainly be described as the bribe formula".[22]

Specifically, the Brief states:

> "in discussions with ENI, they have approached the Issues on finding a settlement as:
> X+SB + Y=Z
> Where:
> X is value that ENI prepared to pay to secure 50% of the Block;
> SB is Signature Bonus to be payable to FGN (by Shell);
> Y is any amount that Shell is prepared to pay to supplement the amount paid by ENI to

20 https://www.lexico.com/definition/Reinforce

21 Court documents from the OPL 245 Investigation, "prod. doc. PM ud. 27.2.2019 (OPL245 Brief).pdf", https://aleph.occrp.org/entities/63100047.92d481fcdc1b4d35600093f373ac2581968c1eb4

22 In the original Italian: "Ma la nota che più direttamente tratta quella che certamente si può definire la formula della tangente . . ." See: Court documents from the OPL 245 Investigation, "63- trascr. ud. 21.7.2020.pdf", p.37, https://aleph.occrp.org/entities/63099621.9a86c2f5d3abd50a487d8d0ad086567dfa901f21#page=37

Etete and thus "ensure" success;
Z is payment to Etete that will be acceptable to all players in Abuja".[23]

According to the Prosecution, "Z" constituted "the bribe that will be deemed acceptable to all players in Abuja".[24]

The judges dispute this. The starting point for their alternative explanation is the testimony of Ian Craig, a senior Shell manager. Craig acknowledged that "Abuja" was "our normal way of referring to the government".[25] The "players in Abuja" therefore meant "all the relevant members of the government". He then posited:

> ". . . the Government had to show that the agreement was fair, just. This obviously involved "trilateral" negotiations, so to speak, so with Shell and Eni on one side, the Federal Government on another side, and Malabu in the last corner. For many months, many years, Malabu had had exaggerated expectations of the value of the block. And the Federal Government realised that these exaggerated expectations were unrealistic. But it did not want exert pressure on Malabu so that it would accept an offer that was unfair, iniquitous. (...) It was a question of fairness more than anything else, because if the proposed price was too low as compared with the other benchmarks, it could have been said that Malabu had suffered the pressure of big international companies to accept a price that in fact was unjust, that was unfair."[26]

On this view, "Z" constitutes the price that would be fair and just to Malabu.

The judges also rely on a restatement of the Z element of the formula in a later briefing by Robinson, dated 1 October 2010; namely that Z is to be understood an "acceptable price to Malabu/FGN to sell rights to the block and enter into a full and final settlement Agreement, whereby clear title to the block is obtained shared 50:50 between ENI and Shell".[27] According to the Judges this gives an "authentic" interpretation of the meaning of the formula, which they deemed to be "perfectly understandable in commercial negotiations like those examined here".[28]

However, the judges conspicuously fail to consider other evidence that renders the above readings wholly implausible:

1. Contrary to Craig's assertion, the negotiations were not trilateral at the point

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23 Court documents from the OPL 245 Investigation, "prod. doc. PM ud. 27.2.2019 (OPL245 Brief).pdf", p.5, https://aleph.occrp.org/entities/63100047.92d481fcdc1b4d35600093f373ac2581968c1eb4#page=5

24 Court documents from the OPL 245, "63- trascr. ud. 21.7.2020.pdf", p.39, https://aleph.occrp.org/entities/63099621.9a86c2f5d3abd50a487d8d0ad086567dfa901f21#page=39. In the original Italian: "Z . . . è la tangente che sarà ritenuta accettabile per tutti i players in Abuja". See:

25 Ian Craig Testimony, Court documents from the OPL 245 Investigation, "47- Trascrizioni ud. 11.9.2019.pdf", p.55, https://aleph.occrp.org/entities/63099727.770dbcbd6ee3f17bf8f24e569189e749397479ac#page=55. Original Italian: "E Abuja è il nostro modo normale di riferirci al Governo".

26 Ian Craig Testimony, Court documents from the OPL 245 Investigation, "47- Trascrizioni ud. 11.9.2019.pdf", p.56, https://aleph.occrp.org/entities/63099727.770dbcbd6ee3f17bf8f24e569189e749397479ac#page=56

Translation per Court of First Instance Judgment, Grounds for Decision, p.228. Available at https://www.eni.com/assets/documents/documents-en/opl-245-full-decision.pdf

27 Court documents from the OPL 245 Investigation, "Documenti RDS - dep. PM 22.3.2019.pdf", p.370, https://aleph.occrp.org/entities/63100307.ab2a2ce973ec870cf7a40e7bcb2e75a5c5cee324#page=370

28 Court of First Instance Judgment, Grounds for Decision, p.228-229. Available at https://www.eni.com/assets/documents/documents-en/opl-245-full-decision.pdf

when the OPL 245 Brief was written. As the judges themselves record,[29] Eni had reported to Shell that the President of Nigeria had told them that the OPL 245 deal was a "normal commercial issue between you (ENI), Malibu and Shell" (indicating he doesn't want to be involved directly)".[30] Government officials should not therefore have been involved in negotiations on what constituted an acceptable payment to Malabu. Mohammed Adoke, the former Nigerian Attorney General, has confirmed this, stating that the role of the Government was confined to that of "facilitator" (rather than co-negotiator).[31]

2. Robinson's subsequent restatement of the formula (which makes no mention of any concerns over "fairness") similarly fails to explain why the FRN had an interest in the price, given that the President had expressly ruled that the matter should be a commercial issue between Shell, ENI and Malabu.

3. Craig's assertion that the FGN's interest in the price arose out of a wider political concern that the deal should be seen to be fair to Malabu conflicts with evidence that Attorney General Adoke subsequently sought to *impose* a price on Etete, threatening to withdraw the license if he did not accept it.[32] The judges were aware of this evidence[33] but did not take it into account. In light of Adoke's alleged actions, Craig's suggestion that the FRN "did not want to put pressure on Malabu to have it accept an offer that was unjust, unfair" is highly implausible.

4. The "fairness" assertion also conflicts with statements in the OPL 245 Brief which set out Shell's approach to the price. The Briefing expressly states: "The key issues in negotiation are: What is the minimum price to Etete that gets a deal" (our emphasis).[34] Given this position, it is highly implausible that Z should be construed (*pace* Craig) as the "fair" price acceptable to Etete/FRN.

5. Even if "fairness" was an issue for the government, the "relevant ministers" were not in a position to give a view as to a "fair and just" price. At the time, neither NNPC not DPR had been consulted – and they would not be asked their views until after the deal was restructured to avoid a direct transaction with Malabu by bringing the government in as an "obligor". Craig knew this (as did the judges) but both fail to draw the obvious conclusion: that, as of September 2010, the FGN was not canvassing views as to the fairness of the price.

6. The OPL 245 Briefing does not discuss the elements that might make for a "fair" and "just" price. Instead it focuses on the upcoming elections as a critical variable in determining what price would be acceptable to government ministers. Indeed, "Z" is expressly defined in terms of the elections (not fairness). The Briefing states: "There are 2 key variables that need to be tested: ENI walk away price (X);

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29 Court of First Instance Judgment, Grounds for Decision, available at https://www.eni.com/assets/documents/documents-en/opl-245-full-decision.pdf. Para 6.1.3 "The 'unlawful' agreements of August/October 2010", p.227.

30 Court documents from the OPL 245 Investigation, "Docc. dep. in ud. 30.9.2020.pdf", p.3, https://aleph.occrp.org/entities/63099575.388284529fb7dd51c7bb58166bf1c3a790fb6894#page=3

31 "I was only a Facilitator In Malabu Oil Deal – Adoke", Leadership, https://leadership.ng/facilitator-malabu-oil-deal-adoke/

32 Court of First Instance Judgment, Grounds for Decision, 6.2 Undue pressure by public official Adoke Bello, p.231ff. Available at https://www.eni.com/assets/documents/documents-en/opl-245-full-decision.pdf.

33 Court of First Instance Judgment, Grounds for Decision, 6.2 Undue pressure by public official Adoke Bello, p.231ff. Available at https://www.eni.com/assets/documents/documents-en/opl-245-full-decision.pdf.

34 Court documents from the OPL 245 Investigation, "prod. doc. PM ud. 27.2.2019 (OPL245 Brief).pdf", p.5, https://aleph.occrp.org/entities/63100047.92d481fcdc1b4d35600093f373ac2581968c1eb4#page=5.

Etete/ Abuja pre-election 'MASP' (Z)" (our emphasis).[35]

7. The Briefing itself offers an explanation for Z which is strongly indicative of bribery. The Briefing states that "Once offer is made it will clearly test Abuja appetite for short term cash".[36] On a plain English reading, the "offer" refers to Z ("the payment to Etete that will be acceptable to all players in Abuja"). Since the payment is to Etete, "the short term cash" for which "Abuja" has an "appetite" must logically involve the money paid to Etete: it cannot be a reference to any signature bonus that the Government might receive from the deal or to any future tax or royalty benefits, which in any event would not constitute "short term cash" (that is imminently available cash). The natural and ordinary meaning of "Abuja's appetite for short term cash" is therefore that "Abuja" (that is "relevant government ministers", pace Craig's definition) would derive a benefit in the form of short-term cash and that the cash would flow from Etete's payment. The judges give no consideration to this critical supporting evidence for the Prosecutor's interpretation of the contested formula.

Indeed, the proper starting point for any explanation of "Z" is not Craig's testimony (the judges' starting point, despite Craig's unreliability on key points, as noted above) but the internal Shell email that reports the pressure on politicians in Abuja to build up "war chests" in the run up to the elections.[37] It is this email (among others) that explains the reference to Abuja's "Appetite for short term cash" and the reasons why the forthcoming election was viewed by Shell as a key variable in "Z", the price paid to Etete that would be "acceptable to players in Abuja". Robinson's reference to "political contributions" in his Briefing of 23 August (for which the judges fail entirely to provide an alternative explanation – see above) provides the delivery mechanism. 'Z' then provides the quantum of such "political contributions".

Example 3: Adoke's payment – recompense for past services?

The judges accept that Adoke "received a benefit deriving directly from the funds flowing from the OPL245 transaction"[38] amounting to "several million dollars".[39]

However, the Tribunal posits that the payment that Adoke received "appears proportionate"[40] to a debt that Etete is said to have owed Adoke for legal services. This possibility, which the judges

35 Court documents from the OPL 245, "prod. doc. PM ud. 27.2.2019 (OPL245 Brief).pdf", p.6, https://aleph.occrp.org/entities/63100047.92d481fcdc1b4d35600093f373ac2581968c1eb4#page=6

36 Court documents from the OPL 245 Investigation, "prod. doc. PM ud. 27.2.2019 (OPL245 Brief).pdf", p.6, https://aleph.occrp.org/entities/63100047.92d481fcdc1b4d35600093f373ac2581968c1eb4#page=6

37 Subject: Abuja sitrep Email from John Copleston to Peter Robinson, Ian Craig, 29 March 2010. Court documents from the OPL 245, "RDS 0000514 - 0000516.pdf", p.2, https://aleph.occrp.org/entities/63100267.c631702736b64a3f138a0cce8eea22cce6092467#page=2

38 Court of First Instance Judgment, Grounds for Decision, 6.6.3 The Minister of Justice, Adoke Bello, p.238. Available at https://www.eni.com/assets/documents/documents-en/opl-245-full-decision.pdf.

39 Court of First Instance Judgment, Grounds for Decision, 6.6.3 The Minister of Justice, Adoke Bello, p.240. Available at https://www.eni.com/assets/documents/documents-en/opl-245-full-decision.pdf.

40 Court of First Instance Judgment, Grounds for Decision, 6.6.3 The Minister of Justice, Adoke Bello, p.240. Available at https://www.eni.com/assets/documents/documents-en/opl-245-full-decision.pdf.

maintain the Prosecutor acknowledged,[41] "would suffice to introduce a reasonable degree of doubt over the existence of the charged unlawful agreement."[42]

In reaching that view, the judges give no consideration to significant evidence that casts doubt of the credibility of such an alternative explanation and therefore the reasonableness of any doubts that it raises:

- In his log of transactions, the intermediary between Eni and Malabu, Emeke Obi, records Adoke as reportedly saying that he "used to work for Etete and Etete never paid him and owes him money" (our emphasis).[43] However, Ednan Agaev gave oral testimony that Etete had told him that he had paid Adoke "a lot" when Adoke was acting as his lawyer.[44] In light of this conflicting evidence, the judges assumption that the sum paid to Adoke from the proceeds of the OPL 245 "appears proportionate" to the monies owed by Etete for legal fees is wholly unwarranted since the amount owed (if indeed it was owed) is unknown. Indeed, if Agaev is correct, any debt may have been small since Etete had already paid Adoke "a lot".
- Any reasonable doubt about the alleged illegal purpose of the payments to Adoke must also rest on a credible explanation as to why the payments differed from those made by Etete to other lawyers. Bank statements for the various accounts into which the OPL 245 monies were paid record payments being made to six lawyers or law firms (Julius Oladele Adesina,[45] Maitre Catherine Degoul, [46]MBL Avocats FZC,[47] Edwards Wildman Palmer UK LLP,[48] Edwards

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41 Court of First Instance Judgment, Grounds for Decision, 6.6.3 The Minister of Justice, Adoke Bello, p.238. Available at https://www.eni.com/assets/documents/documents-en/opl-245-full-decision.pdf. The judges write: " . . the Public Prosecutor himself affirms Adoke Bello was Etete's creditor for having provided his services as his lawyer in the lawsuits brought in opposition to the award of the license to Shell in 2002. Therefore, the prosecution itself points out that a possible agreement between Dan Etete and Adoke Bello might have arisen from the Attorney General's desire to realise the benefit deriving from the satisfaction of outstanding professional bills, a fact that is certainly different and unrelated to the scope of the indictment."

42 Court of First Instance Judgment, Grounds for Decision, 6.6.3 The Minister of Justice, Adoke Bello, p.240. Available at https://www.eni.com/assets/documents/documents-en/opl-245-full-decision.pdf. The judges write: "The amount of the benefit, calculated in the amount of several million dollars, appears proportionate to the reason for the outstanding amount due claimed by the public official for his previous legal work on behalf of Etete, and would suffice to introduce a reasonable degree of doubt over the existence of the charged unlawful agreement".

43 Court documents from the OPL 245 Investigation, "Transaction Log", line 279, https://aleph.occrp.org/entities/18037d1cc8bffad7c1a3ef57c94c8b8bb463ba33.47176cbb620a4575270642ac628ab29d83e73990. Line 279: "in call to AG. Denies AG place an agent/ broker in the transaction. Says AG used to work for Etete and Etete never paid him and owes him money"

44 Court documents from the OPL 245 Investigation, 41- trascrizioni ud. 26.6.2019.pdf, p.67 https://aleph.occrp.org/entities/63099556.5489d53525f56223230333c646ac1fc92fa238f2#page=67. Agaev says : "Adoke ha lavorato per lui anche nel periodo precedente, e ha detto che gli ha pagato tanto già prima quando Adoke faceva le funzioni del suo legale". Translation: "Adoke also worked for him in the previous period, and [Etete] said he paid him a lot earlier when Adoke was serving as his lawyer".

45 Transfer of $5,000,000 on 8 September 2011 from Megatech Engineering account at Keystone Bank. See: Court documents from the OPL 245 Investigation, "Nigeria. Doc. bancaria trasmessa il 4.12.2015.pdf", p.80, https://aleph.occrp.org/entities/63100664.85bea7d17204bd735fbcd0c73609dfb2523a4af9#page=80

46 Written payment instructions, signed by Etete, were sent to Keystone Bank on 6 January 2012. See: Court documents from the OPL 245 Investigation, "Nigeria. Doc. bancaria trasmessa il 3.11.2015.pdf", p.460, https://aleph.occrp.org/entities/63100655.4ecef31b693ab09a75f469b9b114345a96143529#page=460.

47 Court documents from the OPL 245 Investigation, "Doc. Bancaria.pdf", p.302, https://aleph.occrp.org/entities/63100262.2bd5bf4bbbacf4a00809e8d0a66007b7f29e0159#page=302. Bank statement records telex transfer to MBL Avocats FZC of $501,343.47 on 5 December 2011 from Rocky Top Resources account at Keystone Bank.

48 Court documents from the OPL 245 Investigation, "Doc. Bancaria.pdf", p.329, https://aleph.occrp.org/entities/63100262.2bd5bf4bbbacf4a00809e8d0a66007b7f29e0159#page=329.

Angell Palmer & Dodge UK,[49] Bayo Ojo San[50]). These payments were all made transparently, through bank transfers either directly to the named lawyer or law firm, generally against written instructions from Etete to Keystone Bank. By contrast, the payments to Adoke were made in a series of cash transfers from Bureaux de Change,[51] with each payment falling just below the amount that would have triggered money-laundering enquiries. The less-than-transparent nature of these transfer raises red flags over the legitimacy of the underlying transaction. Why would Etete pay any legal fees owed to Adoke in such a clandestine way? This question is not addressed by the judges.

Adoke's own explanation of the transactions did not form part of the evidence presented to the Milan court and cannot therefore be used as part of any rebuttal of the judges' reasoning. However, it is worth noting that he denies having received any monies from the OPL 245 deal. Moreover, he explains the cash payments from the Bureaux de Change as payments from Aliyu Abubakhar (not Etete) to repay a mortgage that he was unable to service. At no point has he sought to explain the payments as monies owed to him for legal fees[52] to Etete or any other entity. Indeed, in

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Written payment instructions, signed by Etete, were sent to Keystone Bank on 13 May 2012. See: Court documents from the OPL 245 Investigation, "Nigeria. Doc. bancaria trasmessa il 4.12.2015.pdf", p.215, https://aleph.occrp.org/entities/63100664.85bea7d17204bd735fbcd0c73609dfb2523a4af9#page=215.

49 Court documents from the OPL 245 Investigation, "Doc. Bancaria.pdf", p.347, https://aleph.occrp.org/entities/63100262.2bd5bf4bbbacf4a00809e8d0a66007b7f29e0159#page=347

Written payment instructions, signed by Etete, were sent to Keystone Bank on 6 January 2012, 15 February 2012, 23 May 2012 and 23 October 2012. See: Court documents from the OPL 245 Investigation, "Nigeria. Doc. bancaria trasmessa il 4.12.2015.pdf" , https://aleph.occrp.org/entities/63100664.85bea7d17204bd735fbcd0c73609dfb2523a4af9#page=166 | https://aleph.occrp.org/entities/63100664.85bea7d17204bd735fbcd0c73609dfb2523a4af9#page=177 | https://aleph.occrp.org/entities/63100664.85bea7d17204bd735fbcd0c73609dfb2523a4af9#page=214 | https://aleph.occrp.org/entities/63100664.85bea7d17204bd735fbcd0c73609dfb2523a4af9#page=245.

50 Court documents from the OPL 245 Investigation, "Nigeria_Doc_bancaria_trasmessa_il_3_11", p.423. Bank statement records telex transfer to Bayo Ojo of $10,026,280.44 on 28 December 2011 from Rocky Top Resources account at Keystone Bank.

51 Adoke bank statements. Court documents from the OPL 245 Investigation, "76- dep. alla 7° 23.10.18 - tabelle e doc. bancari.pdf", p.125ff, https://aleph.occrp.org/entities/63099840.227bc7860f45051fd0eb4c2281550811e3eac58f#page=125

52 Mohammed Bello Adoke, *Burden of Service: Reminiscences of Nigeria's former Attorney-General*, Clink Street, London/New York, 2019, pp.97-98.

Adoke states:

- He was advised in 2011 by his security team to move to a safer house (though he does not explain why this had not been necessary earlier in his tenure as Attorney General).

- He was approached by Alhaji Aliyu Abubakar, "a builder and developer whom I had been acquainted with for a long time", with an offer to sell him a house for N500 million.

- The price was beyond what he could afford from his salary, which, at the time, was "less than N500,000 monthly, after all deductions, from a gross of roughly N990,000".

- He therefore sought and obtained a mortgage. On his account, "I approached my bankers seeking a mortgage to buy a house . . . The bank, the Chairman of whose Audit Committee I used to be, agreed that I should make an equity contribution of N200 million for a mortgage loan of N500 million".

- The mortgage was approved (raising N300 million – N500 million less Adoke's equity contribution) and the "payment made directly to the developer, not me".

- With respect to his own equity contribution, Adoke says he "hoped to raise the N200 million from the sale of a piece of land I owned in Abuja". However, "it turned out that I could not secure a buyer for that price".

- He later found himself unable to service the mortgage (accumulating about N40 million in interest, which he paid from "my savings which predated my ministerial appointments").

correspondence which we have seen, Adoke's London solicitors Gromyko Amedu state: "Our client has never acted as counsel to Chief Dan Etete and the two have never had a client/solicitor relationship". The lawyers have also stated that Adoke vigorously denies receiving any benefit from OPL 245.

Example 4: M1/M2 - It could have been Abacha (not Etete) who paid bribes?

The judges reject the Prosecutor's argument that the payments allegedly received by public officials resulted from "a progressive, linear and consistent" agreement between the defendants and the Nigerian politicians involved in the OPL 245 deal.[53]

The judges argue that it is equally plausible that the payments (if they occurred) were the result of an agreement not between the defendants and the politicians but between the politicians and Sani Abacha, the son of the former military dictator.

The starting point for the judges' alternative explanation is that Malabu's ownership was split between Etete and Abacha. This dual ownership, they argue, is "is proven first and foremost by the division into equal parts, on two different accounts at different banks, of the compensation paid by the government to the company for relinquishing the license".[54] The judges then posit that the monies that went into four companies controlled by Alhaji Abubakar Aliyu were actually intended for Abacha and that Aliyu, far from acting as the public officials' intermediary, was possibly acting "the representative of the other silent shareholder", namely Sani Abacha.[55]

This explanation, they argue, is "confirmed" by a handwritten note made by an associate of Etete, Richard Granier Deferre, in early January 2010, in which the funds that would flow from

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- Adoke's failure to keep up his mortgage payments prompted the interest of the Central Bank of Nigeria (CBN). According to Adoke, Unity Bank informed him that "the CBN was raising issues against the loan, especially the mounting interest, as I was a politically exposed person (PEP)".

- Aliyu Abubakar then came to his rescue, offering to "return the money paid to him by the bank" – that is the N300 million raised through Adoke's mortgage. Abubakar's offer of help arose because he had "got wind of CBN [Central Bank of Nigeria] interest in the property and wanted to take it back".

- Adoke asked Abubakar to pay off the mortgage.

- Adoke says he does not know for sure what happened next. He writes: "All I know . . . was that he [Abubakar] paid off the loan to the bank and retrieved the title documents. I have no inkling of how he paid or how much he paid. I have no idea if he made the payments in dollars, neither do I know if a bureau de change was involved. I merely recall that both the developer [Abubakar] and the MD of the bank confirmed to me that the loan had been repaid and that the title documents had been returned. I asked that the bank be closed" (p.98).

53 Court of First Instance Judgment, Grounds for Decision, 5.4. Alternative indicia-based reasoning, p.215. Available at https://www.eni.com/assets/documents/documents-en/opl-245-full-decision.pdf. The judges wrote: "The Court holds that the matter cannot be summarised, as suggested by the prosecution, on the basis of a progressive, linear and consistent arrangement among the oil companies Eni and Shell, Etete, the intermediaries Obi and Agaev, and the Nigerian politicians involved, i.e. President Goodluck Jonathan, the Attorney General Muhamed Adoke Bello and the Minister of Petroleum Resources, Diezani Alison-Madueke."

54 Court of First Instance Judgment, Grounds for Decision, 5.4. Alternative indicia-based reasoning, p.218. Available at https://www.eni.com/assets/documents/documents-en/opl-245-full-decision.pdf.

55 Court of First Instance Judgment, Grounds for Decision, 5.4. Alternative indicia-based reasoning, p.218. Available at https://www.eni.com/assets/documents/documents-en/opl-245-full-decision.pdf. The judges wrote: "The funds deposited on the first account at First Bank of Nigeria were destined to four companies traceable to Alhaji Abubaker Aliyu, who has been referred to as the public officials' intermediary, but who in reality might also have been the representative of the other silent shareholder, General Abacha's son, the one who at the time of the agreements had brought a civil lawsuit precisely in order to confirm his corporate investment."

any deal were envisaged as being paid into two accounts, described respectively as "M1" and "M2".[56] According to the judges, the explanation of this note is that M1 and M2 represented the two shareholders in Malabu: Etete and Abacha.

The judges opine: ". . . this reconstruction might also lead to the logical conclusion that the destination of the money for the public officials might even lead to possible corrupt arrangements with this silent shareholder of Malabu and not with Dan Etete . . ."[57]

The judges' explanation is pure speculation and as such is impermissible under the judges' own interpretation of the evidence rules, amounting as it does to mere "alternative hypothetical reconstructions":[58]

- Firstly, it ignores entirely the fact that the first attempted payments to Malabu were not divided into two tranches.[59] If the judges' explanation of the M1/M2 note is correct, why were the transfers not made into two accounts from the outset?
- Secondly, it dismisses without any explanation Granier Deferre's entirely plausible explanation that the eventual split payment was to avoid triggering banks' enquiries by the banks if a single amount of one billion was transferred at once.[60]
- Thirdly, it conflicts with the judges' "explanation" that the payment to Adoke might have been a legitimate payment for legal services rendered to Etete (see above "Example 3"). If this were the case, why was the payment made by Aliyu from funds that formed part of what the judges argue was Abacha's share of the deal?

Example 5: The Settlement Agreement of 2006 – The government had a hopeless case

56 Court of First Instance Judgment, Grounds for Decision, 5.4. Alternative indicia-based reasoning, p.218. Available at https://www.eni.com/assets/documents/documents-en/opl-245-full-decision.pdf. The judges wrote: "The existence of this silent shareholder and his participation in the division into equal parts of the compensation from sale of the OPL 245 license would also be confirmed by the handwritten notes prepared during the first days of January by the intermediary Granier Deferre. In those notes, it was claimed that the compensation that Eni would have paid to purchase a share of the license would have had to be deposited on two different accounts of Malabu: MI and M2."

57 Court of First Instance Judgment, Grounds for Decision, 5.4. Alternative indicia-based reasoning, p.219. Available at https://www.eni.com/assets/documents/documents-en/opl-245-full-decision.pdf. The judges wrote: "The epilogue of this reconstruction might also lead to the logical conclusion that the destination of the money for the public officials might even lead to possible corrupt arrangements with this silent shareholder of Malabu and not with Dan Etete, regarding whom there are, as we shall see better hereunder, even other and different political reasons that would justify the favor shown by the various Governments, and not only Jonathan's."

58 Court of First Instance Judgment, Grounds for Decision, 5.1 The reasoning on the evidence, p.210. Available at https://www.eni.com/assets/documents/documents-en/opl-245-full-decision.pdf.

59 The first attempted transfer ($1,092,040,000) was made on 31 May 2011 to an account held with BSI in Lugano by a company called Petrol Service Co Ltd. This transfer consisted of a single payment of $1,092,040,000. BSI rejected the payment for compliance reasons. The second attempted transfer on 3rd August 2011 (to Malabu's account with Banque MISR Liban) also consisted of a single payment, although of a lower amount: $801,540,000. This payment was also rejected. It was only with the third attempt (on 23 August 2011 to Malabu accounts held with First Bank Nigeria and Keystone Bank Limited) that the payment was split into two tranches ($401,540,000 and $400,000,000). These payments were successfully transferred. See: Court documents from the OPL 245 Investigation, "0. Prod. doc. 17.9.2018 (file unico).pdf", p.222, https://aleph.occrp.org/entities/63100500.1784b04c23fec77588ac6ce7fa88101775812471#page=222

60 Granier Deferre Testimony. Court documents from the OPL 245 Investigation, 28- trascrizioni ud. 6.3.2019.pdf, pp.22-25, https://aleph.occrp.org/entities/63099701.90e85e32f32f964431ac80ead95946f7e85d1e69

In 2001, the Federal Government of Nigeria revoked Malabu's license for OPL 245. Although Malabu challenged the decision in 2003, the first instance court rejected its claim in 2006.[61]

Malabu subsequently appealed the decision. However, before the case was heard, the then Attorney General Bayo Ojo signed a Settlement Agreement with Malabu in November 2006, restoring the license to Malabu.[62]

According to the Prosecutor, the Settlement Agreement was the result of a corrupt agreement between Bajo Ojo and Dan Etete.[63] Bayo Ojo is said to have agreed to discontinue the Government's case at Appeal, despite the Government winning at first instance, in exchange for a bribe.

The bribe is alleged to have been paid in 2011 following Etete's receipt of funds from the OPL 245 deal. Bajo Ojo acknowledges receiving $10 million but, as recorded in the Judgment, claims that the money was "partial settlement of his fees for the professional activity he had carried out for Malabu since 2009". [64]

The Judges reject the view that the Settlement Agreement was anything other than an entirely lawful agreement,[65] entered into because the Government deemed it likely that it would lose against Malabu on appeal.[66]

The judges view is based on two main lines of reasoning:

- First that the judgment by Justice Nyako at first instance was "inconsistent with the position upheld by the Nigerian Supreme Court in similar cases."[67] In particular, Nyako had accepted the Government's case that Malabu's challenge being out of time under the Public Officers Protection Act (POPA). However, a ruling in *FGN vs Zebra Energy Ltd*, which the judges describe as "a similar case to the one involving Malabu" (our emphasis),[68] had ruled that POPA did not apply to contract disputes.

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61 Nyako Judgment. Court documents from the OPL 245 Investigation, "prod. doc. PM - ruling judge Nyako.pdf", p.3ff, https://aleph.occrp.org/entities/63099992.21d81ad66aeb9c055053da6533f2f9ce727871df#page=3

62 Court of First Instance Judgment, Grounds for Decision, 6.7.4 Bayo Ojo, public official, p.244. Available at https://www.eni.com/assets/documents/documents-en/opl-245-full-decision.pdf.

63 Court of First Instance Judgment, Grounds for Decision, 3.4 The 2006 Settlement Agreement, 3.4.1 The Public Prosecutor's account of the events, p.77. Available at https://www.eni.com/assets/documents/documents-en/opl-245-full-decision.pdf.

64 Court of First Instance Judgment, Grounds for Decision, 3.4 The 2006 Settlement Agreement, 3.4.1 The Public Prosecutor's account of the events, p.77. Available at https://www.eni.com/assets/documents/documents-en/opl-245-full-decision.pdf.

65 Court of First Instance Judgment, Grounds for Decision, 3.4 The 2006 Settlement Agreement, 3.4.3 Conclusions, p.80. The judges wrote: "The evidence set forth demonstrates that the Settlement Agreement was lawfully adopted by the democratically elected Nigerian Government". Available at https://www.eni.com/assets/documents/documents-en/opl-245-full-decision.pdf

66 Court of First Instance Judgment, Grounds for Decision, 3.4 The 2006 Settlement Agreement, 3.4.3 Conclusions, p.81. The judges wrote: ". . . it is evident that the possibility that Malabu might win the appeal was quite tangible". Available at https://www.eni.com/assets/documents/documents-en/opl-245-full-decision.pdf

67 Court of First Instance Judgment, Grounds for Decision, 3.4 The 2006 Settlement Agreement, 3.4.3 Conclusions, p.80. Available at https://www.eni.com/assets/documents/documents-en/opl-245-full-decision.pdf

68 Court of First Instance Judgment, Grounds for Decision, 3.4 The 2006 Settlement Agreement, 3.4.3 Conclusions, p.81. Available at https://www.eni.com/assets/documents/documents-en/opl-245-full-decision.pdf

- Second, there were strong grounds for Malabu's argument that the license had been illegally revoked because the revocation failed to comply "with the substantive and procedural rules governed by Sections 23-29 of the Petroleum Act".[69]

The judges ignore evidence that undermine both these conclusions:

1. The judges' claim that the Zebra case mirrored the one involving Malabu is explicitly rejected by Shell in its pleadings to ICSID in its arbitration case against the FGN.[70] Shell stated: "In any event, it is clear that there are no legal or factual parallels between the cases bought by . . . Zebbra (sic) on the one hand and that brought by Malabu on the other".[71] Four reasons were given by Shell as to why the cases were different,[72] none of which appear to us to have been addressed by Eni's expert witness Fidelis Oditah in the evidence he presented in the Milan case.[73] The judges' failure to address these differences renders its conclusions as to the relevance of the Zebra case unsound.
2. The Supreme Court judgment in the Zebra case, which dates from 2002, had in any event been overtaken by a further judgment which significantly clarified the circumstances in which POPA properly applied to contractual disputes. It was this second judgment that Judge Nyako relied upon in her first instance ruling against Malabu. Whereas in Zebra, the Supreme Court ruled that the legal relationship between the parties to an oil license was contractual and therefore that POPA did not apply, the second judgment (NPA vs Lotus Plastics) distinguished between different types of contractual dispute, ruling that where the dispute arose from a

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69 Court of First Instance Judgment, Grounds for Decision, 3.4 The 2006 Settlement Agreement, 3.4.3 Conclusions, p.80. Available at https://www.eni.com/assets/documents/documents-en/opl-245-full-decision.pdf. The judges wrote: ". . . it should be recalled that the revocation of an oil concession must comply with the substantive and procedural rules provided for in Articles 23-29 of the Petroleum Act. Unquestionably, the revocation of July 2, 2001 did not comply with any of these legal requirements, as it consisted of a simple communication made without allowing the license holder to put forward any arguments and without providing reasons for the decision".

70 Court documents from the OPL 245 Investigation, "Claimant s Reply Memorial.pdf", p.12 https://aleph.occrp.org/entities/63100340.b46afeedfd254c683b5c9082df7b4e2011054654

71 Shell Reply Memorial, ICSID Arbitration Case No. ARB/07/18, paragraph 2.18. Court documents from the OPL 245 Investigation, "Claimant s Reply Memorial.pdf", p.12 https://aleph.occrp.org/entities/63100340.b46afeedfd254c683b5c9082df7b4e2011054654#page=12.

72 Shell Reply Memorial, ICSID Arbitration Case No. ARB/07/18, paragraph 2.18. Court documents from the OPL 245 Investigation, "Claimant s Reply Memorial.pdf", p.12 https://aleph.occrp.org/entities/63100340.b46afeedfd254c683b5c9082df7b4e2011054654#page=12. Shell states: "In any event, it is clear that there are no legal or factual parallels between the cases bought by OGN and Zebbra on the one hand and that brought by Malabu on the other because: a) OGN and Zebbra originally had their licences revoked following a panel of enquiry, whereas the FRN has stated, and itself proved, that this was not the case for Malabu: b)OGN and Zebbra brought court proceedings against the FRN, which found that the FRN was liable for the wrongful revocation of their licences, whereas no court judgment was ever rendered which held the FRN liable in Malabu's proceedings (indeed, Malabu's claim had been struck out by the Federal High Court and the purported Settlement Agreement between the FRN and Malabu expressly excludes any admission of liability or wrongdoing by the FRN); c) OGN and Zebbra both had their licences returned to them in accordance with the terms of their original deals and without any additional signature bonuses payable, ie the Nigerian courts reversed the FRN's purported revocation, whereas Malanu was purportedly re-awarded its 100% equity interest in OPL 245 on fresh terms, eg. the signature bonus payable was increased from US$20 million to US$210 million; and d) OGN and Zebbra were fully compliant with the terms of their OPL allocations when their licences were revoked, whereas Malabu was not, eg OGN and Zebbra were up to date with the payment of their respective signature bonuses."

73 Evidence of Fidelis Oditah, Court documents from the OPL 245 Investigation,"ENI.Malabu - Fidelis Oditah Expert Report Final - 21 March 2019.docx", https://aleph.occrp.org/entities/63100124.435ab2fa7b1cf7b4c88cbe03906b137fbb53cb5d

party performing their statutory functions, POPA applies. [74] The Milan judges' criticised the Nyako judgment on the basis that it failed to take account of the Zebra ruling. But this is wrong. Nyako does not challenge the contractual nature of the relationship between Malabu and the government. Instead, pace Lotus, she insists that "whether limitation of action applies to cases of breach of contract would depend on the facts of each case". [75] In the case before Justice Nyako, apart SNUD and SNEPCO, the defendants were all public officials and all were acting in the cause of their public duty.[76] This had not been challenged by Malabu.[77] Hence POPA applied.

3. Even if the Government had lost on Appeal and Malabu's challenge to the revocation of the license had been allowed, legal opinion at the time was by no means firmly of the view that Malabu would fail in its the substantive case. Evidence before the Milan court, for example, included the 2004 Final Award of the ICC Arbitration Tribunal in a 2004 case brought by Shell against Malabu. At paragraph 8.2, the ICC Tribunal rules: "It is not for the Tribunal to speculate as to the reasons for the Nigerian Government's executive action withdrawing the allocation of OPL 245 from [Malabu]. Despite [Malabu]'s protestations to the contrary, this was prima facie valid and effective under Nigerian law. Unless and until the decision was reversed as a result of judicial review proceedings in the Nigerian courts, it must be regarded as effective . . ."[78] Shell too was firmly of the view that the revocation of the license was legal. In its pleadings to the High Court in Abuja in 2007, it sought "A Declaration that the Federal Government of Nigeria having lawfully withdrawn the allocation to [Malabu] of OPL 245 . . . cannot lawfully reallocate the same OPL 245 to [Malabu]".[79]
4. In subsequent pleadings to ICSID, the Federal Republic of Nigeria (FRN) said that it withdrew from the Appeal and settled with Malabu following a letter dated 23 August 2006 from Babalakin and Co. According to the FRN, "The review presented and highlighted the futility of proceeding with the defence of the matter as the defence was certain to fail in the light of the decisions in the Zebra Case".[80] The

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74 Nyako Judgment. Court documents from the OPL 245 Investigation, "prod. doc. PM - ruling judge Nyako.pdf", p.5, https://aleph.occrp.org/entities/63099992.21d81ad66aeb9c055053da6533f2f9ce727871df#page=5

75 Nyako Judgment. Court documents from the OPL 245 Investigation, "prod. doc. PM - ruling judge Nyako.pdf", p.5, https://aleph.occrp.org/entities/63099992.21d81ad66aeb9c055053da6533f2f9ce727871df#page=5

76 Nyako Judgment. Court documents from the OPL 245 Investigation, "prod. doc. PM - ruling judge Nyako.pdf", p.5, https://aleph.occrp.org/entities/63099992.21d81ad66aeb9c055053da6533f2f9ce727871df#page=5

77 Nyako Judgment. Court documents from the OPL 245 Investigation, "prod. doc. PM - ruling judge Nyako.pdf", p.5, https://aleph.occrp.org/entities/63099992.21d81ad66aeb9c055053da6533f2f9ce727871df#page=5.

78 ICC Award, paragraph 8.2. Court documents from the OPL 245 Investigation, "ICC Award December 2004.pdf", p.27, https://aleph.occrp.org/entities/63100742.405fc8f5badbdaf6fc9d1c26144becf47c0dc935#page=27

79 ICC Award, paragraph 8.2. Court documents from the OPL 245 Investigation,"15. (2.1) Atti della Federal High Court of Nigeria in the Abuja Judicial Division Holden at Abuja del 26.1.07.pdf", pp.2-3, https://aleph.occrp.org/entities/63100498.97ea1337a03ca6a8c2ab9f1ec57a06c24989146b#page=2

80 FRN Counter Memorial, ICSID Case No. ARB/07/18, paragraph 94. Court documents from the OPL 245 Investigation, "Respondent s Counter Memorial.pdf",p.17, https://aleph.occrp.org/entities/63100349.17cdcfb0bcf0b8dfc2667077e3af15df3e19a4f3#page=17 The FRN stated: "On 23rd August, 2006 FRN received a review of the MALABU case from the Law Firm of Babalakin & Co which was handling the defence of FRN in the matter. The review presented and highlighted the futility of proceeding with the defence of the matter as the defence was certain to fail in the light of the decisions in the Zebra Case. FRN was advised to find a way of resolving the matter."

Babalakin opinion was not part of the evidence submitted to the Milan Court. However, Shell's pleadings to ICSID (which were before the court) cited Babalakin's letter of advice as stating: "Currently, the Government has a good negotiating position". [81] Shell also pointed out that Babalakin's advice "made no attempt critically to examine the existing adverse judgment of the lower court against Malabu and the Zebra Energy decision". This evidence appears to cast doubt on the FRN's bald statement that the case was futile. However, it was not mentioned in the Milan judgment.

Example 6: Bayo Ojo – No power to influence the President's decision

The Court accepted that former Attorney General Bayo Ojo was

- "The Attorney General who on November 30, 2006 signed the Resolution Agreement on the basis of which the OPL 245 license was reallocated to Malabu";[82] and
- "The beneficiary of the sum of over $ 10 million, transferred by Rocky Top Resources and coming from the price paid by Eni for OPL 245. [83]

The judges are scornful of Bayo Ojo's own explanation of the payment – namely that it was a "partial settlement of his fees for the professional activity he had carried out for Malabu since 2009"[84] – which they describe as "hardly credible".[85]

Nonetheless they reject the Prosecution case that the money paid to Bayo Ojo was a bribe for his having restored the license to Malabu in 2006. In the judges' view, "it does not seem reasonable to argue, even in the abstract, that Dan Etete might have resorted to bribing Bajo Ojo in order to get back the license." [86] Such a hypothesis, they postulate, "would

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81 SNUD Post-Hearing Brief, 17 May 2010, Court documents from the OPL 245 Investigation, "Claimant s Post-Hearing Brief.PDF", p.22, https://aleph.occrp.org/entities/63100341.53278b976f367b02c4bc84c901febd6b42490c00#page=22. SNUD stated: "The Settlement Agreement was apparently based on legal advice received from the law firm of Babalakin & Co, which referred to the weakness of FRN's "technical defences" and the decision in the Zebra Energy case. However, that case had been decided back in December 2002 and could be distinguished from the Malabu claim: the legal advice made no attempt critically to examine the existing adverse judgment of the lower court against Malabu and the Zebra Energy decision. The letter of advice states: "If this technical defence [i.e. limitation] is not upheld by the higher Courts, then NNPC and the Federal Government may be open to very substantial damage"; but concludes: "Currently, the Government has a good negotiating position. It has a lower Court victory as an advantage." It does not appear that the Respondent investigated reaching a settlement with Malabu which did not involve infringing the Claimant's [SNUD's] rights, for example, paying damages or allocating a different block to Malabu.

82 Court of First Instance Judgment, Grounds for Decision, "6.7.4 Bayo Ojo, public official", p.244. Available at https://www.eni.com/assets/documents/documents-en/opl-245-full-decision.pdf

83 Court of First Instance Judgment, Grounds for Decision, "6.7.4 Bayo Ojo, public official", p.245. Available at https://www.eni.com/assets/documents/documents-en/opl-245-full-decision.pdf

84 Court of First Instance Judgment, Grounds for Decision, "3.4 The 2006 Settlement Agreement, 3.4.1 The Public Prosecutor's account of the events", p.77. Available at https://www.eni.com/assets/documents/documents-en/opl-245-full-decision.pdf

85 Court of First Instance Judgment, Grounds for Decision, "3.4 The 2006 Settlement Agreement, 3.4.3 Conclusions", p.84. Available at https://www.eni.com/assets/documents/documents-en/opl-245-full-decision.pdf. The judges wrote: "Bajo Ojo justified the transaction by claiming that he had acted as an advisor to Malabu throughout 2009/2010 and had therefore received the money as partial compensation for his professional services. The explanation, however, is hardly credible for a number of reasons. In particular, it is odd that a legal advisory role lasting little more than a year - moreover provided to a company with no employees, no liquidity and which is substantially inactive - can be remunerated with such high amounts. Moreover, the content of the service was described vaguely, without reference to any actual activity other than a generic search (moreover unsuccessful) for potential buyers.".

86 Court of First Instance Judgment, Grounds for Decision, "3.4 The 2006 Settlement Agreement, 3.4.3 Conclusions", p.84. Available at https://www.eni.com/assets/documents/documents-en/opl-245-full-decision.pdf.

require assuming that Bajo Ojo had agreed to expose himself in person by performing an act in open contrast to the policy of his government in exchange for the mere promise of a consideration that he only received many years later". [87]

In addition, the judges argue that Bayo Ojo was not in a position to overturn President Obasanjo's 2001 decision to strip Malabu of the licence, since "according to the Nigerian Constitution, the President is the holder of all executive powers":[88] and that "a more realistic conclusion is that the signing of the Settlement Agreement was endorsed by President Obasanjo himself, who was motivated both by legal reasons and by the desire to overcome the divisions of the past and strengthen relations with the southern community in view of the upcoming elections in 2007".[89] As such, the judges rule, the Settlement Agreement was a legitimate act by the government of a sovereign state taken in the interests of "the management of its internal affairs" and cannot be challenged in court".[90]

However, the judges' reasoning rests on a fundamental misunderstanding of the powers of the Attorney General and conflicts with evidence before the court that Obasanjo's motivations were far from public spirited:

1. Far from being powerless to overturn the 2001 decision, Bayo Ojo was in fact in a strong position to do so. As Nigeria's chief legal officer, responsible for providing the government with legal advice, he simply had to advice the President that the revocation was illegal and that the government would lose the appeal lodged by Malabu. The President would have been bound to act on this advice.
2. The Risk Advisory Group (TRAG)'s due diligence report for ENI provides evidence that the 2006 settlement with Malabu was motivated primarily by a personal dispute between Obansanjo and his vice-President Atiku Abubakar. TRAG states: "Since 2003, it has been widely reported that Obansanjo and Abubakar have been involved in a bitter feud. This is said to have worsened when Abubakar sponsored a campaign to prevent Obasanjo from changing the constitution in order to remain in office after the conclusion of his second term in office in May 2007. As a result of this, sources close to the president have informed us that Obasanjo 'is using everything to try and block efforts by Abubakar to be the next president. It is a vendetta fought out on many different levels, but Etete and OPL 245 are a part of the equation.'"[91] This evidence clearly undermines the judges' claim that that Obasanjo was acting in the public interest since a "vendetta" does not constitute a public interest justification. One might add, that seeking allies for an upcoming

87 Court of First Instance Judgment, Grounds for Decision, "3.4 The 2006 Settlement Agreement, 3.4.3 Conclusions", p.84. Available at https://www.eni.com/assets/documents/documents-en/opl-245-full-decision.pdf.

88 Court of First Instance Judgment, Grounds for Decision, "3.4 The 2006 Settlement Agreement, 3.4.3 Conclusions", p.84. Available at https://www.eni.com/assets/documents/documents-en/opl-245-full-decision.pdf. The judges wrote: ". . it seems difficult to speculate that President Obasanjo's decision might have been overridden in such an obvious and blatant manner by an independent opposite decision of the Attorney General. On this point, it is also worth remembering that, according to the Nigerian Constitution, the President is the holder of all executive powers and that the various ministers act as delegates of the highest body."

89 Court of First Instance Judgment, Grounds for Decision, "3.4 The 2006 Settlement Agreement, 3.4.3 Conclusions", p.84. Available at https://www.eni.com/assets/documents/documents-en/opl-245-full-decision.pdf.

90 Court of First Instance Judgment, Grounds for Decision, "3.4 The 2006 Settlement Agreement, 3.4.3 Conclusions", p.85. Available at https://www.eni.com/assets/documents/documents-en/opl-245-full-decision.pdf.

91 The Risk Advisory Group, Final Report, p.11. Court documents from the OPL 245 Investigation, "ENIA07030 final report.pdf", https://aleph.occrp.org/entities/63100221.cac0bd77151e6cc9d9ffded7631d43c2b5007817#page=11

election Obasanjo (the judges' explanation for Obansanjo's political motivations) also arguably fails any legitimate public interest test.

Example 7 - 1998 Award was legal because no one has challenged it

The judges do not dispute that the 1998 award of the OPL 245 licence to Malabu was tainted by a conflict of interest: "The issue of the lawfulness of the original award to Malabu arises because of the conflict of interest in which Dan Etete found himself at the time the license was issued. Indeed, in 1998 Etete was both Petroleum Minister and the hidden owner of Malabu, which clearly meant he was at the same time the grantor and recipient of the mining license."[92]

The Prosecutor argued that the 1998 award therefore breached the Code of Conduct for Public Officials contained in the 5th Schedule to the Nigerian Constitution of 1979, rendering the negotiations conducted by the oil companies and the subsequent Resolution Agreement illegal. [93]

The judges rejected that view, ruling that the award was legal because neither party to the original license has sought to void it on the grounds that it was corruptly awarded. In the words of Eni's expert witness Oditah, who is cited at length by the judges: "Since the beneficiary has not raised an issue of conflict of interest, this constitutes confirmation that such conflict of interest does not exist." [94]

In reaching their view, the judges also relied on Oditah's argument that the Nigerian Government had eight opportunities to void the 1998 award but instead confirmed it.[95]

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92 Court of First Instance Judgment, Grounds for Decision, "3.3 The lawfulness of the award of OPL 245 to Malabu and the conflict of interest, 3.3.1 The arguments of the parties", p.74. Available at https://www.eni.com/assets/documents/documents-en/opl-245-full-decision.pdf.

93 Court of First Instance Judgment, Grounds for Decision, "3.3 The lawfulness of the award of OPL 245 to Malabu and the conflict of interest, 3.3.1 The arguments of the parties", p.74. Available at https://www.eni.com/assets/documents/documents-en/opl-245-full-decision.pdf.

94 Court of First Instance Judgment, Grounds for Decision, "3.3 The lawfulness of the award of OPL 245 to Malabu and the conflict of interest, 3.3.1 The arguments of the parties", p.75. Available at https://www.eni.com/assets/documents/documents-en/opl-245-full-decision.pdf.

95 Court of First Instance Judgment, Grounds for Decision, "3.3 The lawfulness of the award of OPL 245 to Malabu and the conflict of interest, 3.3.1 The arguments of the parties", p.75. Available at https://www.eni.com/assets/documents/documents-en/opl-245-full-decision.pdf. "Lastly, the expert witnesses have pointed out that the Government had, on several occasions, issued acts confirming the first award to Malabu, thus acting in ways incompatible with any intention to claim a conflict of interest. In this light, expert witness Oditah said, "in my opinion, the Government had eight different opportunities to cancel the award to Malabu, but instead actually confirmed it. The first opportunity was on May 25, 1999 during the Abdulsalami government. On that day, Malabu made an advance payment of the $ 2 million signature bonus, for which the Government issued a receipt. On February 2, 2000, Malabu wrote to the Government reporting that it had conducted two-dimensional seismic investigations, and asked the Government for confirmation that it could go ahead with the activities, hence confirmation of the validity of the award. On March 9, 2000, the Government responded to Malabu by confirming the validity of the license and authorizing the company to continue its oil activities. The third occasion during which the Government could have cancelled the award was on March 30, 2001, when Malabu sold 40 percent of its stake to Shell. The fourth occasion was on April 6, 2001, when Shell paid the Government the balance of the signature bonus, in the amount of $ 17.96 million, which the Government accepted. The fifth occasion was on April 9, 2001, when the Government asked Malabu to start oil operations on the block. The sixth was on April 15 of that year, when the Government issued the license for OPL 245. They confirmed that May 15 was the date of the award of the license to Malabu. And the seventh occasion

The judges' ruling not only conflicts with testimony that Oditah himself made to the court but also with evidence that pointed to government officials having a corrupt interest in the license from 1998 to 2015, when the Buhari administration came to power. The explanation for the 1998 award not being voided lies more plausibly in that continuing corrupt interest than in the absence (pace Oditah) of a conflict of interest. Moreover, the Court's approach to the conflict of interest is at odds with Italy's obligations under the legally binding 2003 "Recommendation of the Council on OECD Guidelines for Managing Conflict of Interest in the Public Service". [96]

1. The "eight opportunities" cited by Oditah for voiding the license were opportunities to revoke the license from Malabu but not to void the original award on conflict of interest grounds. As Oditah himself points out, Nigerian law only provides for two grounds on which a licence may be revoked, neither of which engage conflicts of interest.[97] The eight opportunities are therefore red herrings and the judges erred in allowing themselves to be distracted by them.
2. Procedurally, the route for challenging the conflict of interest underlying the 1998 award – and therefore voiding it (as opposed to revoking and reallocating the license) – was through a complaint against Etete to the Code of Conduct Bureau.[98] However to sustain a case that Etete had a conflict of interest, the Government would have had to prove that he was an owner of Malabu. Although Etete has admitted to using the surname "Amafegha",[99] which was the name in which his hidden interest in Malabu are alleged to be registered, he consistently has denied being a shareholder.[100] It was only in 2013, thus long after the "eight opportunities" arose, that the High Court in London ruled

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was on May 24, when the Government issued the deeds, the documents related to the license, to Malabu. The last occasion was in the period between 2003 and 2006, during the dispute that Malabu initiated after its license was revoked. The purpose of the suit brought by Malabu was to obtain a declaration that the revocation was void. At the time, the Government could have blamed Malabu for not meeting the terms of the contract, on account of the conflict of interest. But it did nothing of the like".

96 Recommendation of the Council on OECD Guidelines for Managing Conflict of Interest in the Public Service, https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0316

97 Court of First Instance Judgment, Grounds for Decision, "3.3 The lawfulness of the award of OPL 245 to Malabu and the conflict of interest, 3.4.2 The defenses' account of the events", p.78. Available at https://www.eni.com/assets/documents/documents-en/opl-245-full-decision.pdf. The judges record: "Oditah's expert witness report points out that under the First Schedule of the Petroleum Act of 1969 a license can be revoked only in two cases:- under paragraph 23, it can be revoked in the event of a change in the nationality of the licensee/OPL holder or of the person or entity directly or indirectly controlling such holder;- paragraph 24 indicates certain violations, such as failure to conduct operations continuously and in a businesslike manner, failure to comply with any provision of the Petroleum Act or the special conditions of the OPL license granted, or in the event of failure to pay due rent or royalties.".

98 Court of First Instance Judgment, Grounds for Decision, "3.3 The lawfulness of the award of OPL 245 to Malabu and the conflict of interest, 3.3.1 The arguments of the parties", p.75. Available at https://www.eni.com/assets/documents/documents-en/opl-245-full-decision.pdf. The judges record: "the expert witness reports pointed out that Paragraphs 12 and 15(l)(d) of the Code of Conduct - i.e., the regulatory source governing the regime of the act adopted by a public official who acted in conflict of interest - set out a specific procedure to identify this type of unlawful act. Specifically, a complaint must be filed with the Code of Conduct Bureau and the public official must be tried before the Code of Conduct Tribunal. Under Nigerian law, this Tribunal is the only constitutionally empowered authority to rule on violations of the Code of Conduct."

99 Court documents from the OPL 245 Investigation, "EVP Malabu 101212.pdf",p.15, https://aleph.occrp.org/entities/63100939.5dbdbf909826e7f53f6b8fe8c6658e8576475d00#page=15

100 See for example, Etete's testimony to the High Court in London in EVP vs Malabu, 2012. Available at: Court documents from the OPL 245 Investigation, "EVP Malabu 101212.pdf", p.25ff, https://aleph.occrp.org/entities/63100939.5dbdbf909826e7f53f6b8fe8c6658e8576475d00#page=25

as a fact that he had "a substantial beneficial interest in Malabu".[101]

3. The Milan judges failed entirely to take account of evidence that government officials had an evolving corrupt interest in maintaining the 1998 award. Thus:

    - Eni's own due diligence advisors The Risk Advisory Group record allegations that Obansanjo's Vice President Atiku Abubakar had inserted himself into Malabu through business associate Otunba Fasawe,[102] an allegation that was also repeated in the report that Eni commissioned from Pepper Hamilton.[103]

    - Justice Gloster in her judgment in Malabu vs EVP (which was entered as evidence in Milan) held that Pecos Energy Limited, which was registered as a Malabu shareholder in 2000, "acted as some sort of nominee for President Obasanjo."[104]

    Even if the TRAG evidence were to be ruled out as hearsay, that of Judge Gloster constitutes a Court ruling. An explanation for the Government's failure to void the 1998 award which does not take account of this evidence is simply not credible. Indeed, the continuing corrupt interest of politicians in the OPL 245 license stands as the most plausible explanation for any failure to void the

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101 Court documents from the OPL 245 Investigation, "35) Judgment rendered by Lady Justica Gloster Mar 26 2014.pdf",p.20, https://aleph.occrp.org/entities/63101069.203119436d883f2403e95cbb24c50f00a09d77c0#page=20

102 Email from Elizabeth Stubbs of Risk Advisory to Simona Righini (Eni), 'Update', 22 Feb 2007". Court documents from the OPL 245 Investigation, "Documenti 17.4.2019.pdf",p.5, https://aleph.occrp.org/entities/63100222.26da234ec9896286a5fb1b0cc3a7fc92534a0141#page=5. Stubbs wrote: "On 22 December 2003, Shell paid the $210 million signature bonus to the Federal Government. Consequently, Malabu filed suit in the Federal High Court challenging the award. According to our sources in Nigeria, a judgment on the Federal High court case was made but appealed. . . . Etete has also launched a series of allegations in the press accusing Vice President Abubakar and Otunba Fasawe (a personal friend of President Obasanjo described in the press as a 'roaming ambassador' for the President) of forcefully taking over OPL 245 against procedures and engaging in corruption. Initially Etete claimed that Obasanjo had also been involved in the corruption concerning the award of OPL 245 to Shell, but he would appear to have since changed his opinion, exonerating Obasanjo, saying that Abubakar had acted on behalf of the President without his knowledge, and calling for Abubakar's impeachment. Etete's change of mind concerning Obasanjo's innocence may have been influenced by the recent and very public feud between Obansanjo and his vice president."

103 Pepper Hamilton Report. Available at: Court documents from the OPL 245 Investigation, "42. Report indipendente commissionato da Eni a Pepper Hamilton LLP.pdf", https://aleph.occrp.org/entities/63100507.2f43655bcabeb42bd412829a5e9ae8b219d5e320. Pepper Hamilton wrote (p.25): "The Corporate Affairs Commission file contains a "Special Resolution" form re-allocating shares to Mr. Seidougha Munamuna (10,000,000 / 50%) and Pecos Energy Limited (10,000,000 / 50%) dated March 6, 2000. Corporate records for Pecos Energy Limited showed that in August 2000, 5,000,000 shares of the company were held by Otunba O. Fasawe. Mr. Fasawe has been listed as a director of Malabu on certain documents; he has also been described as a business associate of Mr. Atiku Abubakar, President Obasanjo's Vice President."

Pepper Hamilton also record (p.27): "In [a] U.S. lawsuit, Malabu alleged that Shell had conspired with President Obasanjo and his Vice President, Atiku Abubakar, to take OPL 245 from Malabu. According to Malabu, once seismic studies had revealed OPL 245's vast reserves, Shell began to conspire with the FGN to steal the Block from Malabu by offering to pay a larger signature bonus and bribing President Obasanjo and other FGN officials. Malabu claimed that Shell coordinated the scheme through Mr. Gabriele Volpi, a business partner of Vice President Abubakar and owner of Intels Nigeria, which operates several large ports in that country . . . The New York lawsuit . . . was unsuccessful and the judge dismissed the case on March 15, 2004. In contrast, the Nigerian House of Representatives agreed with Malabu, and its Committee on Petroleum Resources ordered Shell to pay Malabu $550 million and recommended that the FGN return OPL 245 to Malabu. The House Committee concluded that the revocation violated Nigerian law and echoed Malabu's accusations from the New York case that Shell may have played an improper role and was given the Block under 'very murky circumstances'."

104 Judgment of Lady Gloster, EVP vs Malabu, High Court London, p.21. Available at: Available at: Court documents from the OPL 245 Investigation, "EVP Malabu 101212.pdf", https://aleph.occrp.org/entities/63101069.203119436d883f2403e95cbb24c50f00a09d77c0#page=21

1998 award. Put starkly, the "wrong doers" were in control – and consequently no action was taken.

Strong supporting evidence for this view – which the Judges again failed to consider – is the fact that the Buhari administration, which had no corrupt interest in the OPL 245 license, took action on coming to office to challenge the legality of the 1998 award and the poisoned Resolution Agreements that flowed from it.

4. The Judges' approach to Etete's acknowledged conflict of interest is incompatible with Italy's legally binding obligations under the OECD's 2003 "Recommendation of the Council on OECD Guidelines for Managing Conflict of Interest in the Public Service".[105] The Recommendation binds the parties to take account of its accompanying Guidelines. These clearly state that "Where a private interest has in fact compromised the proper performance of a public official's duties, that specific situation is better regarded as an instance of misconduct or 'abuse of office', or even an instance of corruption, rather than as a 'conflict of interest'" (our emphasis). The judges therefore erred in treating the 1998 award as a "conflict of interest" that can only be voided by the contracting parties. Taking account of the 2003 OECD Guidelines, Etete's award should properly be viewed instead as an act of corruption: it was therefore illegal regardless of whether or not the contracting parties had sought to void it.

   The judges were therefore also incorrect to argue that the defendants ENI and Shell were free to enter into the Resolution Agreements because the original 1998 award had not been voided on conflict of interest grounds. The 1998 award was corrupt and the companies, as acknowledged by the judges, have a duty "not to commit or to contribute to the committal of unlawful acts".[106]

Example 8: Favourable terms awarded to Shell and Eni were a legitimate exercise of ministerial discretion not the product of corruption

It is undisputed that Shell and Eni obtained the OPL 245 license on terms that deviated in important respects from Nigerian Government policy on tax, indigenisation and tendering.

The Prosecutor argued that such favourable terms were evidence that ministerial discretion had been distorted through corruption.

The judges rejected that view, arguing that Ministerial discretion had been legitimately exercised.[107] [108]

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105 Recommendation of the Council on OECD Guidelines for Managing Conflict of Interest in the Public Service, https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0316

106 Court of First Instance Judgment, "3.5 The legitimacy of the negotiations", p.86. Available at https://www.eni.com/assets/documents/documents-en/opl-245-full-decision.pdf. The judges write: "Eni (like any other economic operator) is obliged not to commit or be complicit in unlawful acts"

107 Court of First Instance Judgment, " 7.4.3 Favorable tax treatment ", p.259. Available at https://www.eni.com/assets/documents/documents-en/opl-245-full-decision.pdf. The judges wrote: ". . . the fact that the OPL 245 license was awarded to Eni as a "sole risk award" supposedly represents another indicator of distorted use of discretionary power

The judges reasoning does not stand scrutiny:

1. **Failure to cite public interest justification or give supporting reasons for exercise of discretion in award of license**

   There is no doubt that Ministers in the FRN have powers of discretion. It is trite law, however, that such ministerial discretion cannot be based on mere whim. Its exercise must be justified. Critically, as Eni's own expert witness Felicia Segun testified, the Petroleum Act requires that discretion must be exercised in the public interest.[109]

   In her letter of 11 May 2011 awarding the OPL 245 license to Shell and Eni, the then oil minister, Diezani Alison Madueke ["Madueke"], stipulated that Articles 6,7,9 and 11 of the Resolution Agreements should apply to the license.[110] These article cover the application of the fiscal terms as provided in the Deep Offshore and Inland Basin Production Sharing Contracts Act Cap D3, tax oil being allocated to NAE and SNEPCO, the treatment of all sums reimbursed to SNUD by SNEPCO, conditions relating to the exercise of back-in rights.

   Although reference is made by Madueke to the Resolution Agreements, whose preamble refers to the desire of the FRN and SNUD to settle their differences, no explicit public interest justification is cited, nor any reasons given, for agreeing to terms in the license that depart from applicable Nigerian petroleum laws, regulations, policies. Critically, there is no consideration of whether the "settling of differences" could have been achieved without such departures from applicable laws.

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intended to favor private parties, explainable only through the lens of illegal arrangement but, once again, this line of reasoning fails to account for the underlying reality, which saw the discretionary choices of the government being limited by the fact that the companies wanted to acquire a license at the same favorable conditions by which it had been awarded to Malabu."

108 Court of First Instance Judgment, " 7.4.3 Favorable tax treatment ", p.256. Available at https://www.eni.com/assets/documents/documents-en/opl-245-full-decision.pdf. The judges wrote: ". . . we have to note that the Government used its discretionary power for awarding the license both in 2006 and in 2010, when it confirmed the discretionary award made by other Ministers in 2006, upon authorization by the previous President Obasanjo, who was never suspected by anyone of participating in illegal pacts. Therefore, yet again, use of the same power in 2011 is not in itself indicative of the existence of a corrupt arrangement with the oil companies. Regardless, the prosecution's reasoning is unfounded in fact because it proceeds on the basis of abstract and theoretical considerations that do not take into account the real situation in 2011, which led people to believe that discretionary awards were the most efficient system, and surely less onerous for the Government, to settle the disputes encumbering title of the license."

109 Segun Testimony. Available at: Court documents from the OPL 245 Investigation, Felicia Kemi Segun - Expert Report - en 21.03.19.pdf, p.28, footnotes 23 and 24 https://aleph.occrp.org/entities/63100136.5ab35cde09b39bb47e64dc52474ee4dd848c386a#page=28. Segun writes: "Paragraph 34 of the 1st Schedule to the Petroleum Act, provides that the Minister may impose on a licence or a lease special terms and conditions not inconsistent with the Petroleum Act if he considers it to be in the public interest" "Paragraph 35 of the 1st Schedule to the Petroleum Act provides in relation to the FGN's right to participate in any licence or lease as follows "If he considers it to be in the public interest, the Minister may impose on a licence or lease to which this Schedule applies special terms and conditions not inconsistent with this Act including (without prejudice to the generality of the foregoing) terms and conditions as to— (a) participation by the FGN in the venture to which the licence or lease relates, on terms to be negotiated between the Minister and the applicant for the licence or lease; and (b) special provisions applying to any natural gas discovered, which provisions shall include— (i) the right of the FGN to take natural gas produced with crude oil by the licence / lease holder or lessee free of cost at the flare or at an agreed cost and without payment of royalty; (ii) the obligation of the licence / lease holder or lessee to obtain the approval of the FGN as to the price at which natural gas produced by the licence / lease holder or lessee (and not taken by the FGN) is sold; and (iii) a requirement for the payment by the licence / lease holder or lessee of royalty on natural gas produced and sold."

110 Court documents from the OPL 245 Investigation, "79. (5.9.27) Lettera dell'11.5.11 da Ministry of Petroleum Resources a SNEPCO.pdf", https://aleph.occrp.org/entities/63100520.b09023e848c156ceaa9e99edd80d22671c5dbc31.

In failing to justify the public interest in agreeing to any deviations from applicable petroleum law, regulations and policy, Madueke's award of the license was thus arguably illegal.

The judges' own speculations as to public interest justifications cannot remedy this failure.

2. The Ministerial discretion of the Petroleum Minister and the Attorney General were fettered by Presidential negotiating mandate

The judges argue that "from the legal point of view, the license was not awarded with the Resolution Agreement, but the latter was used as the negotiating tool whereby the Government assured itself approval by Snud and Malabu to reassignment in favor of Snepco and NAE".[111]

However, Madueke's letter awarding the license starts with an umbrella clause that arguably conditions the license on the terms the Resolution Agreements.[112] Indeed, the interpretation of key provisions in the license is only possible if the Resolution Agreements are read as integral to the license. The Agreements cannot therefore be treated as mere "negotiating tools" that are separate from the license: they are specifically integrated into the license through the first paragraph in the award letter.

The fettering of any ministerial discretion in the negotiation of the Agreements should therefore also have been considered by the judges.

Here the evidence is clear that both the Minister of Petroleum and the Attorney General were constrained in the exercise of their discretion when negotiating the Resolution Agreements and the terms of the OPL 245 licence. It is also clear that both Ministers exceeded their negotiation mandate and abrogated the Presidential fettering of their discretion.

The negotiating mandate was set out in a letter of 28 May 2010[113] from the President to the Minister of Petroleum and the Attorney General ordering the enforcement of the 2006 Settlement Agreement with Malabu. The President's letter was sent in response to a letter of 25 May 2010 from Adoke.[114]

Taken together, the letters establish clear parameters to the Ministers' mandate and to the exercise of their discretion. Specifically, the President approved their joint action to:

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111 Court of First Instance Judgment, " 7.1 Introduction: the breach of official duties by the agreements of April 29, 2011", p.249. Available at https://www.eni.com/assets/documents/documents-en/opl-245-full-decision.pdf., p.249

112 Court documents from the OPL 245 Investigation, "79. (5.9.27) Lettera dell'11.5.11 da Ministry of Petroleum Resources a SNEPCO.pdf", https://aleph.occrp.org/entities/63100520.b09023e848c156ceaa9e99edd80d22671c5dbc31. The letter starts: "With reference to the Resolution Agreement dated 29 April 2011 between [FGN, SNUD. NNP, NAE and SNEPCO] in respect of OPL 245; and pursuant to the powers vested in the Honourable Minister of Petroleum . . . approval is hereby granted for the award of OPL 245 to SNEPCO and NAE"

113 Court documents from the OPL 245 Investigation, "21- lettera 28.5.2010, in prod. doc. Pm ud. 23.1.2019, p. 13.pdf", https://aleph.occrp.org/entities/63099839.4c0735f2e7bc6558caae1ec70fb5395c48471db3

114 Court documents from the OPL 245 Investigation, "20- lettera 25.5.2010, in prod. doc. Pm ud. 23.1.2019, pp. 5-12.pdf", https://aleph.occrp.org/entities/63099850.450dfc2d7baac41c43dd308ba4a67de29158c006

a) implement and give full effect to the terms of Settlement Agreement dated 30 November 2006 between Malabu Oil and Gas Limited and the Federal Government of Nigeria as they remain valid and subsisting.

b) call upon Malabu Oil and Gas Limited to pay a signature bonus of $210 million US dollars on OPL 245 less the sum of $2,040,000 million US dollars already paid by it in respect of the block.

c) enable or allow Malabu to exercise all rights incidental to and consequent upon the return of Oil Block OPL 245 to it as Concessionaire/Operator/Contractors of the block and be free to assign or deal in any way in whole or in part with any third party as technical partners or advisers of co-contractors in respect of any of the rights to OPL 245.

e) (sic) ensure that Malabu Oil and Gas Limited and any of its co-investors or technical partners, comply with all the provisions of the Petroleum Act, other applicable legislation/regulations as it affects OPL 245.

f) ensure that all agencies and departments of government, SNUD or any company acting for it, refrains from any interference with Malabu's ownership and operations of OPL 245.

The 28 May letter gave no mandate to either Minister to negotiate a settlement between the FRN, Malabu, Shell and Eni (the purpose of the Resolution Agreements as summarised by the Attorney General in a subsequent letter of 4 April 2011 to the President) [115] and the Resolution Agreements were thus arguably negotiated illegally.

Moreover, the Presidential authority specifically required that "all the provisions of the Petroleum Act, other applicable legislation/regulations as it affects OPL 245" should be complied with. The Minister of Petroleum was thus arguably not permitted to waive any of those regulations or applicable laws.

No consideration is given to this mandate or its implications for ministerial discretion by the judges, who instead rely on the exercise of ministerial discretion in the abstract.

c) Neither the Minister of Petroleum nor the Attorney General had a mandate to sign the final Resolution Agreements.

The Attorney General sought approval from the President for a "Reallocation Agreement" through a letter dated 4 April 2011.[116] The draft text of the proposed "Reallocation Agreement" was appended to the letter.

115 Court documents from the OPL 245 Investigation, "11. Letter dated 4 April 2011 with reference HAGF SH 2011 VOL1 25.pdf", https://aleph.occrp.org/entities/63100902.5491d0773b7c036bdda2a15c5b4cad1ac3100dca. The letter states: "To finally resolve all the contending issues and the claims against the FRN, all the parties have agreed to execute this Reallocation Agreement to re-allocate Block 245 to SNUD [sic]."

116 Court documents from the OPL 245 Investigation, "11. Letter dated 4 April 2011 with reference HAGF SH 2011 VOL1 25.pdf", https://aleph.occrp.org/entities/63100902.5491d0773b7c036bdda2a15c5b4cad1ac3100dca

The President approved the draft "Reallocation Agreement" on 5 April 2011.[117]

We have compared a copy of the draft Agreement (which was made public through other proceedings)[118] with the final version. The two differ significantly:

- The draft Reallocation Agreement that the President approved differs substantially from the final Resolution Agreement that was signed. For example, the draft Reallocation Agreement states (paragraph 11) that there will be no back in rights for the FGN.
- The draft Reallocation Agreement leaves blank the amount of money that NAE and SNEPCO would pay for the block (para 3.1).
- The final Resolution Agreements (as opposed to the draft Reallocation Agreement) included additional agreements, including a "Block 245 Malabu Resolution Agreement". The President was not informed of this agreement nor is there any evidence that he ever approved it.

In effect, the President approved a version of the agreement that was not the final version which differed substantially. The President's approval therefore arguably did not give the Attorney General or the Petroleum Minister the right to sign the final Resolution Agreements since no updated approval was obtained.

The Attorney General's covering letter to the President[119] was also highly misleading:

- It wrongly states that the Reallocation Agreement reallocates the block to SNUD.
- There was no mention of the substantial objections raised by the Department of Petroleum Resources on 1 April 2011 to the proposed agreements.[120]
- There was no mention that negotiations on the proposed agreements were continuing.[121]

The President was thus arguably not properly appraised of what he was being asked to approve, rendering his approval unsound.

d) **The judges misinterpret/misrepresent the 2018 judgment of Justice Binta Nyako**

No consideration was given by the judges to the procedural flaws in the negotiation and approval of the Resolution Agreements discussed above.

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117 Court documents from the OPL 245 Investigation, "12. Letter dated 5 April 2011 with reference number PRES 97 HAGI 134 88 TO 33 MPR 178.pdf", https://aleph.occrp.org/entities/63100908.2a5b30183f12a44fe56d5775afa005507b7cb88d

118 Mohammed Bello Adoke vs Attorey General of the Federation, Federal High Court of Nigeria, Abuja, 2018.

119 Court documents from the OPL 245 Investigation, "11. Letter dated 4 April 2011 with reference HAGF SH 2011 VOL1 25.pdf", https://aleph.occrp.org/entities/63100902.5491d0773b7c036bdda2a15c5b4cad1ac3100dca

120 Court documents from the OPL 245 Investigation, "52.2- DPR ENG.pdf", https://aleph.occrp.org/entities/63099765.b18b03d55d3e443e0b8922eb834d5fd5903efb4c

121 See, for example, minutes of negotiations post 4 April 2011. Available at: Court documents from the OPL 245 Investigation, "46-Minutes of meeting OPL 245 3.2.2011-14.4.2011, allegate ad email Armanna 20.4.2011.pdf", https://aleph.occrp.org/entities/63099845.1aa9dff861275a1a2e2eb4e0db5d3fa8c6c3be23

Instead, the judges rely on a judgment by Justice Binta Nyako, ruling on the application for declaratory relief brought by Adoke Bello.[122] According to the judges, Justice Nyako "confirmed that the settlement agreements complied with Nigerian law".[123]

In fact, Justice Nyako's ruling was restricted to whether or not Adoke could be held personally liable for properly carrying out lawful directives of the President. She did not examine the legality of the Agreements, nor was this ever part of the requested declaratory relief that was sought. She simply examined whether it was a) lawful for the President to delegate authority to Adoke as Attorney to negotiate and execute the Agreements; and b) whether Adoke could be held liable for implementing those instructions. Having concluded that the President had powers to delegate authority to the Attorney General, she ruled that Adoke could not "be held personally liable for carrying out the lawful directives/approvals of the President while he served as a Minister of the Government of the Federation".[124]

Justice Nyako's ruling that the President's delegation of negotiating authority relating to OPL 245 was lawful should not be read as a ruling that the Agreements themselves were lawful or that Adoke did not exceed his negotiating mandate. These were considerations that were outwith the declaratory relief sought. Nyako's ruling is restricted solely to whether the President had the lawful power to make approvals and directives, which he did, and to the legal consequences for Adoke in carrying them out.

Presidential approval for the Agreements does not, however, make the Agreements themselves lawful. To argue otherwise would be to argue that whatever a President of Nigeria approves is legal simply by dint of him or her giving approval. This would be contrary to the Nigerian Constitution which enshrines the subjugation of the Presidency to the rule of law and the judgments of the courts.

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122 Court documents from the OPL 245 Investigation, "19 Mohammed Adoke vs. AGF Judgment.pdf", https://aleph.occrp.org/entities/63100986.934c2c4051982f542939f612c7c0174fd4c4d936

123 Court of First Instance Judgment, " 7.3 Legitimacy of the agreements of April 29, 2011", p.250. Available at https://www.eni.com/assets/documents/documents-en/opl-245-full-decision.pdf.

124 Court documents from the OPL 245 Investigation, "19 Mohammed Adoke vs. AGF Judgment.pdf", p.26, https://aleph.occrp.org/entities/63100986.934c2c4051982f542939f612c7c0174fd4c4d936#page=26