



global witness

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13 February 2013

Dear DCI Benton,

URGENT ACTION REQUESTED UNDER PROCEEDS OF CRIME ACT TO
SEIZE UNLAWFULLY OBTAINED ASSETS ARISING FROM SALE OF OPL 245
OIL FIELD, NIGERIA.

We write as a matter of urgency to alert the Proceeds of Corruption Unit (POCU) to the existence of some \$215 million of assets, currently subject to a UK High Court freezing order, that originated from the sale of the OPL 245 oil concession in Nigeria by Malabu Oil and Gas [hereafter 'Malabu']. There is strong, prima facie evidence that these assets constitute the proceeds of unlawful conduct and we therefore urge you to take immediate action under Section 5 ("Civil Recovery of the Proceeds etc of Unlawful Conduct") of the Proceeds of Crime Act 2002 to recover the assets.

We would also request that POCU acts to recover a further \$801,540,000 that has already been disbursed from the sale of OPL 245 by J. P. Morgan Chase of 125 London Wall, London, EC2Y 5AJ.

The letter sets out:

- a) the legal framework that enables the seizure of assets obtained by unlawful conduct abroad, even where that unlawful conduct has not been subject to criminal proceedings;
- b) the evidence that, on the balance of probability, strongly suggests that Malabu's ownership of the OPL 245 concession was obtained through unlawful conduct; and
- c) the evidence that, on the balance of probability, point to Malabu's illegally gained assets having been deposited with JP Morgan Chase; and
- d) The evidence, on the balance of probability, for \$215 million of those assets being currently held by High Court in London.

If our requests should more properly be referred to an authority other than POCU, we would ask that they be forwarded as a matter of priority, since the currently frozen assets are subject to arbitration proceedings on which the High Court may rule imminently, potentially allowing their disbursement.

Legal Basis for Acting to Recover Assets obtained by unlawful conduct

Section 5, Chapter 1 of the Proceeds of Crime Act 2002:

- Enables enforcement agencies (which, as we understand it, would include POCU) to recover in civil proceedings cash and other property that is, or represents, "property obtained through unlawful conduct".¹

¹ Para 240 (1), Proceeds of Crime Act 2002

- These powers are “exercisable in relation to any property (including cash) whether or not proceedings have been brought for an offence in connection with the property”.²
- The definition of “unlawful conduct” includes conduct that “occurs in a country outside the United Kingdom and is unlawful under the criminal law of that country.”³
- The court is obliged on “a balance of probability” to decide whether the matters alleged to constitute unlawful conduct has occurred.

OPL 245 as property obtained unlawfully by Malabu Oil and Gas

There are strong grounds for concluding that the OPL 245 licence held by Malabu until April 2011 represented property that had been unlawfully obtained and that any cash or other property due to (or subsequently received by) Malabu as a result of relinquishing its illegally obtained rights to OPL 245 also, on the balance of probability, constitute proceeds of crime.

The facts are as follows:

- **OPL 245** is a 1,958 square kilometre oil field located in the Eastern Niger Delta in the offshore waters of Nigeria (plan number TH/97/411).
- In April 1998, the exploration licence for the field was awarded by **Chief Dauzia Loyal Amafeha “Dan” Etete** [“Etete”], the then Nigerian Minister of Petroleum Resources, to **Malabu**, a limited company, incorporated in Nigeria with registration number RC 334442. Malabu was the 100 per cent owner of OPL until 2001 when the award was revoked. The block was then subject to dispute between Malabu and Shell until December 2006 when the asset was re-awarded to Malabu. Thereafter, in April-May 2011, the

2 Para 240 (2), Proceeds of Crime Act 2002

3 Para 241 (2) (a), Proceeds of Crime Act 2002

concession was bought (controversially and, arguably, illegally) by a joint venture of Shell and ENI-AGIP.

- Etete is a convicted criminal, having been found guilty of money laundering by the French courts in 2007, his conviction being upheld on appeal in 2009.⁴ Etete currently resides in Nigeria.
- At the time that Etete awarded the OPL 245 licence to Malabu, he reportedly held a 30 per cent undeclared interest in the company through a fictional character “Kweku Amafeha”, who, in reality, is widely believed to be Etete himself. Significantly, “Mr Amafeha” was also the character through whose bank account Etete laundered some of the funds that resulted in his conviction in France, according to sworn testimony by Mr Jeffrey Tessler, a Briton who was convicted for his part in the Bonny Island bribery scandal.⁵
- The other shareholders in Malabu at the time of its incorporation were Mohammed Abacha, son of the then Nigerian President, and Hassan Hindu, wife of Hassan Adamu, former Nigerian Ambassador to the UK. Nigerian press reports allege that, after the death of President Abacha, Etete increased his shareholding in Malabu, fraudulently taking control of 100 per cent of the company. Indeed, Mohammed Abacha petitioned the Nigerian Economic and Financial Crimes Commission (EFCC) to investigate the matter in January 2012⁶. We understand that the EFCC investigation is yet to be concluded.
- Malabu is in dispute with two companies – Energy Venture Partners and International Legal Consulting Limited – over non-payment of fees allegedly agreed in relation to the sale of OPL 245. This has resulted in court proceedings in New York and, currently, in London. Sworn statements to the Supreme Court of New York affirm that Etete is “Malabu’s principal”⁷ who

4 “France slams \$10.5m fine on Etete”, Nigerian Voice, 20 March 2009

5 “N155billion scandal: How Shell connived with corrupt officials, and subverted Nigerian laws”, Premium Times, 3 June 2012

6 “The Fraud called Malabu Oil and Gas (part 1). Premium Times, 29 June 2012

7 Affidavit of Ednan Agaev, “In the Matter of Arbitration between International Legal Consulting Limited against Malabu Oil and Gas Limited”, Supreme Court of the State of New York, County of New York, 24 June 2011, para 8.

“dominates and controls Malabu”⁸ and “the main man of Malabu”.⁹ A submission by International Legal Consulting Limited to the High Court in London, dated 20 July 2011, likewise refers to Etete as Malabu’s “guiding mind”.¹⁰ The description of Etete as Malabu’s “principal” was also accepted by the New York Supreme Court and employed in a temporary Restraining Order dated 22 July 2011.¹¹ Malabu has also itself acknowledged that Etete was a consultant to the company “at all material times”.

- Publicly available information including Nigerian media reports and sworn testimony to US and UK courts thus provides credible grounds for concluding that, on the balance of probability, Etete is, and always has been, the hidden beneficiary of Malabu.
- As such, the award of the OPL 245 licence to Malabu in April 1998 by Etete when he was the Minister of Petroleum was clearly unlawful, in that it was in clear breach of the Code of Conduct Bureau and Tribunal Act 1988¹² of Nigeria.
- Section 5 of the Act (“Conflict of interest with duty”) states that: “A public officer shall not put himself in a position where his personal interest conflicts with his duties and responsibilities”.
- Section 23 of the Act on the “Powers of the Tribunal to impose punishment” states that

“(1) Where the Tribunal finds a public officer guilty of contravening any of the provisions of this Act, it shall impose upon that officer any of the punishments specified under subsection (2) of this section.

8 International Legal Consulting Limited’s Memorandum of Law in Support of its Petition for an Order without Notice in Aid of Arbitration, . “In the Matter of Arbitration between International Legal Consulting Limited against Malabu Oil and Gas Limited”, Supreme Court of the State of New York, County of New York, 28 June 2011.

9 Transcript, “In the Matter of Arbitration between International Legal Consulting Limited against Malabu Oil and Gas Limited”, Supreme Court of the State of New York, County of New York, Index No 651733/2011, p.6.

10 Timothy Young QC, Skeleton Argument of International Legal Consulting Limited, “Between Energy Venture Partners Limited and Malabu Oil and Gas Ltd and JP Morgan Chase and International Legal Consulting Limited”, High Court of Justice Queen’s Bench Division, Commercial Court, Claim No 2001, Folio No 792, 20 July 2011, para 6.

11 Hon Bernard J Fried, Order to Show Cause with temporary Restraining Order, “In the Matter of Arbitration between International Legal Consulting Limited and Malabu Oil and Gas Limited and J. P. Morgan Chase and Co and all of its subsidiaries and affiliates, including but not limited to JP Morgan Chase Bank, NA”, Supreme Court of the State of New York, County of New York,” Index no 651733/2011, 22 July 2011.

12 Code of Conduct Bureau and Tribunal Act

(2) The punishment which the Tribunal may impose shall include any of the following-

- (a) vacation of office or any elective or nominated office, as the case may be;
- (b) disqualification from holding any public office (whether elective or not) for a period not exceeding ten years; and
- (c) seizure and forfeiture to the State of any property acquired in abuse or corruption of office.

(3) The punishments mentioned in subsection (2) of this section shall be without prejudice to the penalties that may be imposed by any law where the breach of conduct is also a criminal offence under the Criminal Code or any other enactment or law.”

- In addition, there are allegations that the sale of OPL 245 to the Shell/ENI-AGIP consortium may also have breached Nigerian legislation limiting foreign ownership of oil fields designated as “indigenous” to 40 per cent.¹³ This is currently being investigated by both the upper and lower houses of the Nigerian parliament.

The financial arrangements for Malabu’s disposal of OPL 245 and its sale to Shell-ENI-AGIP: The JP Morgan Chase accounts

The disposal of OPL 245 by Malabu and the subsequent purchase of the OPL 245 licence by the Shell/ENI-Agip consortium took a complicated route. Counsel for International Legal Consulting Limited has suggested in the UK High Court that this was because ENI was, “for commercial reasons apparently reluctant to be seen to be dealing with or transferring funds directly to Malabu.”¹⁴

Instead, Shell/ENI-Agip acquired the rights to OPL 245 through a series of back-to-back agreements involving the Federal Government of Nigeria as an intermediary. According to sworn statements made to the New York Supreme Court:

- On 29 April 2011, Malabu entered into an agreement with the Federal Government of Nigeria, entitled Block 245 Malabu Resolution Agreement,

¹³ “\$1.09bn Malabu oil deal” , Punch, 8 December 2012

¹⁴ Timothy Young QC, Skeleton Argument of International Legal Consulting Limited. “Between Energy Venture Partners Limited and Malabu Oil and Gas Ltd and JP Morgan Chase and International Legal Consulting Limited”, High Court of Justice Queen’s Bench Division, Commercial Court, Claim No 2001, Folio No 792, 20 July 2011, para 3.

under which Malabu relinquished all claims to OPL 245 in exchange for the Government paying \$1,092,040,000;

- At or about the same time, the Federal Government of Nigeria entered into an undated, related agreement, entitled Block 245 Resolution Agreement, with the Shell-Eni-Agip consortium, under which ENI (for the consortium) agreed to pay \$1,092,040,000 to the Federal Government of Nigeria for the rights to OPL 245.
- The \$1,092,040,000 paid by the Shell-ENI-Agip consortium to the Federal Government of Nigeria were deposited in an escrow account and subsequently a deposit account held by the Federal Government with JP Morgan Chase.

Malabu has since stated in writing that it had a contractual right to receive sums from the Federal Government of Nigeria and that it “understands that those sums may be paid from sums held by JP Morgan on behalf of the Federal Government of Nigeria”.¹⁵

JP Morgan has also acknowledged to the New York Supreme Court that the account was “for the benefit of Malabu”.¹⁶

On the balance of probability, it may therefore be concluded that the \$1,092,040,000 deposited by the Shell-ENI-Agip consortium in the Government of Nigeria’s accounts with JP Morgan Chase was and remains for the benefit of Malabu. The Attorney General of Nigeria is also on record as stating that the Nigerian Government acted as “obligor” in the transfer of funds from Shell-ENI-Agip to Malabu.¹⁷

Significantly, JP Morgan, acting on the instructions of the Government of Nigeria, has already made two transfers to Malabu, both on the 23rd August 2011. The first, for \$401,540,000, was to Malabu’s account (No 2018288005) with First Bank of Nigeria plc in Nigeria; and the second, for \$400,000,000, was to Malabu’s account (No.

¹⁵ Edwards, Angell, Plamer and Dodge on behalf of Malabu to Clifford Chance LLP, 15 July 2011.

¹⁶ Transcript, “In the Matter of Arbitration between International Legal Consulting Limited against Malabu Oil and Gas Limited”, Supreme Court of the State of New York, County of New York, Index No 651733/2011, 22 July 2011, p.15.

¹⁷ Comprehensive Position Paper by Mr Mohammed Bello Adoke, SAN, CFR, Hon. Attorney general of the Federation and Minister of Justice, to House of Representatives Ad Hoc Committee Investigative Hearing in Respect of “The Transaction involving the Federal Government and Shell/Agip companies, and Malabu Oil and Gas Limited, in respect of oil bloc OPL 245”, 19 July 2012.

3610042472) with Keystone Bank Nigeria Limited in Nigeria.¹⁸ We would request that POCU seek to recover these monies as the proceeds of crime.

The High Court Freezing Order

On 3rd July 2011, EVP (which, to recall, was contesting non payment of a fee by Malabu) obtained a High Court freezing order against Malabu from the Hon Mr Justice Griffith Williams, sitting in Queen's Bench Division of the Commercial Court.

The freezing order, which with subsequent amendments, is still in place restrains Malabu from dispersing of assets in England and Wales up to \$215 million or disposing of assets abroad up to the same value.¹⁹

The order also required a sum of \$215 million to be held by JP Morgan Chase, as escrow agent for the OPL 245 transactions, and not paid out without written permission of EVP or the Court.²⁰

On 5 August 2011, JP Morgan Chase deposited \$215 million with the Court, pursuant to the instructions of the Federal Government of Nigeria.²¹ The monies reportedly came from the same Federal Government of Nigeria account into which the \$1,092,040,000 paid under the Block 245 Resolution Agreement with Shell-ENI-Agip had deposited.

The monies held by the High Court are thus, on the balance of probability, monies that arise from the proceeds of Malabu's disposal of OPL 245 and, consequently, property that has been obtained through unlawful conduct by Malabu and others.

18 Garmishee's objections and Responses to Plaintiffs/Petitioner's first set of interrogatories served on JP Morgan Chase and Co", "In the Matter of Arbitration between International Legal Consulting Limited and Malabu Oil and Gas Limited and J. P. Morgan Chase and Co and all of its subsidiaries and affiliates, including but not limited to JP Morgan Chase Bank, NA", Supreme Court of the State of New York, County of New York." Index No 651773/2011.

19 Energy Venture Partners Limited and Malabu Oil and Gas Limited, Order by the Hon Mr Justice Griffith Williams, High Court, Queen's Bench Division, Commercial Court, 3 July 2011. Paras 5- 9 inclusive set out the freezing injunction. It is understood that Para 7(b) (which covered "any and all assets representing the proceeds of sale or other disposal of all or part of the OPL assets" was deleted following an amendment order by Mr Justice Steel on 16 July 2011. See: Letter from McGuire Woods, representing Energy Venture Partners, to Clifford Chance, representing JP Morgan Chase, 17 July 2011.

20 Energy Venture Partners Limited and Malabu Oil and Gas Limited, Order by the Hon Mr Justice Griffith Williams, High Court, Queen's Bench Division, Commercial Court, 3 July 2011. Para 4 (i).

21 J. Fried, Judgment, "In the Matter of Arbitration between International Legal Consulting Limited and Malabu Oil and Gas Limited and J. P. Morgan Chase and Co and all of its subsidiaries and affiliates, including but not limited to JP

Request for immediate action by POCU

In light of the above, we would request that POCU take immediate action to:

- seize the \$215 million currently held by the High Court as the proceeds of crime.
- recover those monies already disbursed to Malabu from the JP Morgan Chase accounts on 23rd August 2011.
- seize those funds that remain in the JP Morgan Chase accounts into which payments were made by Shell-ENI-Agip under the Block 245 Resolution Agreement of 2011. It is understood that such funds amount to some \$74,840,931.39.

We would also request that you acknowledge this letter and notify us of your decision on this matter promptly.

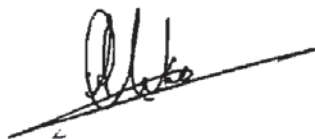
Yours Sincerely



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