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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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KEN WIWA, et al.,

Plaintiffs,

-against-

ROYAL DUTCH PETROLEUM CO., et al.,

Defendants.  
-----X

96 Civ. 8386 (KMW) (HBP)

KEN WIWA, et al.,

Plaintiffs,

-against-

BRIAN ANDERSON,

Defendant.  
-----X

01 Civ. 1909 (KMW) (HBP)

ESTHER KIOBEL, et al.,

Plaintiffs,

-against-

ROYAL DUTCH PETROLEUM CO., et al.,

Defendants.  
-----X

02 Civ. 7618 (KMW) (HBP)

ORDER

KIMBA M. WOOD, U.S.D.J.:

The Court has before it a number of requests and disputes relating to the above-captioned actions. First, Defendants have repeatedly questioned the Court's subject matter jurisdiction over the Alien Tort Statute ("ATS") claims of Plaintiffs in Wiwa v. Royal Dutch Petroleum Co., 96 Civ. 8386, and Wiwa v. Anderson, 01 Civ. 1909 ("Wiwa Plaintiffs"). Second, Wiwa Plaintiffs have requested a continuance of the February 9, 2009 trial date in

these actions. Third, Wiwa Plaintiffs and Defendants also dispute the appropriateness of each other's submissions regarding redeposition documents and international law.

As further explained below, the Court (1) orders the Parties to brief the Court's subject matter jurisdiction over Wiwa Plaintiffs' ATS claims, (2) grants Wiwa Plaintiffs' request for a continuance, (3) orders the Parties to file further submissions regarding the redeposition documents, and (4) lifts its stay on the Parties' international law submissions and resets the date for Wiwa Plaintiffs' Reply.

#### **I. Subject Matter Jurisdiction**

Defendants have not filed a formal motion challenging the Court's subject matter jurisdiction over Wiwa Plaintiffs' ATS claims. Nonetheless, they have repeatedly raised this issue in submissions to the Court on unrelated subjects.<sup>1</sup> (See Defs.' Reply Mem. in Supp. of Shell Transport and Trading Co., Ltd.'s

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<sup>1</sup> Defendants' Reply Memorandum also asks the Court to order Wiwa Plaintiffs and Plaintiffs in Kiobel v. Royal Dutch Petroleum Co., 02 Civ. 7618, to respond to a number of Defendants' discovery requests that the Court has already stricken or quashed as untimely, Defs.' Reply Mem. 5-9, and it challenges the appropriateness of Wiwa Plaintiffs' experts, id. at 1 n.2. The Court will not consider the merits of arguments, such as those in Defendants' Reply Memorandum, that the Court has not granted the Parties leave to make (however, the Court notes that Defendants' arguments regarding their untimely discovery requests are not compelling).

Henceforth, the Parties shall limit their submissions to the subjects which the Court has granted them leave to argue. To the extent that they wish to bring new issues before the Court, they shall request the Court's leave to argue them and they shall do so in compliance with the applicable rules and the Court's Individual Practices.

Mot. to Compel Kiobel Plaintiffs' Responses to Interrogatories 8-9 ("Defs.' Reply Mem."); Defs.' Mem. of L. on Issues of Internat'l L. passim.)

The Court previously ruled that the deadline for filing pre-trial motions in the above-captioned actions was June 28, 2004. However, the Court's lack of subject matter jurisdiction is a defense that cannot be waived and which may be raised at any time. Moodie v. Federal Reserve Bank, 58 F.3d 879, 882 (2d Cir. 1995); Fed. R. Civ. P. 12(h)(3). Accordingly, now that the deadline for completing discovery has passed, the Court grants Defendants leave to file a motion challenging the Court's subject matter jurisdiction over Wiwa Plaintiffs' ATS claims.<sup>2</sup> Should Defendants choose to file such a motion, the Parties shall file their motion papers according to the following schedule:

Defendants' Moving Papers:	Due by January 16, 2009
Plaintiffs' Responsive Papers:	Due by February 6, 2009
Defendants' Reply Papers:	Due by February 20, 2009

## **II. Continuance of Trial**

Wiwa Plaintiffs request a continuance of the February 9, 2009 trial until on or after April 1, 2009. They argue a

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<sup>2</sup> The Court notes that Defendants argue many aspects of a factual challenge to the Court's subject matter jurisdiction over Wiwa Plaintiffs' ATS claims in Defendants' Response to Wiwa Plaintiffs' International Law Brief. As stated above, the Court will not consider the merits of these arguments, and will only consider Defendants' Response to the extent that it informs the Court of the substance of international law, as ordered by the Court. (See Conf. Tr. 64:6-16 (Oct. 7, 2008).)

continuance is warranted because of (1) Defendants' recent substantial document production; (2) the scheduling conflicts of current, new, and prospective trial counsel; and (3) the difficulties of arranging travel documents for Nigerian plaintiffs and witnesses. Defendants do not oppose a continuance, but they nonetheless challenge Wiwa Plaintiffs' claim that a continuance is warranted.<sup>3</sup>

The Court need not address the Parties' arguments because it finds that a continuance is warranted in order to accommodate a pre-trial motion regarding the Court's subject matter jurisdiction over Wiwa Plaintiffs' ATS claims.<sup>4</sup> The Court cautions that no further continuances will be allowed and it sets the following schedule for trial and the remaining pre-trial submissions:

Voir Dire Questionnaire:	Due March 20, 2009
Pre-Trial Order:	Due March 20, 2009

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<sup>3</sup> In Defendants' letter to the Court regarding Wiwa Plaintiffs' proposed continuance, Defendants also request that the Court order Wiwa Plaintiffs to identify their witnesses. If Defendants contend that Wiwa Plaintiffs have failed to meet any legal responsibility they have to disclose their witnesses, Defendants may request leave of the Court to make any available motion. Until such leave is granted, the Court will not consider the merits of Defendants' position.

<sup>4</sup> The Court notes, however, that it finds facilitating foreign witnesses' attendance at trial a compelling reason to grant a limited continuance of the trial date. However, the Court observes that it is very late for Wiwa Plaintiffs to be joining new trial counsel. Accommodating any such counsel's schedules or trial preparation is not a compelling reason to postpone trial. Wiwa Plaintiffs have had ample time to join new counsel; if new counsel join Wiwa Plaintiffs' counsel, they must meet all applicable deadlines.

Jury Charge Request: Due April 1, 2009

Trial: April 27, 2009

### **III. Redeposition Documents**

On October 24, 2008, the Court granted Wiwa Plaintiffs leave to redepose "four witnesses shortly before or during trial, solely with respect to documents that Defendants produced subsequent to Plaintiffs' prior depositions of these witnesses." (Order 8; 96-D.E. 253.) The Court ordered Wiwa Plaintiffs to produce a list of these documents to Defendants so that Defendants could have an opportunity to contest the inclusion of any documents that Defendants contend Wiwa Plaintiffs had in their possession at the time of their prior depositions of these four witnesses. (See Conf. Tr. 40:7-12 (Oct. 7, 2008).)

Subsequent to the Court's October 24, 2008 Order, Defendants produced nearly 50,000 pages of new documents. When Wiwa Plaintiffs submitted their list of redeposition documents, they included many, if not all, of these recently produced documents. Defendants argue that Wiwa Plaintiffs' list violates the Court's October 24, 2008 Order and should be stricken.

The Court's October 24, 2008 Order was rendered ambiguous by Defendants' subsequent production of a substantial amount of new documents. Accordingly, the Court deems its October 24, 2008 Order satisfied by the submissions before it and hereby orders the parties to make the following additional submissions:

(1) Wiwa Plaintiffs shall submit to Defendants a list of those documents that (a) Wiwa Plaintiffs requested before their prior depositions of these four witnesses, (b) Defendants produced subsequent to Wiwa Plaintiffs' prior depositions of these four witnesses, and (c) Wiwa Plaintiffs plan to use in their redeposition of these four witnesses. In producing their list, the Court cautions Wiwa Plaintiffs that they will have limited time to redepose these witnesses, and may have to do so during trial, on the evening of the day before the witness will testify. (See Conf. Tr. 12:10-15; 39:5-7 (Oct. 7, 2008).) Wiwa Plaintiffs shall produce their list to Defendants and the Court by March 6, 2009.

(2) Defendants shall notify the Court and Plaintiffs of any documents on Wiwa Plaintiffs' list that Defendants believe either (a) were not requested before, or (b) were not produced subsequent to, Wiwa Plaintiffs' prior depositions of these four witnesses. Defendants shall provide evidence in support of any such challenges they make. They shall do so by March 13, 2008.

#### **IV. International Law Briefing**

Wiwa Plaintiffs submitted an International Law Brief that argued the substance of international law and applied that law, as argued, to the facts alleged in their most recent complaint. Defendants submitted a Response to Wiwa Plaintiffs' International Law Brief ("Defendants' Response") that argued the substance of



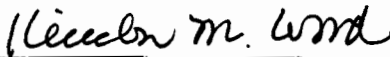
international law and applied that law, as argued, to facts drawn from evidentiary submissions. Wiwa Plaintiffs' contend that Defendants Response is a "Motion for Summary Judgment in disguise." They ask the Court to strike Defendants' Response and grant Defendants leave to refile it without the evidentiary arguments and attachments. Defendants contend that their Response was appropriate.

As indicated above, the Court does not deem it necessary to strike either Wiwa Plaintiffs' International Law Brief or Defendants' Response to that Brief. The Court will disregard both Parties' submissions to the extent that they apply international law to facts, whether alleged or drawn from evidentiary submissions.

The Court hereby lifts its stay on further international law submissions. If Wiwa Plaintiffs wish to reply to Defendants' Response, they shall confine their Reply to arguments about the substance of international law, not its application to the facts in this case. They shall submit any such Reply by January 9, 2009.

SO ORDERED.

Dated: New York, New York  
December 23, 2008

  
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Kimba M. Wood  
United States District Judge