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Shell and Eni's Misadventures in Nigeria

**SHELL AND ENI AT RISK OF LOSING ENORMOUS
OIL BLOCK ACQUIRED IN CORRUPT DEAL**

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EXECUTIVE SUMMARY

In 2011, Shell and Eni paid US\$1.1bn for one of West Africa's largest oil fields, OPL 245, situated off the coast of Nigeria. The payment was equivalent to more than 80% of Nigeria's proposed health budget for 2015 but the money did not benefit the country's citizens. Instead it went to a company called Malabu Oil and Gas which was secretly owned by the former oil minister, who had granted his company rights to the oil field in 1998.

Shell and Eni denied paying anyone other than the Nigerian government but there is clear evidence that they knew their payment would be diverted into private pockets. Police in the UK, Italy and Nigeria are currently investigating the case and the current and former CEOs of Eni are under suspicion for international corruption offences. Around US\$190m in proceeds of the deal has been frozen in the UK and Switzerland.

In 2014, the Nigerian House of Representatives called on the Nigerian government to cancel the deal, describing it as "contrary to the laws of Nigeria". Nothing happened, but in early 2015 a new reform-minded President Muhammadu Buhari was elected with a massive mandate to crack down on corruption, especially in the oil sector.

The new government's intentions regarding the OPL 245 deal may become clearer at a court hearing due to take place in London in late November, at which Malabu will appeal the freezing of the funds. This could be a watershed moment for the companies to learn their fate.

OPL 245 is crucial to Shell and Eni's plans to replenish their oil reserves. The oil block holds an estimated

9.23 billion barrels of crude oil according to the findings of the Nigerian House of Representatives. If the estimates turn out to be correct, the estimated reserves in OPL, when proved, would increase Shell's proven global oil reserves by a third, and add two thirds to Eni's.

And yet, as more details of their complicity come to light, Shell and Eni are in serious danger of losing one of their most promising assets because of the way the deal was done. Investigations already underway against Eni's senior executives suggest this may be one occasion when the problems don't just go away.

Like many others, this deal for a massive state asset was conducted behind closed doors, without the knowledge of the public or investors. This has to change. Extractive companies must disclose their payments to governments so that they cannot go missing.

The laws to make this disclosure happen are in place in the EU, US, Canada and Norway, covering 84 of world's largest 100 oil and gas companies.¹ But the US is only now determining how to implement its law, and is under pressure from big oil companies, including Shell, to water down the disclosure requirements. The US must resist this pressure and follow through with rules requiring meaningful transparency.

This case also proves how critical it is that the public can find out who the real owners of companies are so that criminals - including corrupt officials - cannot disguise their identities to carry out corrupt dealings. The UK, Norway and Ukraine have committed to creating public registries of beneficial ownership: other countries should follow suit. The Extractive Industries Transparency Initiative should also make ownership transparency a condition of compliance.



A slum on the water in the Nigerian city of Lagos where poverty abuts wealth.

THE BACKGROUND

The reign of late Nigerian military dictator, Sani Abacha, was notorious for its brutal human rights abuses and corruption. The November 1995 judicial murder of playwright and Ogoni rights activist, Ken Saro Wiwa together with eight other Ogoni activists², who had opposed Shell's oil extraction, put the spotlight on the Abacha regime. However, it was only after Abacha's death that detailed evidence indicating the sheer scale of corruption during his rule came to light. Abacha's widow, Maryam, was caught trying to flee the country with 38 suitcases stuffed with cash. In total, Abacha and his sons stole an estimated \$4.3bn, which authorities are still trying to recover, mostly from European banks.³

In May 1998, the then Nigerian oil minister, Dan Etete, awarded a series of oil licenses to Nigerian companies, whose owners' identities were questioned.⁴ One of these licenses, Oil Prospecting License 245 (OPL 245), was allocated to Malabu Oil and Gas. This company had only been established for five days before it received the license, and had no

employees or assets. The upfront price for the block was a "signature bonus" of \$20m, a small amount for such a potentially valuable asset, although Malabu actually only paid \$2m, long after the money was due.⁵

It was soon rumoured that the oil minister himself, Dan Etete, was an owner of Malabu Oil and Gas, along with one of Abacha's sons, Mohammed.⁶ While Etete used an alias to hold his shares, it was later proven that he was indeed a beneficial owner of the company.⁷



Dan Etete, former oil minister, and owner of Malabu Oil and Gas.
CREDIT: REUTERS

Having been granted the rights to OPL 245, Malabu brought in Shell as a partner to help fund and conduct all the operations on the block.⁸ In January 2001, Shell agreed to pay the remaining \$18m for the signature bonus, as well as pay Malabu \$147m for a 40% interest in the license.⁹

However, in early July of the same year, President Obasanjo's administration revoked the license from Malabu and Shell after a government panel reported that the awarding of OPL 245 to Malabu was irregular and that the block had been grossly undervalued. The Presidential spokesman said: "Etete and Abacha had abused their positions in the past, while in office, to award themselves the OPL 245 at a ridiculously low price".¹⁰

Initially Shell tried to work with Malabu to oppose the revocation of the license, saying it "did all it could do to assist Malabu to reverse the FGN's [Federal Government of Nigeria's] decision". However, in 2002 the block was put back out to bid between Shell, Chevron and ExxonMobil. Shell won, and agreed to pay US\$210m as an upfront signature bonus: a significant increase on the US\$20m Malabu had been asked to pay, but still not a lot for such a valuable block.¹¹

Having been crowded out, Malabu challenged the decision to award the block to Shell. They alleged that Shell had received seismic data on the block, allowing it to assess how much oil was present, and that Chevron and ExxonMobil had not had access to this data, making the 2002 bidding process unfair.¹² In 2006, after legal wrangling and parliamentary pressure, Malabu and the Nigerian government agreed a settlement which returned the block to

Etete's company on the condition it paid the full US\$210m signature bonus within 12 months.¹³ Shell lost its rights to the block.

In spite of its victory, Malabu once again found itself in a position where it was unable to pay what it owed and was incapable of developing the oil block on its own. Having fallen out with Shell, it set out to find another international oil company to partner with. Shell meanwhile, did its best to dissuade other companies from investing, and embarked on more legal cases to try to wrest the block back, including at the World Bank's International Centre for the Settlement of Investment Disputes (ICSID).¹⁴



OPL 245: The Vital Statistics

- OPL 245 is in the offshore waters of the Gulf of Guinea and covers 1,958 square kilometres.¹⁵
- It encompasses two deep water oil fields, Zabazaba and Etan, at depths of between 1,500 and 2,000 metres respectively.¹⁶
- The field holds an estimated 9.23 billion probable barrels of crude oil:¹⁷ which if confirmed would be equivalent to nearly one quarter of Nigeria's total proven oil reserves.¹⁸
- If proven, the estimated reserves in OPL 245 would increase Shell's proven global oil reserves by a third, and add two thirds to Eni's.¹⁹

THE DEAL

In the end, Malabu did find another company willing to deal with them: the Italian oil giant Eni, which is partly state-owned and also listed on the US and Milan stock exchanges. The negotiations spanned a number of years, and took place both directly and through an intermediary. Shell was brought back into the negotiations as a possible joint partner with Eni. Seemingly having found a way to resolve their differences, senior Shell managers were again talking to Etete, and worked with others at Shell's headquarters in the Hague to decide how much to offer him. In an email read out in court hearings they describe their meeting with Etete:

"Our initial response is that it will remain very difficult to meet Chief's expectations in terms of the cash Shell is able to put up front on the table[...]. Peter has to talk to The Hague and we will come back with a figure [..]. As always, the issue will be the extent to which the Chief is ready to be sensible... Meanwhile we are getting along very well personally – lunch and lots of iced champagne – and this time round we are at least negotiating face to face".²⁰

The Shell hierarchy seems to have been closely involved. Global Witness believes that "Peter" could have been Peter Robinson, Shell's Vice President for Commercial Sub Saharan Africa, who took in part the negotiations for Shell in this deal. The figures above Peter Robinson in Shell's hierarchy at the time were Malcolm Brinded, Shell's Head of Upstream, and then the executive committee together with the Chairman and CEO.²¹ This raises serious questions about the involvement of Shell's senior management in the OPL 245 deal. Shell has failed to answer questions about the involvement of its senior management in the deal.

Shell's willingness to go back into partnership with a company they had been fighting in the courts, and to negotiate with a former oil Minister who had by this time had been convicted of money laundering,²²

shows how key OPL 245 was to its plans. It also shows the lengths it was willing to go to to hold on to the block, in spite of the obvious risk to investors of doing business this way.

Due diligence reports commissioned by Eni during the negotiation process prove that the company knew about Etete's involvement from the early stages. A 2007 report states clearly that Malabu is "controlled by the former petroleum minister, Dan Etete. The company was awarded OPL 245 by the Abacha administration, while Etete was still petroleum minister",²³ while the 2010 report is even more explicit: "whatever the formal ownership structure of Malabu, all of the sources to whom we have spoken are united in the opinion that Dan Etete is the owner of the company".²⁴

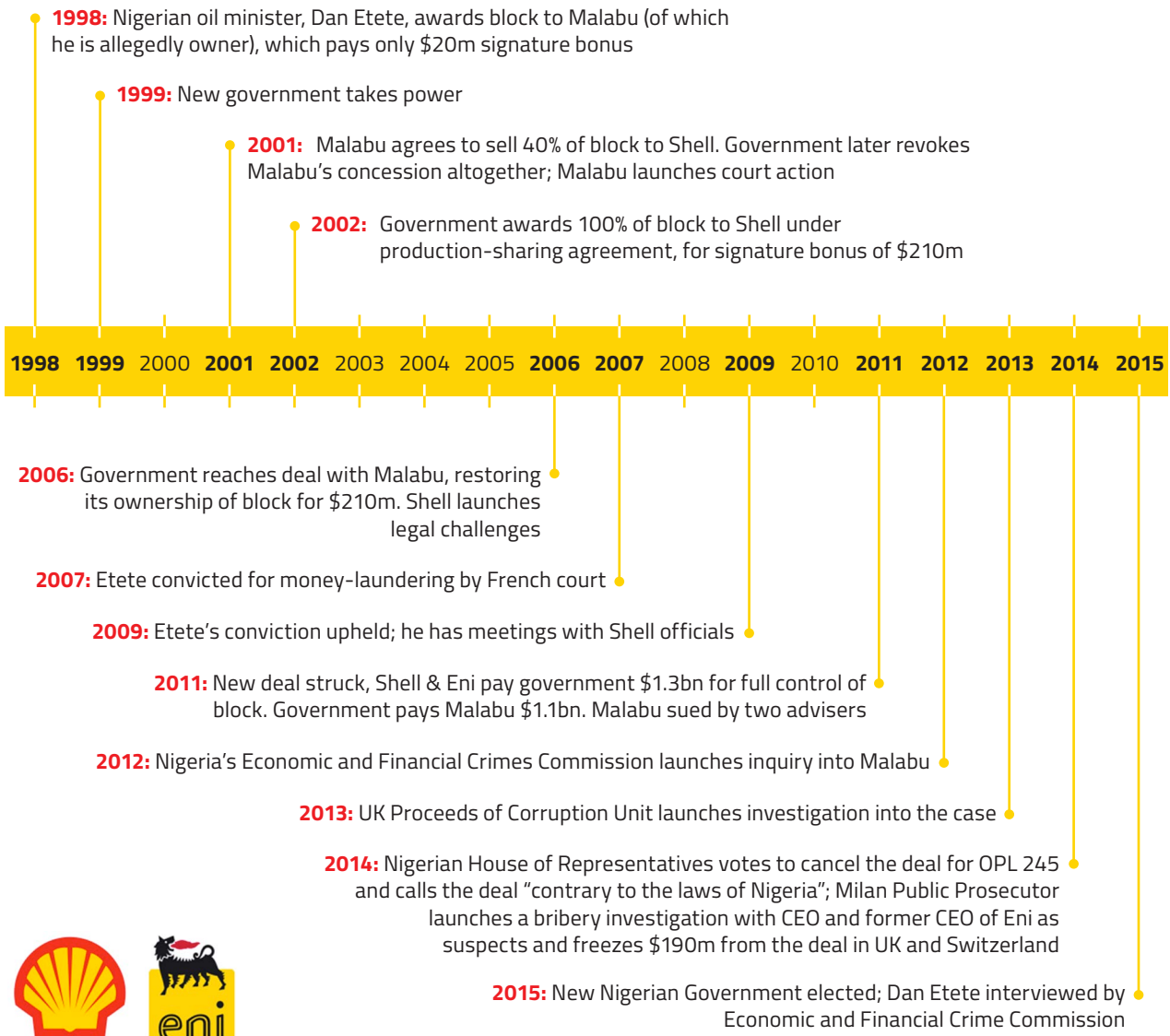
Global Witness and our partners attended Eni's Annual General Meeting in 2014 as shareholders and asked in a written question "what did Eni understand to be the involvement/role of Etete in Malabu?" In its written answer Eni replied that "no clear evidence was found during the preliminary audits conducted by the Eni legal department under the anti-corruption procedures, particularly in relation to his [Etete's] connection with the company".²⁵ Global Witness put it to Eni that they lied to their investors about their knowledge of Etete's involvement in Malabu, they did not respond.



Le Bristol, a luxury Paris hotel, where some of the negotiations to buy OPL 245 took place.

CREDIT: ELIE KHOURY, FLICKR

Pass the parcel The saga of Nigeria's oil block OPL245



In October 2010, Eni offered to buy OPL 245 directly from Malabu but Etete would not agree on the price.²⁶ The final negotiations took place in late 2010 and early 2011 in the office of Nigeria's attorney general, Mohammed Adoke, with over five days of meetings between Shell, Eni, Malabu, and Nigerian officials.²⁷ In April 2011, Shell and Eni agreed to pay \$1.1 billion, plus the much delayed signature bonus of \$210 million, in exchange for OPL 245.

The deal was altered in the final stage of the negotiations so that Eni and Shell would not pay Malabu the money directly, nor would they sign a

direct contract; instead a series of back-to-back resolution agreements were signed between the parties. These arranged for Shell and Eni to pay the \$1.1 billion into an escrow account at J.P. Morgan in London, set up by the Nigerian Government, who would then pass it on to Malabu. Ednan Agaev, one of the middlemen involved, described this structure to the Economist magazine as a "safe-sex transaction".²⁸

The deal diverted \$1.1 billion, equivalent to 80% of the 2015 Nigerian health budget,²⁹ to a private company owned by a former Minister, who had illicitly given a valuable state asset to himself and his cronies.

THE EXPOSÉ

In 2011 Emeka Obi, a middleman who had acted for Malabu in negotiations with Eni, sued Malabu through the UK commercial court for fees he claimed he was owed for his cut of the sale of OPL 245. The court froze \$215 million from the proceeds of the sale in London, pending the outcome of the case. A second middleman, Ednan Agaev, also sued Malabu for unpaid fees, first in New York then in London's court of arbitration.

These courts were in effect asked to divvy up the loot from the corrupt deal for OPL 245. One judge in London raised some concerns about the case, saying, "Given the large sums of money involved that are effectively to be paid to a former minister to a bank account in the middle east [sic] and the whole exercise is backed by murky instructions [...] I have seen some odd cases in this Court over the years but even by those standards this is a striking one. I am troubled as to who I am involved with".³⁰ Nevertheless, in 2014 the UK Commercial Court awarded Emeka Obi \$110.5m for his role in the OPL 245 deal, which was then transferred to Switzerland.

When asked about OPL 245, Shell and Eni have always stressed that they only paid the Nigerian government. However the evidence brought forward in the court cases proved that the companies' senior managers negotiated with Etete and his cronies to buy the block from Malabu.

Etete alleged in the UK court case that Eni's senior managers inflated their payment to Malabu so money could be siphoned off into kickbacks for them and their associates. It should be noted that this allegation has been denied by Eni, who were not part of the UK High Court proceedings. In those proceedings, the allegation was emphatically rejected by the judge for lack of evidence and the unreliability of the source.

However in October 2014 the Italian newspaper La Repubblica published an article on an interview given by Vincenzo Armanna, a former senior manager of Eni who was involved in the negotiations for the deal for OPL 245. La Repubblica reported that Armanna claimed that it became public knowledge in Abuja that the arranged US\$200m commission for the middleman Emeka Obi was "bribes for the Italians"

- implying Eni executives, their intermediaries and their associates. In the La Repubblica article Mr Armanna describes the actions of the Attorney General during negotiations in autumn 2010 in the deal for OPL 245: "He threatened to arrest us all. And he told me he knew that the \$200 million for Obi's mediation was nothing but bribes, kickbacks and a way of blackmailing Etete". La Repubblica also reported that Mr Armanna has claimed that US\$50m of the funds transferred to Etete, part of the US\$1.1bn paid by Shell and Eni for OPL 245 that was diverted to Malabu, has ended up with "Italians". Eni responded saying [unofficial translation] "We take note of the assertions by Vincenzo Armanna that are obviously defamatory and obviously will follow up all legal action to protect the image of Eni and its managers. We wish to emphasize that Vincenzo Armanna was fired by Eni because of personal and serious violations of the ethics code."³¹

At the request of Italian prosecutors the US\$110.5m awarded to Emeka Obi has been frozen, it has been reported that Italian prosecutors do believe these funds were intended as kickbacks to Eni executives and their associates.³²

The New York judge who ruled on the Agaev case found that the Nigerian government was the "proverbial straw man [...] holding \$1.1billion for ultimate payment to Malabu",³³ while the Nigerian Attorney General who brokered the deal for OPL 245 described the government's role as that of a "facilitator" or "obligor".³⁴



A Nigerian 500 Naira note with a picture of an oil rig on it, showing the importance of oil to the economy.

These cases put previously secret information into the public domain, revealing how Eni and Shell had acquired OPL 245 from Malabu and Etete, and also confirmed that Etete was a beneficial owner of Malabu. If it hadn't been for the disgruntled middlemen, the world might never have known about the dirty dealings that had occurred.

The remaining \$800m that had not been frozen as a result of the middlemen's court cases was transferred to Malabu. It was then passed on to five other Nigerian companies whose ultimate beneficial owners are not known.³⁵ Among the listed owners of three of the recipient companies is Alhaji Abubakar Aliyu, who was found in a UK money laundering trial to have paid bribes to Diepreye Alamieyeseigha, the former governor of Bayelsa state. At this time, Goodluck Jonathan, Nigeria's President between 2009 and 2015, was Alamieyeseigha's deputy.³⁶ Etete told the UK court that he received \$250m in total for his role in the deal.³⁷ The ultimate recipients of the rest of the money are not yet known.

What is a 'beneficial owner'?

A 'beneficial owner' is a natural person – that is, a real, live human being, not another company or trust – who directly or indirectly exercises substantial control over a company or receives substantial economic benefits from a company.

THE INVESTIGATIONS

The OPL 245 deal is now being investigated by authorities in three countries. In early 2013, Global Witness, together with its partners Corner House, Re:Common, and Nigerian activist Dotun Oloko, wrote to UK police documenting corruption concerns over the deal and by June that year the police had launched a formal investigation, "Operation Zafod", into the deal.³⁸

Global Witness and its partners also wrote to the authorities in Italy, where Eni, its current and former CEOs, and other senior managers, have all been named as suspects in a corruption investigation carried out by the Milan Public Prosecutor. The Italian authorities have stated their belief that over half a billion dollars from the deal was intended as bribes for Nigerian public officials.³⁹ At their request, around US\$190m of the proceeds of the \$1.1bn payment made by Shell and Eni has been frozen in UK and Switzerland.⁴⁰

In 2014, the Nigerian House of Representatives called on the Nigerian government to cancel the deal, describing it as "contrary to the laws of Nigeria".⁴¹ Nigeria's Economic and Financial Crime Commission is also investigating, and in June 2015 questioned Dan Etete.⁴²



Nigeria's new President Buhari campaigned on an anti-corruption platform. CREDIT: AFP PHOTO, PIUS UTOMI EKPEI

In May 2015, a new Nigerian President, Muhammadu Buhari, was elected on a strong anti-corruption platform. Given President Buhari's pledge to prioritise recovery of stolen funds, there are strong grounds for hope that the House of Representatives' recommendation to cancel the OPL 245 deal will be followed up.

In sum, these investigations - and the potential future ones, - demonstrate a clear risk that Shell and Eni will have their exploration rights revoked because of the way the block was acquired.

Eni has commissioned an external audit of the case from a US law firm which it has shared with investigators and it claims did not find evidence of illegal conduct. However when asked by Global Witness it would not say which law firm was used or reveal the terms of reference or findings of the investigation. Eni's senior managers have denied wrongdoing. Shell has said it does not agree with the premise behind various public statements made by Global Witness about Shell companies in relation to OPL 245 but has not answered specific questions or identified where it disagrees.

WHAT NEXT?

Malabu is currently appealing the freezing of its money in London, and a hearing is expected to take place at Southwark Crown Court on the 23rd of November. If reporting restrictions are not applied - which they shouldn't be given the clear public interest in this case - further relevant information may come to light about the progress of the case. The hearing also offers the new Nigerian authorities the chance to state their position on the deal.

Regardless of the outcome of the hearing, there are clear actions that need to be taken given the evidence that has already come to light. Shell, Eni and their managers must be fully investigated by the relevant law enforcement authorities and held accountable. The other recipients of payments for the OPL 245 deal must also be fully investigated, as should the actions of any decision makers who abused their power and allowed public money to be diverted into private pockets.

Global Witness and others have long campaigned for laws requiring extractive companies to disclose their payments to governments. Had such laws been in place in the first decade of this century, the OPL 245 scandal would almost certainly not have happened. In such circumstances we believe it is questionable whether Shell and Eni, knowing that their payment would be published, would have gone ahead with the deal as concluded. If the Nigerian government had known their payment to Malabu would have been so easy to track, they too may have thought twice.

In part because the OPL 245 case, such laws have now been passed in the EU, US, Canada and Norway, covering 84 of world's largest 100 oil and gas companies. Some companies are proactively supporting these laws and voluntarily disclosing their payments. However, a group of big oil companies are using all possible means to try to block the legislation in the US, or weaken it to the point of uselessness. Shell has been one of the most forthright opponents of increased transparency.

The US first passed the Dodd Frank Act in 2010, section 1504 of which requires companies to report payments to governments for oil, gas and minerals. The Securities and Exchange Commission (SEC) then set about drafting a rule that would detail the requirements for companies, and allow for implementation of the law. In 2013, the EU passed similar legislation, the Transparency and Accounting Directives, which requires the disclosure of project-by-project payments to governments by extractive companies, including logging companies.⁴³ All Member States are due to have now transposed these laws into their national legislative framework and the first company reports are due in the UK next year.

In 2012, the American Petroleum Institute, whose members include Shell and a number of other big oil companies, brought a case against the SEC in the US courts, challenging the SEC's regulations for 1504. This delayed implementation of the US legislation and meant that the EU overtook the US as the leader on extractive industries transparency. The SEC recently announced it would finalise the rule implementing this long-delayed legislation by June 2016 just one month short of 6 years from the date President Obama signed the Dodd-Frank Act into law.⁴⁴



When will Nigeria's citizens get a fair share of their country's resource wealth? CREDIT: GEORGE OSODI, PANOS

It is vital that the SEC agrees a strong rule, which requires companies to disclose all their payments at the project level, thus allowing the public, investors and law enforcement to spot if a corrupt deal is carried out. Just as importantly, the requirement to disclosed can have a deterrent effect, making sure companies no-longer pursue deals in which illicit payments become part of the structure of the deal - a factor that has enormous risk-reduction benefits for investors. Company arguments that the information should be anonymized and aggregated are specious, and should be ignored by the implementing authorities. At the very least, the US, which was the original leader on this issue, must put in place a rule that is as strong as the laws now in place in Europe.

The OPL 245 deal also would not have taken place had Etete and Abacha's son not been able to hide their ownership of Malabu. The UK, Norway and Ukraine are creating the world's first public registries of beneficial ownership, so that investors, taxpayers and other interested parties can see who really owns and gains from companies and businesses. The EU

has also recently agreed that all Member States will have to create national registries and that members of the public will have access providing that they can pass a "legitimate interest" test.

The OPL 245 case demonstrates the need for the similar laws to be passed in other countries, and for membership-based industry schemes, such as the Extractive Industry Transparency Initiative, to make ownership transparency a condition of compliance.

RECOMMENDATIONS

- Law Enforcement authorities should formally investigate Shell and its past and present senior managers for their actions in the OPL 245 deal.
- Shell and Eni should make public their internal investigations into the deal, the actions of their staff and their internal controls. Such disclosures should also include publication of the terms of reference, credentials of those undertaking these investigations and all supporting materials.

- US lawmakers should finalize a strong rule to implement Dodd Frank Section 1504 that matches the EU legislation in requiring project by project payments that are not aggregated or anonymised so that corrupt payments can be identified and deterred.
- The Nigerian Government should cancel the license for OPL 245 and reallocate it through a fair and open bidding process.
- The Nigerian Government should seek to recover the \$1.1bn that was diverted away from the state budget through the deal for OPL 245. Authorities in all jurisdictions where funds from this deal may have been transferred should cooperate to ensure seized assets are returned for the benefit of the Nigerian people and that perpetrators are held accountable.
- Investors must require Shell and Eni to examine their anti-bribery and risk assessment systems to prevent the company entering into corrupt deals that later harm the company's value.
- UK and EU governments must ensure that the EU accounting and transparency directives are not undermined by business guidance that encourages companies not to fully report their payments.
- All governments should commit to public registries of beneficial owners.
- The Extractive Industries Transparency Initiative (EITI) should make beneficial ownership transparency for extractive companies a requirement for membership.

ENDNOTES

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3. Guardian, 18 March 2015, David Smith, "Switzerland to return Sani Abacha 'loot' money to Nigeria" <http://www.theguardian.com/world/2015/mar/18/switzerland-to-return-sani-abacha-loot-money-to-nigeria>
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6. The News (Lagos), 3 May 1999, "What The Generals Grabbed"
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8. Shell was aware of Dan Etete's role in awarding OPL 245 to Malabu, as evidenced by its claimant's memorial in 2009 in arbitration before the International Centre for Settlement of Investment Disputes ICSID Case No. ARB/07/18: "In 1998, during the President Abacha regime, OPL 245 had been allocated to Malabu on behalf of the Ministry of Petroleum Resources by Mr Dan Etete in his capacity as the then Presidential Advisor on Petroleum and Energy
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23. Risk Advisory Group, March 2007, Due diligence report for Eni, p2
24. Risk Advisory Group, April 2010, Due diligence report for Eni, p5

25. Eni's shareholder meeting in 2014 the company claimed in a written answer to questions submitted by Global Witness that "no clear evidence was found during the preliminary audits conducted by the Eni legal department under the anti-corruption procedures, particularly in relation to his [Etete's] connection with the company." And Paolo Scaroni, the then CEO stated that "in 2007 and 2010 preliminary due diligence has been conducted about the corporation Malabu by the division E&P also through an external company of international level. From in-depth research carried out on these two occasions, evidence did not emerge of the participation of Dan Etete in the shareholding capital of Malabu" (Unofficial translation).
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