



global witness

## Shell's obscure payments kill its case for weak US and EU transparency laws

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### The story:

Court documents from a March 2012 New York arbitration case reveal that Nigerian subsidiaries of both Shell and ENI agreed to pay US\$1.092 billion to the Nigerian Government for oil block OPL 245 in the country.<sup>1</sup> At the same time, precisely the same amount was agreed to be paid by the Nigerian Government to *Malabu Oil and Gas*, a company widely reported as controlled by an Abacha-era minister and convicted money-lauderer.

The documents from the court case<sup>2</sup> show that Shell and ENI subsidiaries agreed to pay US\$1,092,040,000 to the Government of Nigeria to settle any existing claims surrounding the ownership of the long-disputed block OPL 245,<sup>3</sup> although the documents suggest the ENI subsidiary, Nigeria Agip Exploration Ltd, may have made the payments to the Nigerian Government on behalf of both companies as the 'operator' of the block.

A second agreement, made in the same month, reveals that the Government of Nigeria pledged to pay 'Malabu' precisely the same amount - US\$1,092,040,000 - as compensation for relinquishing any claim to the block.<sup>4</sup>

The court documents also suggest that Shell's subsidiary agreed to pay a signature bonus of approximately US\$208 million to the Government of Nigeria.<sup>5</sup> The final judgement of the case states that, "...it does appear that the FGN [the Federal Government of Nigeria] was the proverbial "straw-man," holding \$1.1 billion for ultimate payment to Malabu."<sup>6</sup>

Shell and ENI have previously declined to disclose details of their payments for OPL 245.<sup>7</sup>

Nigerian citizens will be highly interested in the terms of the OPL 245 deal as these were previously undisclosed in any detail by the companies. It is of particular interest that Malabu was promised precisely the same amount that ENI and Shell jointly agreed to pay the government.<sup>8</sup> Malabu Oil and Gas, which formerly claimed to own the licence, is widely reported to be controlled by controversial Abacha-era oil minister Dan Etete, who has a 2007 conviction for money-laundering in France, that was upheld in 2009.<sup>9</sup>

Shell and ENI deny paying any money to Malabu Oil and Gas in respect of the licence.<sup>10</sup> Global Witness does not allege that the companies made any illegal payments but given the history of this block, Shell and ENI should explain what steps they took to ensure their payments did not end up in the hands of Etete's company, Malabu.<sup>11</sup> Shell and ENI must now publicly disclose full details of all the arrangements they made with the Nigerian government with respect to these payments.

Although Shell had published details of payments made to governments in 2011, the company's reports do not enable citizens to identify payments made for specific licences or deals, such as OPL 245.<sup>12</sup>

### **The need for tough and effective U.S and EU oil, gas and mining transparency laws:**

Despite Nigeria's abundant oil wealth, Nigerians remain amongst the world's poorest people. In a country that continues to be plagued by corruption the need for citizen oversight of payments to governments for their natural resources is as important as ever.

Currently, and as this case demonstrates, information of this nature only comes to light through the accident of unrelated court cases on the other side of the world. Had the court case not gone ahead this information would not have come to light.

There are moves in the U.S and the EU to change this.

After extensive advocacy by Global Witness and others in the [Publish What You Pay](#) coalition, and a decade long campaign, provision 1504 of the U.S *Dodd Frank Wall Street Reform and Consumer Protection Act* was passed in the June 2010. This provision forces oil, gas and mining companies to open up their books and publish details of their payments to governments on a country-by-country and on a project-by-project basis as a condition of their listing on US Stock Exchanges.

The EU is currently debating similar legislation in the form of revisions to the Accounting and Transparency Directives, and is likely to agree the details of new rules for mandatory revenue disclosure by extractive and timber companies listed on EU stock exchanges by June 2012. The EU proposal includes a requirement for reporting at the project level which mirrors provision 1504 of the Dodd-Frank Act, which is now U.S law.

**Not just any data, the right data:**

Extractive companies have suggested, in place of project-by-project reporting, that companies report on their payments to each level of government – national, regional/provincial, district and local. Under this proposal, each company would disclose one set of figures for its revenue payments to each named government agency (disaggregated by payment type), whether national or sub-national.

Alongside this, it is proposed that a list of the projects is supplied that give rise to the payments made to each government authority – *but without associating any payments with these individual projects.*

Significantly, under these proposals, there would be no reports on payments arising from any particular project – even for projects with huge bonus and royalty payments like the payments for OPL 245.

It would be a mistake for the European Union to allow this.

Disclosure by “level of government” is not a viable alternative to project-level reporting. It is critical to ensure a definition of “project” that is fit for purpose: a project should be defined as ‘equivalent to activities governed by a contract or other legal agreement between an extractive company and a host government’.

However, if enacted with project-level reporting, these laws will kick-start the beginning of a new global standard of transparency and accountability in the extractive sector, thereby helping end the disenfranchisement of affected citizens who can not access the information necessary to prevent the state-looting by corrupt officials in their countries.

**How this story leaves Shell’s case for weakening transparency laws in tatters**

The revelations about OPL 245 will be embarrassing for Shell. The company is at the forefront of an aggressive lobby efforts designed to critically weaken Section 1504 of the Dodd Frank Act, and efforts under way in the EU to enact similar legislation.

Shell insists it supports transparency. However its lobbying continues to push against providing precisely the kind of project-level detail that would allow citizens to demand accountability for these payments from their governments.<sup>13</sup>

Most recently at an EU Parliamentary hearing<sup>14</sup>, Alan Mclean, Shell’s Executive Vice President for Tax and Corporate Structure, stressed Shell’s argument against ‘project-level reporting’. Specifically they argue for payments to be aggregated by government level<sup>15</sup>, obscuring payments made on a project-level basis such as those revealed in this case. Shell say that project level reporting “will not provide any meaningful transparency in a significant majority of the countries where we operate”.<sup>16</sup>

In the U.S, the American Petroleum Institute (API) which represents major oil companies including Shell, has made a thinly-veiled threat to sue the Securities Exchange Commission (the body tasked with determining how Section 1504 will work in practice), should the SEC implement rules<sup>17</sup> the API does not agree with. This is despite the clear legislative

intent of US Congress, and that the SEC does not have the discretion to remove project-level reporting from the law.

### **Policy-makers and regulators must not cave in to industry pressure**

This is the second time in just a few months that Global Witness has exposed significant undisclosed payments made by big oil companies in countries with a history of corruption<sup>18</sup>. Regulators and policy-makers in the U.S and the EU must not be cow-towed, they must enact effective transparency rules.

### **Global Witness is calling for:**

- Shell and ENI should explain what steps they took to ensure their payments did not end up in the hands of Etete's company, Malabu.
- Shell and ENI should disclose full details of all the arrangements they made with the Nigerian government with respect to these payments.
- Shell and other international oil companies must support effective transparency and stop lobbying to weaken transparency requirements in the U.S, EU and elsewhere. This must include a divorce from the American Petroleum Institute's (API) threat to sue the Securities and Exchange Commission should it come out with a rule consistent with the spirit of the Congress that wrote the law.
- Both the U.S and the EU laws must require disclosure on a country-by-country and project-by-project level.
- The laws must include an appropriate definition of project reporting in disclosure regulations – with "project" being equivalent to activities governed by a licence, concession or similar legal agreement. Where any payment liabilities are incurred on a different basis, reporting shall be on that basis. This definition recognises that most project payments arise from specific legal agreements but does not require companies to artificially allocate to individual projects those payments such as corporate income tax that they make on an entity basis.
- Regulators should ensure that no countries are exempt from the regulations based on their own domestic laws. This would create a massive loophole, allowing corrupt regimes to pass blocking laws in their home countries.
- Governments must work with civil society and enlightened companies to ensure resultant transparency leads to meaningful changes in resource-rich but desperately poor and kleptocratic states.

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<sup>1</sup> The information comes from contracts disclosed in a New York arbitration case, the judgement from which was made in March 2012. A consulting firm initiated a claim as they acted as sellers for the block on Malabu's behalf, but claim not to have been paid. The case was reported on by African Energy Intelligence *Where the millions flew*, Africa Energy Intelligence, 29th February 2012. See *Matter of International Legal Consulting Ltd.v Malabu Oil & Gas Ltd.*, Sup Ct, New York County, March 15, 2012, [https://iapps.courts.state.ny.us/fbem/DocumentDisplayServlet?documentId=IIMhqMX\\_PLUS\\_/fJrxubSXRkww==&system=prod](https://iapps.courts.state.ny.us/fbem/DocumentDisplayServlet?documentId=IIMhqMX_PLUS_/fJrxubSXRkww==&system=prod)

<sup>2</sup> Shell and Agip were not parties to the New York arbitration case, which centred on claims by a consulting firm hired by Malabu to help sell the latter's rights in OPL 245 and did not receive a promised fee for its services. Global Witness takes no view on this case.

<sup>3</sup> OPL 245 gives exploration rights over an area off the coast of Nigeria that is thought to be rich in oil and its ownership has been disputed by Shell and Malabu for nearly a decade. According to Africa Energy Intelligence, the OPL 245 licence was first awarded to Malabu by the government in 1998 when its reported owner, Dan Etete, was Nigeria's oil minister. Shell was brought in as a technical partner in 2001. The license was then rescinded from Malabu by President Obasanjo's administration on the grounds that Malabu had won the block under questionable conditions, after which the block was awarded to Shell in 2002. The Abuja government later re-awarded the block to Malabu in 2006 after a pro-longed legal battle. Shell then began arbitration proceedings in Washington for the loss of the licence. The recent New York court case reveals the negotiated settlement between the parties to resolve the disputed ownership of the block.

<sup>4</sup> See Exhibit 2, Block 245 Malabu Resolution Agreement in *Matter of International Legal Consulting Ltd.v Malabu Oil & Gas Ltd.*, Sup Ct, New York County, March 15, 2012, [https://iapps.courts.state.ny.us/fbem/DocumentDisplayServlet?documentId=Jtr9Y6OfsfY/6GA\\_PLUS\\_Izeu6A==&system=prod](https://iapps.courts.state.ny.us/fbem/DocumentDisplayServlet?documentId=Jtr9Y6OfsfY/6GA_PLUS_Izeu6A==&system=prod)

<sup>5</sup> See Exhibit 1, Block 245 Resolution Agreement and Exhibit 2 Block 245 Malabu Resolution Agreement in *Matter of International Legal Consulting Ltd.v Malabu Oil & Gas Ltd.*, Sup Ct, New York County, March 15, 2012, available at <https://iapps.courts.state.ny.us/fbem/DocumentDisplayServlet?documentId=BmxYax/eWICqEHTBk1JT6A==&system=prod> (Exhibit 1) and [https://iapps.courts.state.ny.us/fbem/DocumentDisplayServlet?documentId=Jtr9Y6OfsfY/6GA\\_PLUS\\_Izeu6A==&system=prod](https://iapps.courts.state.ny.us/fbem/DocumentDisplayServlet?documentId=Jtr9Y6OfsfY/6GA_PLUS_Izeu6A==&system=prod) (Exhibit 2)

<sup>6</sup> Although this issue was not the subject of the ruling, the comment appearing in the judgement is noteworthy. See *Matter of International Legal Consulting Ltd. v Malabu Oil & Gas Ltd.*, Sup Ct, New York County, March 15, 2012, page 10, [https://iapps.courts.state.ny.us/fbem/DocumentDisplayServlet?documentId=IIMhqMX\\_PLUS\\_/fJrxubSXRkww==&system=prod](https://iapps.courts.state.ny.us/fbem/DocumentDisplayServlet?documentId=IIMhqMX_PLUS_/fJrxubSXRkww==&system=prod)

<sup>7</sup> Letter from Marc den Hartog, Royal Dutch Shell plc VP Commercial Sub-Saharan Africa to Global Witness, 27 September 2011 (Shell did not disclose the payment for OPL 245 after Global Witness asked them to provide this information); Nor do Shell's nor ENI's Annual Reports specifically disclose the payments made for the purchase of OPL 245 in 2011, See Royal Dutch Shell 2012 Annual Report, available at <http://www.sec.gov/Archives/edgar/data/1306965/000095012312004791/u11387e20vf.htm> ("The dispute regarding the ownership of the license and the rights in the OPL 245 PSC was resolved during 2011, with Shell being awarded a 50% equity interest") and ENI Spa 2012 Annual Report ("In 2011, Eni optimized its production asset portfolio...the awarding from the Nigerian Government a 50% interest in Block OPL 245"), available at <http://www.sec.gov/Archives/edgar/data/1002242/000131143512000005/sj0412en20f2011.htm>. Global Witness also notes that in Shell's 2011 Revenue transparency document ([www-static.shell.com/static/environment\\_society/downloads/society/shell\\_cfo\\_message\\_revenue\\_transparency\\_25042012.pdf](http://www-static.shell.com/static/environment_society/downloads/society/shell_cfo_message_revenue_transparency_25042012.pdf)) Shell states it paid US\$1.301bn dollars in royalty payments in Nigeria, as well as listing other aggregated payments to governments. It is impossible however for citizens to track what these payments are for and for which specific projects they relate to.

<sup>8</sup> See *Matter of International Legal Consulting Ltd. v Malabu Oil & Gas Ltd.*, Sup Ct, New York County, March 15, 2012, page 2, [https://iapps.courts.state.ny.us/fbem/DocumentDisplayServlet?documentId=IIMhqMX\\_PLUS\\_/fJrxubSXRkww==&system=prod](https://iapps.courts.state.ny.us/fbem/DocumentDisplayServlet?documentId=IIMhqMX_PLUS_/fJrxubSXRkww==&system=prod)

<sup>9</sup> Vanguard: *Nigeria: Money Laundering – French Court Hands Dan Etete 3-Yr Jail Term*, November 7, 2007, available at <http://allafrica.com/stories/200711080184.html>; Agence France Presse: *Paris court upholds Nigerian minister laundering conviction*, March 18, 2009.

<sup>10</sup> Email from Jonathan French, Senior Spokesman, Global Media Relations Shell International, on 15 March 2012 to Global Witness re: Nigeria OPL 245 ("Any payments relating to the licence were made only to the Federal Government of Nigeria. No payments were made by NAE [Nigeria Agip Exploration Limited, a subsidiary of ENI Spa] and/or SNEPCo [Shell Nigeria Exploration and Production Company Limited, a subsidiary of Shell] to Malabu Oil and Gas in respect of the licence."). International Oil Daily, *Eni finally able to join Shell in prospective Nigeria block*, September 14<sup>th</sup> 2011 ("Eni decline to comment on the contract beyond saying that the transaction was done direct with the Nigerian government and not with Malabu").

<sup>11</sup> Global Witness has privately raised concerns with Shell officials, twice in 2008 and once in 2010, that the company should not resolve the disputed ownership of OPL 245 by making payments that might end up with Etete. Global Witness also wrote to Shell's chief executive Peter Voser on 5th September 2011 asking him to comment on the widespread rumours that Etete, a convicted criminal, is the owner or controlling party of Malabu. Shell replied but did not address our specific concerns about Malabu's ownership or specify what steps it was taking to avoid any corruption risks associated with the OPL 245 deal, which has been widely reported on in the Nigerian media.

<sup>12</sup> Global Witness notes that in Shell's 2011 Revenue transparency document ([www-static.shell.com/static/environment\\_society/downloads/society/shell\\_cfo\\_message\\_revenue\\_transparency\\_25042012.pdf](http://www-static.shell.com/static/environment_society/downloads/society/shell_cfo_message_revenue_transparency_25042012.pdf)) Shell states it paid US\$1.301bn dollars in royalty payments in Nigeria, as well as listing other aggregated payments to governments. It is impossible however for citizens to track what these payments are for and which specific projects they relate to.

<sup>13</sup> When asked Shell to comment on their objections project by project disclosure, Shell's Executive Vice President, Tax and Corporate Structure, commented on 16th May 2012, "*we believe that publishing the total payments that a company has made to each level of government would provide the necessary data to enable civil society to hold governments to account for what they have received and should prove to be one tool that helps prevent the illicit misuse of funds received by governments. Conversely we believe project reporting would in very many cases obfuscate the true picture of how revenues are generated and collected in a country and would not provide any meaningful transparency*". Given the details of the payments detailed in this document, Global Witness believes this not to be the case.

<sup>14</sup> Legal Affairs Hearing, 26-04-2012, Review of the Accounting and Transparency Directives: the new country-by-country reporting requirements; as detailed here [www.europarl.europa.eu/committees/en/juri/events.html](http://www.europarl.europa.eu/committees/en/juri/events.html)

<sup>15</sup> Global Witness notes that in Shell's 2011 Revenue transparency document ([www-static.shell.com/static/environment\\_society/downloads/society/shell\\_cfo\\_message\\_revenue\\_transparency\\_25042012.pdf](http://www-static.shell.com/static/environment_society/downloads/society/shell_cfo_message_revenue_transparency_25042012.pdf)) Shell states it paid US\$1.301bn dollars in royalty payments in Nigeria, as well as listing other aggregated payments to governments. It is impossible however for citizens to track what these payments are for and which specific projects they relate to.

<sup>16</sup> Email from Shell's Executive Vice President, Tax and Corporate Structure, 16th May 2012

<sup>17</sup> This refers to section 1504 Dodd Frank Wall Street Reform and Consumer Act, 2010

<sup>18</sup> Global Witness recently brought attention to BP's agreement to make multi-million dollar payments into obscure "social projects" controlled by the highly opaque state oil company of Angola as part of a deal to win oil exploration rights, *BP makes opaque payments for Angola oil block as petro-lobby seeks weak transparency rules*, 21<sup>st</sup> February 2012, <http://www.globalwitness.org/library/bp-makes-opaque-payments-angola-oil-block-petro-lobby-seeks-weak-transparency-rules>