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The Case for Publishing Petroleum Contracts in Nigeria

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Petroleum contracts are fundamental documents that set out the legal framework for oil and gas projects. Publishing them creates space for much-needed public scrutiny of deals that can be worth billions of dollars to the people of Nigeria. It also provides an important opportunity for the government and companies to build public trust in the petroleum industry. This brief makes the case for publishing Nigerian petroleum contracts, recommends what should be included in these disclosures and suggests how the government can make these commitments a reality.

I. WHY THE GOVERNMENT OF NIGERIA SHOULD PUBLISH PETROLEUM CONTRACTS

Government commitments to disclosure

Since 2015 the government of Nigeria has made several public commitments to publish petroleum contracts:

- **2015 public statement by the minister of state for petroleum resources.** In his previous position as Group Managing Director of the Nigerian National Petroleum Corporation (NNPC), current Minister of State for Petroleum Resources, Emmanuel Ibe Kachikwu, announced "contracts will be made open to the public."[1]
- **2016 U.K. Anti-Corruption Summit.** In a country statement, under President Muhammadu Buhari, Nigeria committed to "[working] towards full implementation of the principles of the Open Contracting Data Standard, focusing on major projects as an early priority."[2] These principles center on the public disclosure of contracts.
- **2016 "7 Big Wins."** The Ministry of Petroleum Resources short- and medium-term strategy document calls on the government to "Publish all established fiscal rules and contracts" within two to four years.[3]

1 *Premium Times*, "NNPC contracts to be made open to public — Kachikwu," 25 September 2015, http://www.premiumtimesng.com/business/business-interviews/190605-nnpc-contracts-to-be-made-open-to-public-kachikwu.html.
2 Government of Nigeria, *Nigeria Country Statement* (2016), 1, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/523799/NIGERIA-_FINAL_COUNTRY_STATEMENT-UK_SUMMIT.pdf.
3 Government of Nigeria, "7 Big Wins (2016)," 16, http://www.7bigwins.com/wp-content/uploads/2016/10/7-Big-Wins-Short-and-Medium-Term-Priorities-to-Grow-Nigerias-Oil-and-Gas-Industry-2015-2019.pdf.

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- **2017 "7 Big Wins" Mid-Term Report.** The Minister of State for Petroleum Resources reiterated his commitment to "benchmark transparency… to enable the public know what NNPC is doing" in the mid-term report of the "7 Big Wins" Agenda.[4]
- **2017 Open Government Partnership National Action Plan.** Nigeria formally joined the Open Government Partnership—a multilateral initiative to strengthen governance—in July 2016. In the country's first National Action Plan, Commitment 3 on fiscal transparency contains language committing to "disclose oil, gas and mining contracts in the area of exploration and production, exports, off taking and swap on a publicly access portal in both human and machine readable formats."[5]

Benefits of contract transparency

Secrecy of contracts prevents Nigerian citizens from being able to understand the rules that govern petroleum projects. In Nigeria, the rules governing petroleum projects are contained in a range of official documents including the constitution, legislation, regulations and contracts (see Figure 1). But while the constitution and laws are publicly available, petroleum contracts and some regulations are not. Without access to the rules contained within these documents, relevant stakeholders cannot determine whether the government or a company is acting in compliance with their obligations. Notably, many government officials and legislators are unable to access contracts, and this may prevent them from understanding rules that are relevant to their responsibilities. Given that petroleum resources are public assets,[6] all citizens—both within and outside government—should be able to access the rules by which they are governed.

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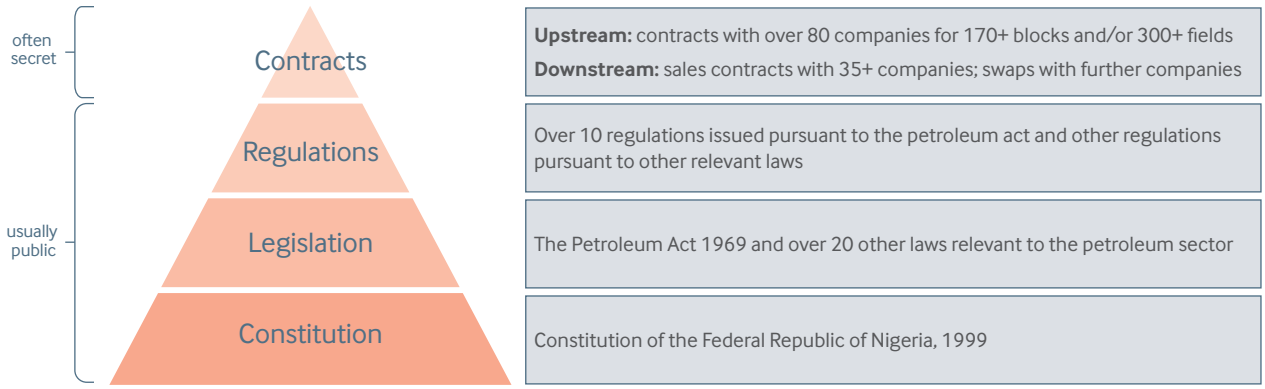
Figure 1. Overview of the legal framework governing the petroleum industry in Nigeria



Our review of 23 upstream and downstream contracts in Nigeria, including 10 model contracts, shows that contracts in Nigeria contain several terms for which a strong public interest case can be made for disclosure.[7] Fiscal terms contained within contracts can have an enormous impact on public finances. In the upstream

4 Bassey Udo, "Kachikwu gives oil and gas mid-term report; highlights goals," Premium Times, 1 September 2017, https://www.premiumtimesng.com/business/business-news/242135-kachikwu-gives-oil-gas-mid-term-report-highlights-goals.html.

5 Government of Nigeria, *OGP Nigeria National Action Plan 2017–2019* (2017), 27, https://www.opengovpartnership.org/sites/default/files/nigeria_nap_2017-2019.pdf.

6 See *Constitution of the Federal Republic of Nigeria* (1999), Sec. 14.2, which states "the entire property in and control of all minerals, mineral oils and natural gas in under or upon any land in Nigeria or in, under or upon the territorial waters and the Exclusive Economic Zone of Nigeria shall vest in the Government of the Federation and shall be managed in such manner as may be prescribed by the National Assembly."

7 See Appendix for an overview of contracts reviewed.

sector, exploration and production contracts and associated agreements contain clauses that dictate the amount of money that the country receives in taxes and royalties and how much oil or gas the companies must share with the government. Downstream, sales and swap agreements determine how much the country receives for the oil it sells. These deals are hugely important. In 2015, for example, petroleum revenue from taxes, royalties, oil trading and other payments accounted for 53 percent of total government revenue. Of these revenue streams, oil sales made by NNPC alone accounted for 39 percent.[8]

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Making secret agreements closes the space for much-needed public scrutiny. Out of the public eye, Nigerian government officials have negotiated a complex web of agreements that only a handful of people understand, exposing the country to conditions under which mismanagement and corruption can lead to significant leakages from government coffers. *Ad hoc* disclosures show us that some companies have received significant fiscal incentives to invest, while other companies have negotiated a range of byzantine financing agreements, such as modified carry agreements or third-party financing agreements, which have the potential to significantly impact the quantities of revenue and oil that the government receives.[9] In one example, the government gave royalty rate incentives to Addax Petroleum for four Oil Mining Leases (OMLs) worth as much as USD 2.8 billion (NGN 549 billion).[10] Recent investigations have revealed that Addax bribed government officials to receive more favorable terms.[11] Without access to contracts, it is impossible to fully understand how common these kinds of agreements are and the risks that they pose.

Public disclosure of contracts could also expose inconsistencies in fiscal terms, as seen with undercharged royalty rates for deep offshore production in Nigeria. The country has lost an estimated USD 60 billion in royalty payments and nearly USD 2 billion in extra government revenue due to the non-implementation of the 1993 Production Sharing Contract (PSC) provisions that permit royalty payments according to the Deep Offshore Act. According to the terms of the agreement, royalties depend on the depth of the water where oil is found and should be reviewed upward whenever crude exceeds USD 20 per barrel. Unfortunately, the Nigerian government has failed to take advantage of this provision, leading to huge revenue loss.[12]

Where contracts have been obtained or made it into the public realm, independent analysis has helped identify problematic contractual provisions and led to much-needed reform. For example, analysis by the Natural Resource Governance Institute of a type of oil-for-product swap agreement known as an offshore processing agreement (OPA) revealed that the OPAs contained terms that inappropriately favored certain companies. Nigeria might have lost an estimated USD 381 million in a single year from two of these contracts, due to just three inappropriate provisions.[13] This stirred a national discussion in the media, and, after the change in government, NNPC canceled the OPAs in August 2015.

8 Government of Nigeria, *Federal Budget Office 4th Quarter Implementation Report* (2016).
9 Nigeria Extractive Industries Transparency Initiative (NEITI), 2014 Oil & Gas Industry Audit Report (2016), 113–121, https://eiti.org/sites/default/files/documents/neiti-oil-gas-report-2014-full-report-301216.pdf.
10 See Nicholas Ibekwe, "INVESTIGATION: Attorney-General, Adoke, in shady deal that may rob Nigeria of N549billion," *Premium Times*, 24 March 2015, https://www.premiumtimesng.com/news/179015-investigation-attorney-general-adoke-in-shady-deal-that-may-rob-nigeria-of-n549billion.html.
11 Ben Ezeamalu, "How drowning Chinese-owned oil firm paid millions of dollars as bribe to Nigerian officials," *Premium Times*, 25 September 2017, https://www.premiumtimesng.com/news/headlines/250539-drowning-chinese-owned-oil-firm-paid-millions-dollars-bribe-nigerian-officials.html.
12 *Nigerian Tribune*, "The unclaimed $60bn oil royalty," 19 December 2017, http://www.tribuneonlineng.com/the-unclaimed-60bn-oil-royalty.
13 Aaron Sayne, Alexandra Gillies and Christina Katsouris, *Inside NNPC Oil Sales: A Case for Reform in Nigeria* (2015, Natural Resource Governance Institute), 7.

Availability of contract terms allows oversight actors to determine whether the state and companies are meeting their commitments and enables companies to check whether they are being treated fairly. All too often, lack of access to contracts means that accusations in the media or national assembly reports result in uninformed finger-pointing that cannot be independently verified. For example, in 2017, an *ad hoc* House of Representatives committee accused NNPC subsidiary Duke Oil of "unlawfully" withholding proceeds from hydrocarbon sales. In the ensuing public hearings, different actors disagreed wildly on the types of hydrocarbons involved, the identity of the NNPC subsidiary that sold them and the value of what was sold—with reported estimates ranging from USD 205 million to approximately USD 16 billion (NGN 6 trillion).[14] Because NNPC closely guards the terms of its refined product sales contracts, oversight actors could not separate fact from fiction when trying to parse the allegations, and the parliamentary probe devolved into a series of competing accusations with no clear outcome.

One area for which disclosure is important is exploration work programs. These outline companies' commitments to carry out exploration work. From the perspective of the government and citizens, company compliance with work programs is critical to ensure a steady flow of discoveries to keep production going in the long term. But companies also have an interest in ensuring that these terms are adequately enforced. The success or failure of exploration efforts can provide important clues to the underlying geology that is useful to all companies working in a particular area. Companies therefore have an interest in ensuring that those working in neighboring blocks are carrying out their obligated work program and are equally exposed to the financial risks associated with exploration.

Elsewhere, other contractual terms have important ramifications for local populations, the labor force and suppliers. These include geographic boundaries for exploration and production, environmental protections, and social obligations including employment, local content and training requirements. Publication of these terms can help citizens and companies understand how projects will affect their lives and how they can play a role in the industry. Moreover, where poor community relations have deteriorated into unrest and conflict, as is the case in many producing regions in Nigeria, publication of contracts and associated documents could be included in a package of efforts aimed to rebuilding citizen trust in petroleum industry.

Publication of contracts presents an important avenue to hold public officials and company representatives accountable for the deals they make.

When negotiators know that the outcome of their work will be public and subject to legal, public and commercial scrutiny, they have powerful incentives to draft more carefully. This helps make companies and especially government negotiators resist high-level political interference and excessive industry pressure during the negotiations and drafting of these contracts. These kinds of pressures, which are quite common in licensing and contract award processes in Nigeria, can lead to the kind of lopsided deals that result in non-compliance of the agreed terms and costly confusion, which hampers operations. With talks of a possible licensing round for marginal fields and likely negotiations of dozens of new contracts in 2018, the government has ample opportunity to realize these benefits in the near future.

14 John Ofikhenua, "'PPMC received $205m from Duke Oil for products'", *The Nation*, 10 November 2017, http://thenationonlineng.net/ppmc-received-205m-duke-oil-products; James Emejo, "House C'ttee Probes Duke Oil over Alleged N6tn Revenue Loss," This Day, 11 October 2017, https://www.thisdaylive.com/index.php/2017/10/11/house-cttee-probes-duke-oil-over-alleged-n6tn-revenue-loss.

Three contract secrecy myths

Myth 1. Confidentiality of petroleum contracts is in line with standard commercial practice.

While contract secrecy may be common practice in Nigeria, industry practice in the rest of the world is changing. Over 40 countries have disclosed extractive industry contracts and 22 countries have laws requiring disclosure.[15] Currently, 11 African countries disclose either petroleum or mining contracts, including the Democratic Republic of Congo, Ghana, Guinea, Liberia, Mozambique, São Tomé and Príncipe, Senegal, Mali and Mauritania.

Within the international community, the practice is endorsed by the International Monetary Fund's Guide on Resource Revenue Transparency,[16] the United Nations Principles for Responsible Contracts,[17] the International Bar Association's Model Mining Development Agreement[18] and encouraged by the Extractive Industries Transparency Initiative (EITI) Standard.[19] The private sector lending arm of the World Bank, the International Finance Corporation (IFC), requires that all their oil, gas and mining financings disclose the "principal contract with government that sets out the key terms and conditions under which a resource will be exploited,"[20] and this has resulted in the disclosure of three Nigerian petroleum contracts by Seven Energy after they received IFC financing in 2014.[21] The World Bank's Multilateral Investment Guarantee Agency, which guarantees foreign direct investments in developing countries, has similar requirements for projects it supports, such as Accugas Limited, a subsidiary of Seven Energy in Nigeria.[22] Contract disclosure was recently recommended in the OECD Secretary-General's High-Level Advisory Group Report on Anti-Corruption and Integrity.[23]

The private sector increasingly recognizes the value of contract transparency. A recent survey of 40 major petroleum and mining companies showed that 18 have made public statements supporting some form of contract transparency. This includes Total, Statoil, BP and Shell who all have significant operations in Nigeria.[24] Several more companies have disclosed contracts in stock exchange filings in their home countries, including

15 See https://docs.google.com/spreadsheets/d/1FXEeD43jw6VYHV8yS-8KJ5-rR5I0XtKxVQZBWzr-ohY/edit#gid=0 based on Rob Pitman and Don Hubert, *Past the Tipping Point? Contract Disclosure within EITI* (Natural Resource Governance Institute, 2017), 2 and 27, https://resourcegovernance.org/sites/default/files/documents/past-the-tipping-point-contract-disclosure-within-eiti-web.pdf.

16 International Monetary Fund (IMF), *Guide on Resource Revenue Transparency* (2007), 17, https://www.imf.org/external/np/pp/2007/eng/051507g.pdf.

17 United Nations, *Principles for Responsible Contracts* (2015), 32, http://www.ohchr.org/documents/publications/principles_responsiblecontracts_hr_pub_15_1_en.pdf.

18 International Bar Association, *Model Mine Development Agreement* (2011), 130, http://www.mmdaproject.org/presentations/mmda1_0_110404bookletv3.pdf.

19 Extractive Industries Transparency Initiative, *The EITI Standard* (2016), 20, https://eiti.org/sites/default/files/migrated_files/english_eiti_standard_0.pdf.

20 International Finance Corporation, *Policy on Environmental and Social Sustainability* (2012), 11–12, http://www.ifc.org/wps/wcm/connect/7540778049a792dcb87efaa8c6a8312a/SP_English_2012.pdf?MOD=AJPERES. The European Bank for Reconstruction and Development has similar requirements for hydrocarbon projects. See European Bank for Reconstruction and Development, *Energy Sector Strategy* (2013), 60, http://www.ebrd.com/what-we-do/sectors-and-topics/ebrd-energy-strategy-transparency.html.

21 See "Contract Disclosure," International Finance Corporation, accessed 16 February 2018, http://www.ifc.org/wps/wcm/connect/industry_ext_content/ifc_external_corporate_site/ogm+home/priorities/contract+disclosure.

22 See Multilateral Investment Guarantee Agency, *Policy on Environmental and Social Sustainability* (2013), 10, https://www.miga.org/documents/Policy_Environmental_Social_Sustainability.pdf.

23 Organisation for Economic Co-operation and Development, *On Combating Corruption and Fostering Integrity* (2017), 15, https://www.oecd.org/corruption/HLAG-Corruption-Integrity-SG-Report-March-2017.pdf.

24 See, Isabel Munilla and Kathleen Brophy, *Contract Disclosure Survey 2018*, Oxfam America, https://policy-practice.oxfam.org.uk/publications/contract-disclosure-survey-2018-a-review-of-the-contract-disclosure-policies-of-620465

Camac Energy Inc., who disclosed two contract amendments for Nigerian Petroleum Projects.[25] Many of the large international oil companies (IOCs) that operate in Nigeria have allowed contract disclosure in other countries where they work, including BP (Azerbaijan), Chevron (Liberia), ENI (Mozambique), ExxonMobil (São Tomé and Príncipe), Shell (Philippines) and Total (Mauritania).

Myth 2. Contracts contain commercially sensitive information that can lead to competitive harm if disclosed.

Petroleum contracts are unlikely to contain the kinds of information about a project that is commercially sensitive. Our review of 23 Nigerian petroleum contracts suggests that upstream contracts usually contain a range of terms relating to project management, work programs, royalty and tax payments, production shares, work obligations, local content obligations, employment and training of personnel and accounting procedures, while downstream contracts speak to payments, delivery information and pricing, among other things. While some of these terms may be commercially sensitive when companies are bidding for and negotiating their contracts, once a contract has been agreed it is highly unlikely that any of these terms could substantially harm the competitive position of a company if disclosed.

One exception might apply to "trade secrets"—information that is genuinely sensitive and for which companies have valid arguments for maintaining secrecy. Examples of such information include a company's technological secrets or information on future transactions. Yet, our review suggests that these kinds of terms are simply not included in Nigerian petroleum contracts. This stands to reason; after all, it is common for petroleum contracts to be signed by consortiums of companies and for the companies within those consortiums to change overtime, meaning that companies go into contracts knowing that competitors will have access. In such circumstances, it is highly unlikely that any company would risk writing trade secrets into any contract.

Myth 3. Confidentiality clauses in contracts do not permit disclosure.

While most contracts in Nigeria appear to contain confidentiality clauses, our review suggests that these would not present barriers if the government of Nigeria wanted to make contract disclosure a requirement. Among the 23 contracts in our review, all, except four, contained confidentiality clauses.[26]

These confidentiality clauses were remarkably similar, appearing to have been duplicated from one contract to the next over time. Box 1 presents a typical confidentiality clause from the 2007 Draft PSC for Continental Shelf Blocks. The Nigerian confidentiality clauses in our review were all extremely broad, applying to a range of information that might include "plans, maps, drawings, designs, data, scientific, technical and financial reports and other data and information" (see Clause 18.1). Yet, all the contracts we reviewed also contained an important exemption that allowed disclosure where it is required "to comply with statutory obligations or the requirements of any governmental agency or rules of a stock exchange" (see Clause 18.1(b)).

This is important because it means that there would be no barrier if any Nigerian government agency required public disclosure of petroleum contracts. In addition, this could be done through a number of channels including passing a law, developing

25 See Natural Resource Governance Institute, "How Many Governments Are Disclosing Oil, Gas and Mining Licenses and Contracts?" (2017), https://resourcegovernance.org/blog/how-many-governments-are-disclosing-oil-gas-and-mining-licenses-and-contracts.

26 See Appendix.

a regulation or even establishing a policy. Furthermore, the clause also allows for a home state or foreign stock exchange to require disclosure of certain contracts—an exemption that has already been used to disclose two contract amendments by Camac Energy to the United States Securities and Exchange Commission.

Box 1. Sample confidentiality clause

Clause 18: Confidentiality and Announcements, Draft PSC for Continental Shelf Blocks (2007)

18.1 The CONTRACTOR and the CORPORATION shall keep information furnished to each other in connection with petroleum operations and all plans, maps, drawings, designs, data, scientific, technical and financial reports and other data and information of any kind or nature relating to petroleum operations including any discovery of petroleum as strictly confidential, and shall ensure that their entire or partial contents shall under no circumstances be disclosed in any announcement to the public or to any third party without the prior written consent of the other party(ies). The provisions of this Clause 18 shall not apply to disclosure to:

- Subcontractors, affiliates, assignees, auditors, financial consultants or legal advisors, provided that such disclosures are required for the effective performances of the aforementioned recipients' duties related to Petroleum Operations;
- Comply with statutory obligation or the requirements of any governmental agency or the rules of a stock exchange on which a party's or affiliate's stock is publicly traded in which case the disclosing party will notify the other party(ies) of any information to be disclosed prior to such disclosure.
- Financial institutions involved in the provision of finance for the Petroleum Operations hereunder provided, in all such cases, that the recipients of such data and information agree in writing to keep such data and information strictly confidential.
- A third party for the purpose of negotiating an assignment of interest hereunder provided such third party executes an undertaking to keep the information disclosed confidential.

II. WHAT SHOULD BE DISCLOSED?

The arguments outlined in Part 1 apply to a range of contracts used by the government in both the upstream and downstream sectors. Because these contracting regimes are relatively complex, it is important to consider the basics of petroleum contracts in Nigeria when considering what should be disclosed.

Contracts in the upstream sector

The upstream sector is concerned with petroleum exploration and production—the processes by which oil and gas are found and exploited. Contracts in this part of the industry can detail important public issues such as government revenue both in cash and in oil, employment and business linkages, and environmental and social impacts. When making sense of upstream contracts it is important to note that each "contract" usually relates to a small ecosystem of documents including annexes, amendments and other associated documents. Contracts detail how operations proceed within licenses and leases, which refer to geographical areas (commonly referred as "blocks") within which companies are given the right carry out exploration or production activities, or in specifically designated operating fields.

Licenses and leases. The government petroleum regulator, the Department of Petroleum Resources (DPR), uses licenses and leases to give companies the right to carry out petroleum operations in specifically designated areas. Exploration rights

are granted through an oil prospecting license (OPL).[27] If a company discovers oil or gas in commercial quantities and satisfies the conditions set by the minister of petroleum resources, it is then able to obtain production rights via an oil mining lease (OML). Companies can also obtain these rights by acquiring the interest of another company that already owns them. The DPR discloses a list of all awarded licenses and leases in its Oil and Gas Industry Annual Reports.[28] As of November 2017, the DPR website stated that Nigeria has awarded a total of 68 OPLs and 102 OMLs, and a further 216 blocks had not been allocated to any company. Within the allocated blocks are a total of 315 petroleum fields, including 218 that were producing petroleum.[29]

Contracts. There are five different types of contractual arrangements under which companies carry out exploration and production operations. Government participation in these deals is undertaken by the state-owned oil company, NNPC, or its operating arm, the National Petroleum Development Company (NPDC).

1. **Joint operating agreement (JOA).** Nigeria has produced most of its petroleum through unincorporated joint ventures agreed between NNPC and international oil companies (IOCs). Six original JOAs covering multiple areas were signed with Shell, Chevron, Mobil, Agip, Elf and Texaco in the 1970s and 1980s, but following the sale of several JOA blocks to independent and indigenous companies as well as to NPDC, NNPC now has JOA relations with over a dozen companies covering about 60 blocks. Under each of the larger IOC agreements, the IOC usually acts as operator,[30] while NNPC holds a majority participatory interest share of between 55 and 60 percent managed by a subsidiary, National Petroleum Investment Management Services (NAPIMS). Operations are funded jointly by the IOCs and NNPC as per their interest share via annual cash calls and petroleum ownership is shared on the same basis. However, meeting cash call requirements presented the government with significant challenges over time, and inability to make payments in the 1990s precipitated the negotiation of a number of associated agreements with operators or third-party financiers, which alter the proportion of petroleum NNPC receives and dramatically increase the complexity of the JOA agreements.

    - Known associated documents:
        - Memoranda of understanding: agreements that modify the fiscal regime
        - Modified carry agreements (MCAs):[31] financing agreements made with JOA partners to finance NNPC's cash call obligation, which replaced earlier carry agreements
        - Third-party financing agreements:[32] financing agreements made with third party financiers to finance NNPC cash call obligations
        - Strategic alliance agreements:[33] financing agreements made between NPDC with domestic oil companies to finance NNPC cash calls in eight blocks operated by NPDC

27 The government is also able to issue Oil Exploration Licenses (OELs) for more limited exploration activities than those covered by the OPLs, however in practice OELs are no longer issued.
28 The Department of Petroleum Resources' Oil and Gas Industry Annual Reports are available at https://dpr.gov.ng/index/oil-gas-industry-annual-reports-ogiar.
29 See Department for Petroleum Resources, Statistics – Upstream, https://dpr.gov.ng/index/statistics.
30 Although NNPC reserves the right to become operator in all JOAs.
31 There are likely over a dozen active MCAs.
32 There are a handful of active agreements.
33 Two controversial agreements were signed and are now in the public domain. These appear to have since been terminated.

2 **Production sharing contract (PSC).** PSCs offer an alternative to the problematic cash call requirements of JOAs. This type of contract is now the preferred contractual arrangement following the expansion of the petroleum industry to deep offshore and inland basin acreages in the 1990s. PSCs are used in over 70 blocks, which have been signed with IOCs and independents, such as Addax, Shell, ExxonMobil, Total and Chevron, several national oil companies including CNODC, KNOC and Statoil, and a number indigenous companies. Under the PSC arrangement, the contracted company does not own any petroleum until it is taken out of the ground. A royalty and certain taxes are then paid, after which the company is allowed to recoup certain costs in oil. The remaining production is then shared between the company and NNPC on the basis of an agreed production share. The PSC regime is designed to emphasize fiscal and legal flexibility in which means that there is significant variation between among the various PSCs in operation. The PSC regime is governed in part by the Deep Offshore and Inland Basin Production Sharing Contracts Act. Model PSCs were produced in 1993, 1998, 2005 and 2007.

   - Known associated documents:
     - Annexes, which may include contract area, accounting procedures, allocation procedures, procurement and project implementation procedures, minimum financial commitment, strategic downstream projects (if applicable), nomination, ship scheduling and lifting procedures
     - Appendices, which may include participating interest, signature bonus, prospective bonus, parent company/affiliate guarantees, and memorandum of understanding

3 **Service contract.** Nigeria has experimented with service contracts since the late 1970s as an alternative to PSCs, but they remain uncommon. Under typical service contract arrangements, the contracted company never owns the oil produced but instead is simply paid a fee (in cash or petroleum) by the government to operate the field on its behalf. The only service contract currently in operation is for OML 116. NPDC has 100 percent equity in the block, and Agip Energy and Natural Resources Limited (AENR) carries out operations. Nevertheless, the terms of this agreement are incredibly similar to a PSC agreement.

   - Known associated documents: Annexes, which may include contract area, accounting procedures, allocation procedures, lifting procedures, and procurement and project implementation procedures

4 **Sole risk contract.** Sole risk contracts are another alternative to the PSC in Nigeria. Under these arrangements, the government and company involved do not share physical production according to an agreed formula. Rather, the company assumes all the risk of exploration and production, keeps all of the oil produced for itself, and is responsible for making statutory payments, including royalties and taxes to the government in cash. There are currently about 50 sole risk agreements active.

   - Known associated documents: Unknown[34]

5 **Marginal field agreement.** Under the banner of encouraging the development of indigenous petroleum companies, in the 1990s the government of Nigeria started to encourage IOCs to surrender marginal fields within their producing blocks to be "farmed out" to indigenous concession holders on a sole risk basis. In

34 The authors were unable to review a sole risk document.

1996, the government amended the Petroleum Act to regulate for marginal fields where discoveries had been booked and reported annually to the DPR for over 10 years, but where production had not taken place. The first marginal fields were awarded in 2003. There are now about 30 marginal fields of which about 9 are currently producing.[35] A second marginal field licensing round for several dozen fields has been many years in planning and is expected as soon as early 2018.[36]

- Known associated documents: Schedules, which may include farm-out area, description of environmental conditions of the farm-out area, environmental evaluation studies, and decommissioning and abandonment security plans

Common amendments. Over time, certain parts of contractual relationships tend to change. Common amendments of interest to the public include:

- **Changes in assignment of interest.** Any company with equity or participating, contractual or working interest in licenses, leases or marginal fields can transfer those rights or an interest in those rights to another company through merger, acquisition, take-over, divestment or other means, provided they meet certain requirements set by the DPR and obtain approval of the minister. Where changes occur, deeds of assignment and farm-in agreements confirm new ownership arrangements.
- **Extensions.** Licenses and leases in Nigeria have set terms. OPLs vary from between 5 and 10 years, while the standard term for OMLs is 20 years. An extension could be granted by the ministry, which contains new terms alongside a mandatory payment made by the license/lease holder to the ministry. It is also important to disclose these fees companies pay for extensions, renewals and assignments.
- **Relinquishments.** To encourage exploration, it is standard practice for companies to have to relinquish or give up part of their OPL area over time and when discoveries are made and the OPL is converted into an OML. Relinquishments detail the new contract areas.
- **Unitization.** Some discoveries straddle multiple blocks. Where the underlying geology determines that production efforts between rights holders should be coordinated, a unitization agreement is used to establish the new field and the agreement between the existing sub-surface rights holders.

Environmental documents. A further set of associated documents for which there is a strong public interest case for disclosure provides information about the management of environmental and social risks of a project. In Nigeria, the most important of these documents is the environmental impact assessment (EIA), which is required by the Environmental Impact Assessment Act. The environmental impact assessment process for oil and gas projects includes the following documents:[37]

- **Initial assessment.** A screening and scoping of significant issues carried out by the company and the DPR. Sets out various options that the project may follow.

35 See https://dpr.gov.ng/index/list-of-marginal-fields.

36 See Ejiofor Alike, "FG Sets Bid Round Guidelines for Award of 46 Marginal Oil Fields," *This Day,* 18 September 2017, https://www.thisdaylive.com/index.php/2017/09/18/fg-sets-bid-round-guidelines-for-award-of-46-marginal-oil-fields.

37 Soji Awogbade, Kofoworola Bamgbose and Otasowie Izekor, *Oil and Gas Regulation in Nigeria: Overview* (2017), accessed 10 November 2017, https://uk.practicallaw.thomsonreuters.com/5-523-4794?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1.

- **Preliminary assessment of impact report (PAIR).** Once a specific project option has been chosen, a PAIR assesses that approach in detail. It must be approved by the DPR before an approval of the project conceptual plan is granted to the company in question. If no significant impact is identified, project can proceed on the basis that appropriate mitigation measures and post-EIA monitoring are put in place.
- **Detailed EIA study.** If the PAIR identifies significant potential impact on the environment, the DPR and company must produce a detailed EIA study before the project can proceed.
- **Environmental evaluation report.** A post-impact report following the end of operations is required by law.

Other environmental and social documents include:

- **Environmental permits for emissions and discharge.** Effluent discharge sites must be registered with the DPR and no operator can discharge effluent without required permits.
- **Closure and decommissioning plans.** Details about decommissioning are set out in regulations and individual PSCs. Companies are required to submit a decommissioning plan to the DPR in order to discontinue or abandon a pipeline or petroleum facilities.

Contracts in the midstream and downstream sectors

The midstream and downstream sectors concern the marketing, distribution and refining of petroleum. The most important downstream public contracts detail the terms by which NNPC and its affiliates sell the petroleum they receive as a result of their participation in the upstream sector. The significance of these deals cannot be overstated. Between 2004 and 2014, NNPC received between 41 and 53 percent of total Nigerian crude and condensates produced each year,[38] and revenue from these trades is usually the largest single source of government revenue. While important contractual relationships exist for a wide range of midstream and downstream issues, this analysis focuses on trading contracts. Other areas where important contractual relationships may require increased transparency include but are not limited to refining, sale of products and petroleum imports.

Types of sales. Historically, NNPC has divided its crude oil sales into two main categories. Some of the barrels available to NNPC each month are allocated for *export sales* by NNPC's Crude Oil Marketing Division (COMD), after roughly 445,000 barrels per day (35 percent of total NNPC sales in 2013) is assigned to the *domestic crude allocation* (DCA). In theory, DCA oil is supposed to be sold on an inter-company basis to the Pipelines and Product Marketing Company (PPMC), NNPC's main downstream subsidiary, who are supposed to process it in the country's three NNPC-owned domestic refineries. However, owing to chronic financial and operational challenges in the domestic refineries, DCA crude actually ends up going in three different directions:

1. **Supply to refineries.** This is the petroleum that PPMC actually refines locally, which comprised around 10 percent of the DCA in July 2017.[39]
2. **Oil-for-product swaps.** Up to 50 percent of the DCA is allocated to complex oil-for-product swaps between NNPC and (mostly) international trading companies.

38 From *Inside NNPC Oil Sales*, based on *NNPC* statistical bulletins.
39 *NNPC Monthly Oil & Gas Report* (August 2017).

3 **Export sales of non-refined domestic crude.** Whatever remaining crude is left over from the DCA is sold on terms that are similar to regular export sales.

NNPC and some of its subsidiaries also sell a range of natural gas-based fuels and refined products, which are discussed in the next section.

Contracts. The sales described are structured by a range of contracts containing terms that have important bearing on the amount that NNPC receives for its petroleum share. In all cases, NNPC and contractors control the flows of information and accountability concerning these large and valuable but niche deals.

1 **Crude oil term contracts.** Term contracts are the main export sales contract used by the COMD. A typical COMD term contract lasts one year and grants holders the ability to purchase and lift[40] a set allocation of the government's equity share of Nigerian oil production. Term contracts tend to be awarded in one batch per year. In some years COMD has rolled over the prior year's contracts, extending them beyond their initial expiration dates. The most recent set of 39 term contracts was awarded in January 2017, with NNPC picking winners from among 224 bids submitted in November 2016. Most are supposed to receive 32,000 barrels per day.

2 **Spot sale contracts.** COMD occasionally makes one-off trades for individual cargoes of crude using spot sale contracts.

3 **Inter-company contracts.** Details the basis on which sales of crude or refined products are made by NNPC to PPMC or to its trading subsidiaries such as Duke Oil.

4 **Direct sale of crude oil and direct purchase of refined products agreements (DSDP).** DSDP deals are a kind of swap arrangement made by NNPC, under which the contract holders deliver fuel—mainly gasoline and kerosene—from abroad in exchange for the oil they receive from NNPC. NNPC entered into its first DSDP contracts in 2016, to replace other types of swaps signed during the tenure of president Goodluck Jonathan.

5 **Contracts for domestic and export sales of natural gas feedstock, natural gas liquids and refined products.** COMD, PPMC and Duke Oil regularly enter into a high number of (mostly) spot contracts to sell gas feedstock to local users; pentane, butane and other natural gas liquids to (mostly) export buyers; and a range of locally refined and imported fuels, notably gasoline, diesel, kerosene, fuel oil, naphtha and other intermediate products. Taken together, these contracts are worth several billion dollars annually. They are among the most secretive transactions in the industry and often grant buyers large, questionable per-unit discounts.

40 "Lifting" refers to the process of loading oil into a ship at an export terminal.

III. FOUR STEPS TO DISCLOSING PETROLEUM CONTRACTS IN NIGERIA

Step 1. Define the scope of disclosure.

As a first step, the minister of petroleum resources should define the scope and a pathway toward disclosure. There is a strong public interest case to be made for disclosure of all of the contracts outlined in Part 2, and government commitments made in "7 Big Wins" and the Open Government Partnership (OGP) National Action Plan are sufficiently broad to cover all of these documents.

Full text disclosure represents the strongest path to realize the benefits of public contracts. Contracts usually have several interlinked clauses and sub-clauses. For this reason, it is usually impossible to fully understand or scrutinize agreed terms without access to the full text of contracts. Further, without access to full text, general misunderstandings and rumors can lead to misinformation and erosion of trust. Full text means publishing unredacted complete versions of contract documents along with any annexes and any amendments that are produced as part of the normal management of extractive projects. This has become standard practice in recent years and is recommended by EITI requirement 2.4.[41]

Step 2. Establish a contract disclosure rule.

While our review of existing petroleum contracts suggests it is not necessary for the National Assembly to pass legislation to compel disclosure in Nigeria, moving to establish effective disclosure rules in law as soon as possible would be helpful. An immediate way to make contract disclosure mandatory would be via a government decree. Such a decree could easily be made by the Ministry of Petroleum and would allow it to quickly meet its commitments including those in "7 Big Wins," OGP and elsewhere. As an alternative—or in addition to—a decree, the government should include a requirement for contract disclosure in the tender protocols for upcoming upstream and downstream contracts or include a contract disclosure provision in all new model/draft contracts.[42] This has the benefit of ensuring that all prospective companies are aware of the policy before any application and awards are made.

The government could also choose to legislate this issue. Perhaps the best opportunity for a contract disclosure requirement lies in the Petroleum Industry Administration Bill (PIAB). There is ample precedent for a contract transparency provision in previous debates around petroleum industry bills, with requirements having been included in several previous iterations. (See Box 2.) Ideally, a provision on contract transparency would state:

- What specifically must be disclosed (best practice is the full text of all "active" contracts; the full text of any annex, addendum or rider; the full text of any alteration or amendment)
- A reasonable timeframe for publication following the date of signature
- The format of the disclosed contract (searchable electronic file) and channel for dissemination

41 https://eiti.org/document/standard#r2-4.

42 In Mongolia, Afghanistan and Malawi, to name just a few countries, it has become common practice to insert a clause to state that "This Agreement shall be made public." See, for example, Mongolia – Ivanhoe Mines Mongolia Inc. LLC, Ivanhoe Mines Ltd., Rio Tinto International Holdings Ltd., Oyu Tolgoi Deposit-6708A-6710A, Investment Promotion Agreement (2009), Article 15.21.

Box 2. Precedent for the establishing contract transparency in the petroleum industry bills

The idea of including contract transparency in the petroleum industry bills is not new. By our count, at least a half-dozen past drafts have contained contract transparency provisions, most often located in the subsections on contract confidentiality. This includes executive versions from the Umaru Musa Yar'Adua and Jonathan governments and versions introduced and debated in both the Senate and the House of Representatives.

For example, Section 173 of the version drafted by the 2009 inter-agency team created by the then-minister of petroleum resources read in part:

> "(6) The text of any existing or future license or lease or contract with the National Oil Company and any amendments or side letters thereto shall not be confidential and shall be published on the website of the Directorate…
>
> (7) The texts pursuant to subsection (6) of this section shall be on the website of the Directorate within one year after the commencement of this Act, and where such information is not supplied to the Directorate, a company in default shall pay a penalty of US 10,000 for every day such information is not available after the date required to the Directorate."

Other versions containing very similar language have included:

- Sec. 198(6) and (7) of the 2010 Senate version (SB 236)
- Sec. 208(6) of the 2011 House of Reps draft (HB 54)
- Sec. 174(6)-(7) of the 2012 Executive Petroleum Industry Bill
- Sec. 152(6)-(7) of the version recommended by the Joint Committee reviewing the 2012 Executive Petroleum Industry Bill

Step 3. Make contracts accessible.

While Nigeria's first priority should be to make contracts public, including via the publication of electronic copies online with paper-based options available to increase accessibility for communities lacking internet access, in the medium term the government should work to make contracts easy to browse, find, search and use.

Some of the most transparent countries have set up contract web portals that allow users to browse contracts by company, project and also geography. The best of these connect the information held by several different government agencies, such as those working with the petroleum sector, business linkages and the environment, making it easier for interested citizens to find needed information in one place. A leading example is the portal developed by Mexico's National Hydrocarbons Commission (CNH), which has a page for each petroleum project presenting full text contracts, work programs, local content and procurement rules, and environmental documents including environmental impact assessments and related studies and management plans (see Figure 2).

Another important consideration when releasing information is to ensure that documents are disclosed in machine-readable formats. All too often, disclosed documents are in locked PDF files that a computer cannot read. Machine-readable formats make the process of using contracts much easier. For example, with a machine-readable contract, someone interested in finding out company royalties across contracts would only have to keyword search for "royalties" in each document to find what they are looking for rather than having to go through pages and pages of contract language. Fortunately, technologies such as the resourcecontracts.org platform now allow for the publication of signed and initialed contracts in machine-readable formats.[43] Several countries, including the Philippines and Sierra Leone, are using this technology, and the Democratic Republic of Congo, Guinea and Mongolia are in the process of developing new sites

43 See http://resourcecontracts.org.

using the technology.[44] Indeed, ResourceContracts.org could present a ready-to-use platform that the government of Nigeria could use to publish petroleum contracts.

Step 4. Support contract use.

Nigeria's efforts should not end with the disclosure of contracts and licenses. For the government, companies and citizens to benefit from contract disclosure, the government of Nigeria should support initiatives to encourage the use of contracts. This may involve informational tools such as plain-language explanations of contracts, or training and outreach including participation in public forums to discuss contract terms, and training to build the capacity of local government officials, journalists, civil society groups and other stakeholders to better understand the nuances of extractive industry contracts and their impacts on extractive industry governance.

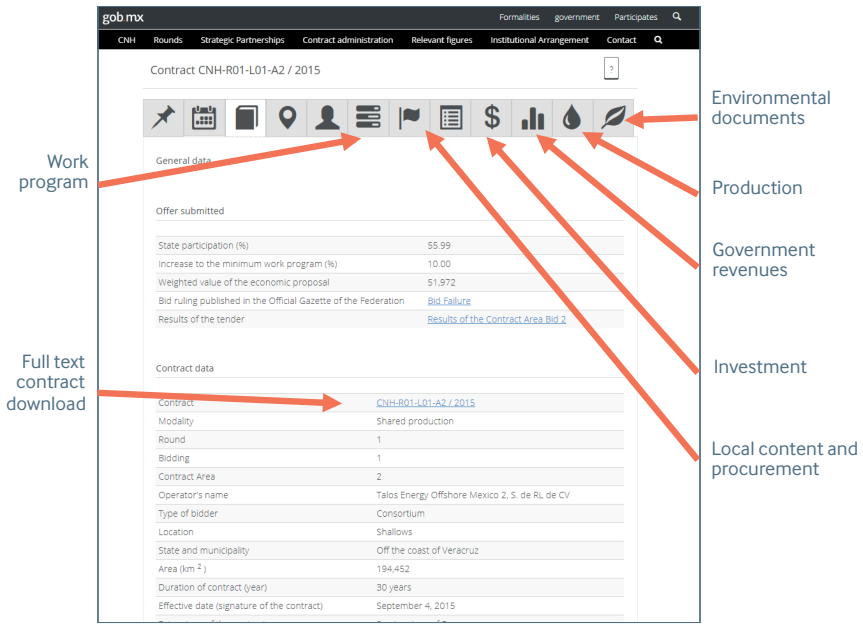

Figure 2. Example of a project page on the Mexican hydrocarbon regulator website connecting information from a range of regulatory realms[45]

44 For the Philippines website, see http://contracts.ph-eiti.org; for the Sierra Leone website, see http://www.nma.gov.sl/resourcecontracts.

45 See http://rondasmexico.gob.mx.

APPENDIX

List of contracts reviewed

Upstream model contracts

- Model PSC (1993)
- Model PSC (2005)
- Draft PSC for Continental Shelf Blocks (2007)
- Draft PSC for Deep Offshore Blocks (2007)
- Draft PSC for Inland Basin Blocks (2007)
- Draft PSC for Onshore Blocks (2007)
- Draft Joint Operating Agreement
- Draft Modified Carry Agreement*

Upstream contracts

- PSC between NNPC, Gas Transmission and Power Limited, Energy 905 Suntera Limited and Ideal oil and gas limited for Block 905 Anambra Basin (2007)
- PSC between NNPC, Sahara Energy Nigeria Limited and Seven Energy Nigeria Limited for OPL 332 (2005)
- Service Contract between NNPC and AGIP Energy and Natural Resources (Nigeria) Limited for Okono and Okpoho fields in OPL 91 (2000)
- Strategic Alliance Agreement between NNPC and Atlantic Energy Drilling Concepts Nigeria Limited for OML 30 (2011)
- Strategic Alliance Agreement between NNPC and Septa Energy Nigeria Limited for OMLs 4, 38 and 41 (2010)
- Marginal Field Farm-Out Agreement between NNPC, Shell Petroleum Development Company of Nigeria Ltd., Nigerian Agip Oil Company Ltd. and Elf Petroleum Nigeria Ltd. as Farmor, and Universal Energy Resources Limited as Farmee, for Stubb Creek (2003)

Upstream contract amendments

- Novation Agreement between Allied Energy Plc, Camac International (Nigeria) Limited, Nigerian Agip Exploration Limited and Camac Petroleum Limited (2010)*
- Agreement Novating Production Sharing Contract between Allied Energy Plc, Camac International (Nigeria) Limited, Nigerian Agip Exploration Limited and Camac Petroleum Limited (2011)*

Downstream model contracts

- Model NNPC oil sales term contract (2011) and General Conditions for NNPC Oil Sales Term Contract (2011)

Downstream contracts

- Duke RPEA 2011 – full contract and supporting documents
- Duke RPEA 2011 – Duke–Taleveras subcontract
- SIR OPA 2010 – full contract
- SIR OPA 2010 – SIR-Sahara subcontract*
- Aiteo OPA 2015

** Contract did not have a confidentiality clause*

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