



China-Nigeria Oil-for-Infrastructure Deal: Addressing Opacity and Exclusion in the Award of Oil Drilling Rights

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Key Points:

- The need to close the critical infrastructure gap in Nigeria was a primary factor in the adoption of the Oil-for-Infrastructure (OFI) investment model.
- The China-Nigeria OFI deal is an intentional resistance against over half a century of oil exploitation by Western oil behemoths that has stifled competition, reinforced a culture of rent-seeking and transnational bribery among Nigeria's political class, and ultimately constrained socio-economic development.
- The China-Nigeria Friendship Hospital and the University of Transportation project are not in exchange for oil, rather, they are part of the broader variety of related strategies that Beijing uses to cement its overseas investment relationships.
- China's enforcement of the anti-bribery provision against its national oil companies may dispel fears that some CSR programs by Chinese SOEs are used as smokescreens to influence the outcome of oil licensing exercises or gain business advantage, generally, over Western companies.

Introduction

For over five decades, Western multinational oil companies such as Shell, ExxonMobil, Chevron, Total, and Eni/Agip were the only major foreign investors in the Nigerian oil industry. But 2004 marked a watershed in the history of Nigeria's oil industry with the entry of Chinese national oil companies (NOCs) which led to the reconfiguration of the criteria for the acquisition of oil mining rights. China, through its NOCs, agreed to an oil-for-infrastructure (OFI) arrangement with Nigeria and, under the China-Nigeria OFI investment arrangement, Chinese NOCs are at various times awarded oil blocks in exchange for undertaking to invest in infrastructure projects in the host state.¹ These projects include, but are not limited to, the revival of moribund refineries and railways, the construction of seaports, airports, highways and electricity-generating plants, and the establishment of free trade zones. However, there are regulatory concerns and arguments in the interdisciplinary literature that suggest that the Sino-Nigeria OFI investment arrangement exacerbates corruption in the Nigerian oil sector

and has wider implications for the global war against bribery and corruption. Scholars contend that the negotiation and process of granting oil drilling rights to Chinese NOCs are opaque.² It has also been noted that Western oil investors were excluded from the oil licensing rounds of 2006, 2007, and 2008.³ Therefore, in this Research Brief, I address the claims of opacity, bribery, and exclusion of Western multinational oil companies (MNOCs). Whereas the concerns in the literature about the China-Nigeria OFI arrangement are important and I do not seek to minimize them at all, my Research Brief provides a nuanced understanding of the concerns and regulatory challenges arising from the China-Nigeria OFI investment arrangement.

China's Oil Investments in Nigeria: Crude Oil as a Bargaining Chip

Due to the unstable political system in Nigeria that persisted for more than three decades, Nigeria, as Africa's largest oil producer,⁴ was faced with a huge infrastructure gap. The infrastructure deficit was succinctly captured by the then

Minister of Finance and Coordinating Minister of the Economy, Dr. Ngozi Okonjo-Iweala, when she noted that “we need roads, we need power, we need help on aviation, agriculture”.⁵ In the words of Dr. Okonjo-Iweala, “they [China] want more oil and gas...we have something they want now, and they have something we want, so you have grounds for negotiations”.⁶ Consequently, the Nigerian and Chinese governments found complementarities of investment interests that resulted in the purchase of equity stakes in various Nigerian oilfields by Chinese NOCs.⁷ China's investment was made by its three NOCs: China National Offshore Oil Corporation (CNOOC), China Petroleum & Chemical Corporation (Sinopec), and China National Petroleum Corporation (CNPC). China's ‘Going Out’ strategy⁸ and its international petroleum policy⁹ are two key political and economic frameworks that have been driving Beijing's oil investment in Nigeria; over the past ten years, many of the infrastructure components of OFI investment deals such as railways and airports have been completed and handed over to the host state.

¹ Ian Taylor, *China's Relations with Nigeria*, 96 COMMONWEALTH J. INT'L AFF. 631-645 (2007).

² Alex Vines et al., *Thirst for African Oil: Asian National Oil Companies in Nigeria and Angola*, CHATHAM HOUSE (2009), https://www.chathamhouse.org/sites/default/files/ro809_african_oil.pdf; Ian Taylor, *Chinese Interest in Nigeria's Oil and the American Context*, 48 CANADIAN J. AFR. STUDIES / REVUE CANADIENNE DES ÉTUDES AFRICAINES 391 (2014); Cyril Obi, *The Petroleum Industry: A Paradox or (sp)oilier of Development?*, 28 J. CONTEMP. AFR. STUD. 443 (2010); Ugo G Nwokeji, *The Nigerian National Petroleum Corporation and the Development of the Nigerian Oil and Gas Industry: History, Strategies and Current Direction*, BAKER INSTITUTE & JAPAN PETROLEUM ENERGY CENTER (Mar. 2007) 109.

³ Vines et al., *supra* note 2.

⁴ U.S. Energy Information Administration, *Nigeria - International Analysis*, <https://www.eia.gov/beta/international/analysis.php?iso=NGA> (visited Apr. 8, 2019).

⁵ Joe Brock and Onuah Felix, *Nigeria to Sign Off on \$3 Billion in Chinese Loans*, REUTERS (July 13, 2013), [https://www.](https://www.reuters.com/article/nigeria-china-idUSL5NoF93N620130703)

[reuters.com/article/nigeria-china-idUSL5NoF93N620130703](https://www.reuters.com/article/nigeria-china-idUSL5NoF93N620130703) (visited Nov. 2, 2020).

⁶ *Id.*

⁷ *China and Nigeria Agree Oil Deal*, BBC NEWS (Apr. 26, 2006), <http://news.bbc.co.uk/2/hi/business/4946708.stm> (visited Nov. 3, 2020).

⁸ The “Going Out” strategy is a plan of action by Beijing for entering and navigating the mainstream global trade and investment landscape through its state-owned. *See, e.g., Better Implementation of the “Go Global” Strategy*, THE CENTRAL PEOPLE'S GOVERNMENT OF THE PRC (Mar. 15, 2006), http://www.gov.cn/node_11140/2006-03/15/content_227686.htm (visited Feb. 27, 2020).

⁹ The objectives of China's international petroleum policy are to implement the “Going Out” strategy, diversify the country's petroleum imports, build globally competitive flagship oil companies, and conduct petroleum diplomacy, among others; BO KONG, CHINA'S INTERNATIONAL PETROLEUM POLICY (2009).

Opacity in the Award of Oil Drilling Rights and Infrastructure Projects

The negotiation and process of granting oil drilling rights to the Chinese NOCs lacked transparency in the eyes of the public because most of the Sino-Nigeria OFI deals were agreed upon during a series of reciprocal visits between the Chinese and Nigerian leaders.¹⁰ The state-to-state relations of power that are embedded in the OFI arrangement make it an opaque and unique investment model and complicate its regulation.

In addition to the opaque nature of granting oil mining rights to the Chinese NOCs, all the infrastructure projects in Nigeria are being handled by Chinese state-owned engineering and construction firms and their subsidiaries.¹¹ It is concerning that some of the Chinese construction and engineering firms such as China Railway Construction Corporation, China Gezhouba Engineering, and China Zhonghao Nigeria

Limited, that have been awarded infrastructure contracts have been debarred, at one point or another other, by the World Bank Group and the African Development Bank for fraudulent and corrupt practices in procurement.¹² Why do Chinese companies get all the contracts? In light of the very large-scale projects, Nigeria is unlikely to be able to pay non-Chinese contractors as a result of insufficient liquidity; its economy is recovering from a historic downturn with significant external debt and budget deficits.¹³ Thus, the Sino-Nigeria OFI investment arrangement was likely to be the most economically, and perhaps even the most politically, expedient method of completing the projects. But the practice of awarding all infrastructure contracts to Chinese state-owned firms may be a violation of Nigeria's commitment to Article 9(1) of the United Nations Convention against Corruption (UNCAC) that enjoins State

¹⁰ *Obasanjo Calls for Chinese Aid*, THE MAIL & GUARDIAN, (Apr. 12, 1999), <https://mg.co.za/article/1999-04-12-obasanjo-in-china/> (visited Mar. 2, 2020); *Hu Jintao Holds Talks with Nigerian President Obasanjo*, MINISTRY OF FOREIGN AFFAIRS, PRC (2006), https://www.fmprc.gov.cn/mfa_eng/wjb_663304/zjzg_663340/fzs_663828/gjlb_663832/3059_664144/3061_664148/t249448.shtml (visited Mar 2, 2020); *Xi Jinping Holds Talks with President Muhammadu Buhari of Nigeria - The Two Heads of State Decide to Jointly Elevate China-Nigeria Strategic Partnership to a New Level*, EMBASSY OF THE PRC IN THE FEDERAL REPUBLIC OF NIGERIA (Apr. 14, 2016), <http://ng.china-embassy.org/eng/zt/buharivisit/t1355511.htm> (visited Mar. 2, 2020).

¹¹ The Chinese state-owned firms include China Harbour Engineering Company, China Railway Construction Corporation, China Civil Engineering Construction Corporation, China Petroleum Pipeline Engineering Company Limited, China Gezhouba Engineering Corporation, Sinohydro, and China Geo-Engineering Group Corporation, and China Zhonghao Nigeria Limited. See also China's African Policy, MINISTRY OF FOREIGN AFFAIRS (2006), <https://www.fmprc.gov.cn/zflt/eng/zgdfzcc/t463748.htm> (visited Dec. 10, 2019).

¹² *World Bank Group Debars China Railway Construction Corporation Ltd. and Two Subsidiaries*, THE WORLD BANK

(June 5, 2019), <https://www.worldbank.org/en/news/press-release/2019/06/05/world-bank-group-debars-china-railway-construction-corporation-ltd-and-two-subsidiaries> (visited May 14, 2020). *Debarment and Sanctions Procedures: List of Debarred Entities*, AFRICAN DEVELOPMENT BANK GROUP (2019), <https://perma.cc/DC6S-Z83S>; By virtue of the Agreement for Mutual Enforcement of Debarment Decisions signed by five Multilateral Development Banks (MDBs), individuals and firms debarred by one MDB for a minimum of one year are automatically debarred by the other MDBs. The Five MBDs are the African Development Bank Group, the Asian Development Bank, The European Bank for Redevelopment and Development, the Inter-American Development Bank Group, and the World Bank Group. See SUSAN FINDER, *The International Fraud and Corruption Sanctioning System: The Case of Chinese SOEs* in CHINA'S INTERNATIONAL INVESTMENT STRATEGY: BILATERAL, REGIONAL, AND GLOBAL LAW AND POLICY (Julien Chaisse, ed., 2019) 397-398-9.

¹³ *Nigeria: Staff Concluding Statement of the 2021 Article IV Mission*, INTERNATIONAL MONETARY FUND (Nov. 19, 2021), <https://www.imf.org/en/News/Articles/2021/11/19/nigeria-staff-concluding-statement-of-the-2021-article-iv-mission> (visited Mar. 13, 2022).

parties to “...take the necessary steps to establish appropriate systems of procurement, based on transparency, competition, and objective criteria...in preventing corruption”. Each State party to the UNCAC is urged to enact domestic legislation on anti-corruption to enhance the effective implementation of the international regime. The UNCAC is enforced by State parties and the enforcement is monitored and reviewed by the Conference of State Parties (COSP). Claims bordering on corruption and unethical business practices under the UNCAC are brought by a State party’s regulatory agency – in the case of Nigeria, the Economic and Financial Crimes Commission (EFCC). However, the enforcement of Article 9(1) of the UNCAC (or any of its provisions) in the Sino-Nigeria OFI investment deal may be hampered or attenuated by a conflict of interest as the Nigerian state is both the enforcer and presumed violator.

Exclusion of Western Multinational Oil Companies

The Nigerian government gave the Chinese NOCs the right of first refusal in the 2006, 2007, and 2008 oil licensing rounds.¹⁴ As a result, Western MNOCs were excluded. But there are plausible reasons and explanations for these actions by the host state. First, the Nigerian government provided equal opportunity to both the Chinese NOCs and Western MNOCs by inviting both sets of investors to concurrently exploit petroleum resources and invest in infrastructure projects – an offer that was turned down by Western

investors.¹⁵ The Chinese government accepted the offer. Second, the need to close the critical infrastructure gap in Nigeria, which I noted above, was a primary factor in the adoption of the OFI investment model. The exclusion of Western MNOCs and Nigeria’s use of the OFI arrangement is in accordance with the United Nations’ Resolution 1803 (XVII) on the *Permanent Sovereignty over Natural Resources* which recognizes “the inalienable right of all States freely to dispose of their natural wealth and resources in accordance with their national interests and with respect for the economic independence of States”.¹⁶ The infrastructure deficit in the host state meets the litmus test of “national interest” in this regard and the Nigerian government leveraged its rich hydrocarbon deposits by using various oil licensing agreements as useful means of infrastructure development. That the Sino-Nigeria OFI investment arrangement exacerbates corruption in the Nigerian oil sector, as claimed by some scholars, indicates that corrupt practices were already present in the industry before the arrival of Chinese NOCs. Indeed, opacity and other unethical practices in the Nigerian oil sector were institutionalized by the Western oil behemoths as the traditional ways of doing business and became the hallmarks of both Nigerian and Western oil companies’ practices, shaping the way they interacted over time.¹⁷ I shall return to this point below.

¹⁴ NIGERIA EXTRACTIVE INDUSTRIES TRANSPARENCY INITIATIVE REPORT 2006-2008: EXECUTIVE SUMMARY OF RECOMMENDATIONS AND PROPOSED ACTIONS, 32 (2011), <https://perma.cc/386X-TKXF>.

¹⁵ Nwokeji, *supra* note 2 at 111.

¹⁶ PERMANENT SOVEREIGNTY OVER NATURAL RESOURCES, A/RES/3171, UN GENERAL ASSEMBLY (DEC. 17, 1973),

<https://www.refworld.org/docid/3boofc64.html> (visited Feb. 18, 2022).

¹⁷ Kairn A. Klieman, *U.S. Oil Companies, the Nigerian Civil War, and the Origins of Opacity in the Nigerian Oil Industry*, 99 J AM. HIST. 155 (2012).

Sino-Nigeria Oil-for-Infrastructure Investment Model: Looking Eastward and Not West

In both colonial and post-colonial eras, trade and investment relations between Nigeria and Western investors in oil and non-oil sectors have been asymmetrical.¹⁸ As a result, Nigeria has been pigeonholed as an exporter of petroleum products and an importer of refined crude oil and manufactured products.¹⁹ Nigeria's oil industry was largely shaped by British oil imperialism²⁰ and for over five decades, petroleum exploration in Nigeria was monopolized by the Anglo-Dutch company, Royal Dutch Shell. Under the British oil policy of 1904, for example, non-British companies were expressly excluded from obtaining oil concessions in colonial Nigeria.²¹ The China-Nigeria OFI pact is therefore an intentional resistance by the host state against the transnational capitalist hegemony of Western MNOCs in Nigeria's oil sector and over half a century of exploitation of petroleum resources by Western oil companies that have stifled competition in the industry, reinforced a culture of rent-seeking and transnational bribery among Nigeria's political class, and ultimately constrained socio-economic development.

The Nigerian operations of Chinese NOCs and some Western private MNOCs - two different types of investors from two distinct and opposing legal, economic, and political ideologies - raise some intractable regulatory challenges. The Chinese approach is different because Beijing's processes for gaining access to oilfields in Nigeria tend to blur, in some cases, the lines between a bona fide gift and a bribe which complicates the regulation of the OFI deal. For example, China built a 150-bed China-Nigeria Friendship Hospital in Abuja as a gift to mark the 42nd anniversary of the establishment of diplomatic relations between the two countries. At the time of writing, Beijing is funding the construction of a University of Transportation that is being constructed by the China Civil Engineering Construction Company and sited in the hometown of Nigeria's president. In addition, the Chinese government has, in the last decade, increasingly rolled out various scholarships, exchanges, and training opportunities targeted at Nigerians. These two buildings, the Friendship Hospital and University of Transportation, are gifts to Nigeria as they are not part of the OFI deal. The university, for example, is part of the firm's corporate social

¹⁸ As Olufunmilayo B. Arewa rightly notes, "relationships between China and African countries unfold in a context shaped by histories of relationships between African countries and external parties, particularly European former colonial powers, which have far too often been exploitative and unequal. See Olufunmilayo B. Arewa, *Constructing Africa: Chinese Investment, Infrastructure Deficits, and Development*, 49 CORNELL INT'L L.J. 101 (2016).

¹⁹ Ian Taylor has, however, argued that Nigeria's trade relations with China are also extremely unbalanced as the African country imports ten times more than it exports to China. See Ian Taylor, *The Pathology of Dependency: Sino-Nigerian Relations as a Case Study*, in THE OXFORD HANDBOOK OF NIGERIAN POLITICS (Carl Levan & Patrick Ukata eds., 2018) 746-7. See also Taylor, *supra* note 1.

²⁰ In this Research Brief, I use the term 'imperialism' to refer to the domineering political and exploitative economic practices of the British Empire in colonial Nigeria, since I agree with Antony Anghie that the British Empire of the nineteenth century engaged in both colonial and imperial practices. See ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY, AND THE MAKING OF INTERNATIONAL LAW (2004). Similarly, Michael Doyle defines 'empire' as "a relationship, formal or informal, in which one state controls the effective political sovereignty of another political society. It can be achieved by force, by political collaboration, by economic, social, or cultural dependence. Imperialism is simply the process or policy of maintaining an empire". See MICHAEL W. DOYLE, EMPIRES (1986) 45.

²¹ BRIAN STUART MCBETH, BRITISH OIL POLICY, 1919-1939 (1985).

responsibility (CSR).²² The hospital and university projects are not in exchange for oilfields; they are part of the broader range of varied relational strategies that Beijing uses to cement its overseas investment relations. Yet, the gift and CSR initiative could be used as smokescreens to unduly influence a decision on oil drilling rights.

The bribery and corruption scorecards of the Western MNOCs in Nigeria are significantly different in some ways. As I have noted above, some Western MNOCs inaugurated corrupt practices in Nigeria. The bribery of Nigerian government officials by Western MNOCs takes different forms such as transnational wire transfers, the use of intermediaries and agents, concealment of bribery payments in accounting books, bid-rigging, cash-filled briefcases, and car gifts. In 2010, a Houston-based court found that Shell Nigeria violated the Foreign Corrupt Practice Act (FCPA) by falsifying its accounting books in furtherance of payment of bribes to Nigerian government officials to obtain an improper business advantage for the Bonga Deepwater oilfield.²³ A consortium of American and non-American oil services companies which includes Halliburton and Houston-based KBR pleaded guilty in the US for bribery and falsification of accounts in connection with their Nigerian

operations. Both used intermediaries and offshore entities to funnel money to high and low-ranking Nigerian government officials over ten years to win a contract for the construction of a liquefied natural gas (LNG) facility on Bonny Island in the Niger Delta region.²⁴

All forms of bribery are criminalized under Nigeria's Economic and Financial Crimes Commission Act (EFCC Act). The EFCC Act regulates any crime of an economic or financial nature involving private individuals, government officials, and companies within Nigeria and the EFCC investigates and prosecutes government officials, individuals, and local and foreign companies alleged to be involved in oil-related bribery. Notably, it investigated a one-time Halliburton's Chief Executive Officer and former US Vice President, Dick Cheney, in connection with his company's bribery of Nigerian officials for the award of a contract to build a LNG facility in Nigeria.²⁵ Following the intervention of former US President George Bush Sr. and former Secretary of State James Baker, the Nigerian government dropped the bribery charges against Halliburton and accepted a payment of \$35 million as fine.²⁶ In a similar vein, Article 164 of the Criminal Law of China makes illegal the act of offering bribes to a foreign official by a Chinese company or national

²² *Nigeria's Minister Optimistic About Future of University Built by Chinese Company*, XINHUA (Sept. 3, 2020), http://www.xinhuanet.com/english/2020-09/03/c_139340653.htm (visited May 15, 2022).

²³ *Oil Services Companies and a Freight Forwarding Company Agree to Resolve Foreign Bribery Investigations and to Pay More Than \$156 Million in Criminal Penalties*, US DEPT JUSTICE (Nov. 4, 2010), <https://www.justice.gov/opa/pr/oil-services-companies-and-freight-forwarding-company-agree-resolve-foreign-bribery> (visited July 29, 2019).

²⁴ SEC Charges KBR, Inc. with Foreign Bribery; Charges Halliburton Co. and KBR, Inc. with Related Accounting Violations - Companies to Pay Disgorgement of \$177 Million; KBR Subsidiary to Pay Criminal Fines of \$402 Million; Total

Payments to be \$579 Million, U.S. SECURITIES AND EXCHANGE COMMISSION (Feb. 11, 2009), <https://www.sec.gov/litigation/litreleases/2009/lr20897a.htm> (visited Aug 4, 2020). For a more detailed account of the bribery case in literature, see KEVIN E. DAVIS, *BETWEEN IMPUNITY AND IMPERIALISM: THE REGULATION OF TRANSNATIONAL BRIBERY* (2019) 197-227.

²⁵ Foreign Corrupt Practices Act: Enforcement Action Dataset, <http://fcpa.stanford.edu/enforcement-action.html?id=126> (visited Aug. 2, 2019).

²⁶ David Smith, *Nigeria to Drop Dick Cheney Charges after Plea Bargain*, THE GUARDIAN (Dec. 15, 2010), <https://www.theguardian.com/world/2010/dec/15/nigeria-dick-cheney-plea-halliburton> (visited Sep. 12, 2019).

for the purpose of obtaining illegitimate benefits. There is, however, no record of China's investigation or prosecution of its national companies operating overseas.²⁷ This is because the Party-State, through its control, has aligned the interests of SOEs with its own.²⁸ There is a possibility that the FCPA might be used to fill the regulatory gap in the Chinese Criminal Law if the NOCs engage in the bribery of foreign government officials. The FCPA can be invoked against the Chinese NOCs as the stocks of the NOCs, or those of their subsidiaries, are traded on the floor of the New York Stock Exchange. The three Chinese NOCs operating in Nigeria are American issuers by virtue of 15 U.S.C. s.78dd-1 of the FCPA.

Conclusion

The methods through which the Chinese and Western oil companies obtain oil drilling rights in Nigeria present different regulatory challenges. The Chinese NOCs use an atypical foreign investment model (the OFI) that, although it aligns with the host state's socio-economic needs, comes with the challenge of opacity. For their part, Western MNOCs lean in favour of a transparent, competitive, and level-playing field process in oil licensing exercises. As this Research Brief has demonstrated, the US authorities have increasingly prosecuted bribery of foreign government officials under the FCPA regime. For their part, the Nigerian anti-corruption agency (EFCC) has shown some indications, albeit slowly,

of fighting the bribery of its government officials by foreign business enterprises. The Chinese NOCs are conduits to achieving Beijing's economic policies and objectives. In any event, as the oil investments of Chinese NOCs in Nigeria (and in the extractive industries of other African countries) increase exponentially, Beijing should inject some measure of transparency into the operations of its NOCs by enforcing the foreign anti-bribery provision in its Criminal Law. China should enforce the anti-bribery provision by investigating and/or prosecuting foreign bribery allegations involving its NOCs and other SOEs under its Criminal Law whenever the case arises. The Chinese authorities should also be willing to work with foreign anti-corruption agencies to uncover corrupt deals involving its companies when the alleged deals have transnational elements. In this way China may demonstrate to the world that its SOEs doing business abroad can be trusted to play according to the norms of international business. China's enforcement of the anti-bribery provision against its NOCs may dispel fears that some CSR programs by Chinese SOEs are used as smokescreens to influence the outcome of oil licensing exercises or gain business advantage, generally, over Western companies.

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²⁷ Matthew S. Erie, *Chinese Law and Development*, 62 HARV. INT'L L.J. 51 (2021) 72. See also Andrew Brady Spalding, *The Irony of International Business Law: U.S. Progressivism and China's New Laissez-Faire*, UCLA L. REV. 354 (2012); Daniel C.

K. Chow, *China's Anti-Corruption Crackdown and The Foreign Corrupt Practices Act*, 5 TEX. A&M L. REV. 323 (2017).

²⁸ Erie, *supra* note 27.