

Promises are vanity, contracts are reality, transparency is sanity

Contracts signed between governments and resource companies are the fundamental documents that set out obligations, rewards, rights and protections in many oil, gas and mining investments. Without access to them, it is not possible for citizens to understand the nature of the agreements that their governments have made or monitor government and company commitments.

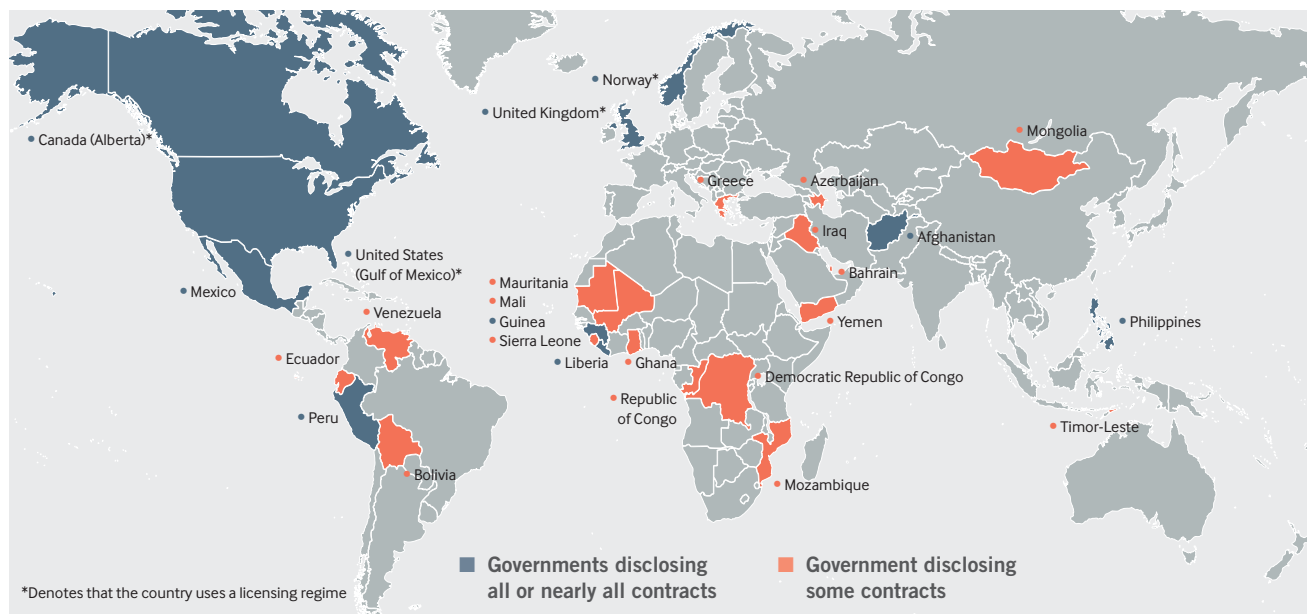
Disclosing contracts is an emerging global norm

Despite scepticism that contract transparency would ever take off, disclosure is rapidly emerging as a global norm among countries, companies and in international policy. This is reflected in uptake through EITI country processes and within national EITI commitments.

Open online contract repositories such as ResourceContracts.org and the OpenOil repository¹ have collected upwards of 900 contracts and associated

documents that are in the public realm. These disclosures include documents from more than 70 countries that have been shared for multiple reasons.

An increasing number of **host governments** are encouraging contract publication. There are now more than 25 countries that have published contracts and more are coming on board as time passes. Since 2010, at least 8 new countries have disclosed contracts.² Further, countries such as Guinea³ have instituted online searchable databases for their contracts and/or licenses. In Liberia⁴, the Republic of Congo⁵ and the Philippines⁶, online contract databases have been established by national EITI processes.



Companies are also publishing their contracts. While there were fears that this would lead to a backlash from investors, at the start, these concerns have proved unfounded. Company publication is mostly occurring as a result of systematic country level contract publication policies, such as for ExxonMobil in the U.S. and Liberia and for Rio Tinto in Guinea, or as a result of ad hoc publication by either governments and/or companies, including disclosures by BP, SOCAR, Amaco, Lukoil, Elf and Statoil in Azerbaijan, and Tullow and Kosmos in Ghana.

Elsewhere, **stock exchange disclosure rules** mean that many contracts and/or their key terms are publicly available in the stock exchange filings of extractive companies. Examples include TOTAL in Gabon (as a result of US Security and Exchange Commission rules)⁷, and Lion Petroleum in Kenya (as a result of a filing with the Canadian Securities Administrators).⁸

Progressive companies are cheerleading for contract transparency to build trust and improve their long term licence to operate. Rio Tinto stated in its Taxes Paid in 2014 Report that it "... supports countries publicly disclosing contracts and licences for the exploitation of oil, gas and minerals ..."⁹, while a Newmont official attested publicly that he "cannot see one reason why investment agreements are kept confidential", calling "the commercially-sensitive thing... an anachronism"¹⁰. Tullow Oil has stated that they "take the position that should a government wish to make these agreements public, we would fully support them in doing so"¹¹. Similarly Kosmos Energy has announced that "where it is legally possible and acceptable to our host governments, we also prefer to make the material terms of our Petroleum Agreements (PAs) and Production Sharing Contracts (PSCs) publicly available"¹².

International institutions have also supported contract disclosure. The World Bank Group's International Finance Corporation (IFC) requires that each IFC-backed oil, gas and mining project to disclose its "principal contract with government that sets out the key terms and conditions under which a resource will be exploited"¹³. Examples can be found on their website. For its part, the World Bank recommends open contracting as good practice.¹⁴ The IMF's Code of Good Practices on Fiscal Transparency states that natural resource "contractual arrangements ... should be clear and publicly accessible"¹⁵. The International Bar Association's Model Mining Agreement states: "This Agreement ... is a public document, and shall be open to free inspection by members of the public at the appropriate State office ..."¹⁶.

Advancing Contract Transparency through EITI

Section 3.12 of the EITI Standard encourages EITI-implementing countries to "publicly disclose any contracts and licenses that provide the terms attached to the exploitation of oil, gas and minerals". Furthermore, it is a "requirement that the EITI Report documents the government's policy on disclosure of contracts and licenses that govern the exploration and exploitation of oil, gas and mineral...", including "an overview of the contracts and licenses that are publicly available ..."¹⁷. However, recent analysis of 29 EITI reports that were submitted in 2014 revealed that more help is needed. *Many countries were failing to declare government policy on contract transparency, while five countries were failing to live up to their own disclosure laws (Burkina Faso, Cote d'Ivoire, Mauritania, Republic of Congo, DRC).*¹⁸

Positive impacts from contract transparency

There is mounting positive evidence that demonstrates the benefits of contract disclosure accrue to all stakeholders: governments, companies and citizens.

Getting a better deal. When contracts are made public, countries enter into negotiations with companies on a more level playing field, and the best companies enhance their competitive advantage over unscrupulous or under-qualified rivals. In Peru, a series of reforms carried out in 2007 saw the routine release of oil contracts as the country put in place a more transparent bidding process. This resulted in Peru massively improving the minimum level of royalties it received from 5% to 26% on average.¹⁹ In Liberia, effective transparency policies surrounding the contracting process have undoubtedly helped attract investment, including from some of the largest global resource companies such as Chevron and ExxonMobil. Moreover, an earlier opaque award process in Liberia with ArcelorMittal was addressed by a collaborative renegotiation, resulting in an agreement that had wider buy-in and public support.²⁰

Monitoring the rules. Availability of contracts makes it easier to know who should be doing what, and when they should be doing it, helping to ensure that expectations held by communities, governments and companies are keeping with reality. Community engagement in monitoring processes helps companies strengthen their social license to operate, and can reduce local conflict between stakeholders by bringing roles and obligations into the open. In DRC, civil society tracking of the payment and use of social development funds at the massive Tenke Fungurume copper and cobalt mine in 2013 revealed that while some social investments bore fruit, many local citizens were unaware of how funds were managed or how expenditure decisions were made. Civil society representatives were able to bring these concerns to the company, which welcomed the intervention and has expressed enthusiasm for constructive discussion building on a shared understanding of obligations.²¹

Improving trust and managing expectations. Awareness of the terms within contracts helps lay the foundations of trust between society, government and companies, and helps avoid misperceptions around agreements. In Cambodia, civil society was able to access the key terms of an oil contract disclosed by the operator and carry out an analysis with the support of Oxfam America which provided a reality check on the project and the timing and potential amount of revenues experts expected to flow to the government. Contrary to the expectations of many, the analysis showed that the government had actually done a fair job in its negotiations with extractive companies, but that expert estimates of the size and timing of revenues was vastly unrealistic.²² Conversely, failure to release contracts has led to national and local tensions for example in Tanzania²³, where a recently passed law encouraging contract transparency hopes to set things straight.²⁴

Feedback & collaboration with industry. Governments are finding that industry is often a willing partner in increasing openness around contracting. For example, the recent energy sector reforms in Mexico have built in transparency throughout the process so information is available throughout the bid rounds through to disclosures of payments and details of how those payments will be saved and invested. The oil firms provided constructive feedback in shaping the reforms and seem to appreciate the clarity and level playing field the transparent process affords. For what are often decades-long investments, industry and government have a shared interest in managing societal expectations and providing reassurance as to the integrity of the deal-making. This, in turn, reduces pressure for future renegotiations.

Mythbusting²⁵

Myth 1

Contracts contain commercially sensitive information that could cause competitive harm if disclosed. In reality, contracts are already widely circulated within the private sector and can often be bought online from commercial providers. Contracts being disclosed do not generally contain information that would meaningfully impact a company's competitiveness. Indeed, the more materially important that the contract is, the more likely it is to be disclosed to investors under stock exchange requirements.

Myth 2

Confidentiality clauses in contracts do not permit their disclosure. In practice, legislation and/or mutual consent supercedes confidentiality clauses. Confidentiality clauses often make room for exceptions when all parties to the contract agree.

Myth 3

Contract transparency might scare off investors. There is no evidence of this in practice. In fact, open contracting can reassure financial investors. Countries such as Guinea, Liberia and Ghana have received significant investment while disclosing contracts.

Myth 4

Disclosure of contract terms will fuel a 'race to the bottom'. As things stand, information in extractive deals is so asymmetric that "companies currently have a strategic advantage over governments, with greater access to information, and to contracts in particular"²⁶. Companies already know key terms and go in with a clear requirements for return on investment. Contract transparency would erode this advantage. Evidence from countries such as Peru suggests extractives contract disclosure and open contracting led to an increased fiscal take in subsequent deals.

What governments can do

1. Publish their contracts in an accessible, digestible manner, including summaries of the key contract terms.

Contracts and key terms therein should be published in a open data format to allow improved navigation and searchability in line with the Open Contracting Data Standard. The Philippines EITI contract portal is a great example of what can be done, using the readily available ResourceContracts.org platform.

2. Start a conversation with companies and civil society concerning contracts that are not in the public domain.

The first step in contract transparency is for all stakeholders to agree that the contracts can be shared openly.

3. Fully implement contract transparency laws.

While there are an increasing number of laws requiring contract transparency, only a handful of countries are publishing all their contracts. Non-disclosure of specific contracts can arouse suspicion of the particular deals surrounding those contracts.

4. Analyse and use information to negotiate better, more balanced deals, backed up by robust modelling.

Transparency enables better scrutiny, debate and policy, regular review of key terms, and helps monitor companies' performance of their obligations. Indeed, in extractives, you don't know what kind of deal you have until it is modelled. Disclosure is a key part of that modelling.

Greater complexity typically advantages companies over governments: one effective practice has been to adopt and publish model contracts that are vetted by the legislature or to legislate key terms to minimise the discretion in contract negotiations and in their monitoring, implementation and administration. Ideally, contracts should only be used to complement the legal framework to either accommodate specific frontier projects or as a temporary measure when the legal framework is not strong and comprehensive enough.²⁷

5. Adopt open contracting throughout whole process of concession awards.

Contract disclosure should be at the end of the chain of good practice in concession allocation, covering planning, tender, award and negotiation as per the Open Contracting Global Principles.²⁸ Peru's reforms show the benefit from both contract transparency and a better, more open allocation process.

Endnotes

- 1 See http://repository.openoil.net/wiki/Main_Page
- 2 These include Afghanistan, DRC, Guinea, Mali, Mauritania, Mongolia, Mozambique and Sierra Leone.
- 3 See <http://www.contratsminiersguinee.org/blog/021513-communiqu-e-eng.html>
- 4 See <http://www.leiti.org.lr/contracts-and-concessions.html>
- 5 See http://www.itie-congo.org/index.php?option=com_content&view=article&id=102&Itemid=127
- 6 See <http://contracts.ph-eiti.org/>
- 7 See https://www.sec.gov/Archives/edgar/data/1471261/000104746909009334/a2195051zex-10_5.htm
- 8 See <http://www.sedar.com/GetFile.do?lang=EN&docClass=13&issuerNo=00024587&fileName=/csfprod/data150/filings/02262626/00000001/w%3A%5CClient%5C4612%5C001%5C00678232.PDF>
- 9 See http://www.riotinto.com/documents/RT_taxes_paid_in_2014.pdf, p.6
- 10 See <http://allafrica.com/stories/201007020835.html>
- 11 Andrea K. Bjorklund (2015), Yearbook on International Investment Law & Policy, 2013-2014, Oxford University Press, p.563
- 12 See <http://www.kosmosenergy.com/responsibility/transparency.php>
- 13 See IFC Policy on Environmental and Social Sustainability http://www.ifc.org/wps/wcm/connect/7540778049a792dcb87efaa8c6a8312a/SP_English_2012.pdf?MOD=AJPERES, p.11-12
- 14 See http://www.ifc.org/wps/wcm/connect/industry_ext_content/ifc_external_corporate_site/industries/oil,+gas+and+mining/transparency/contract+disclosure
- 15 See <http://www.imf.org/external/np/fad/trans/>
- 16 http://www.mmdaproject.org/presentations/MMDA1_0_110404Bookletv3.pdf, Section 30.1(a), p. 130
- 17 See https://eiti.org/files/English_EITI%20STANDARD_11July_0.pdf, p. 25
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- 19 See <http://www.perupetro.com.pe/wps/wcm/connect/perupetro/site-en/Investors/Contracting/Contracting%20in%20Peru%20Evolution>
- 20 See <http://www.resourcegovernance.org/publications/getting-better-deal-extractive-sector-executive-summary>
- 21 See <http://www.resourcegovernance.org/news/blog/putting-contract-transparency-work-civil-society-monitoring-compliance-legal-obligations-a>
- 22 See Cambodia Block A Economic Modeling Project at <https://cambodiablocka.wordpress.com/independent-economic-analysis/about-the-modeling-project/>
- 23 See <http://www.thecitizen.co.tz/News/Pressure-mounts-over-Statoil-agreement/-/1840392/2439342/-/mqdkaaz/-/index.html>
- 24 See <https://eiti.org/news/tanzania-enacts-eiti-legislation>
- 25 With thanks to http://www.resourcegovernance.org/sites/default/files/nrgi_ContractDisclosure_20150311.pdf
- 26 See Contracts Confidential, <http://www.resourcegovernance.org/sites/default/files/RWI-Contracts-Confidential.pdf>, p.46
- 27 <http://ccsi.columbia.edu/work/projects/comparing-mineral-regimes-licensing-vs-contracts/>
- 28 http://www.open-contracting.org/global_principles