

The Case for Publishing Indonesian Mining Agreements

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Key messages

- The publication of mining contracts and licenses is a growing global norm that contributes to a more stable investment climate bringing benefits to government, companies and civil society. In Indonesia, publishing contracts may also aid cooperation between different levels of government.
- Despite enabling legislation to publish mining contracts and licenses, the government of Indonesia has not made these documents available to the public. Following a 2011 Central Information Commission decision and a 2016 Supreme Court decision confirming contracts and certain kinds of licenses to be open documents respectively, the government established a request-based disclosure system, but this system has not resulted in disclosure.
- As an Extractive Industries Transparency Initiative (EITI) implementing country, Indonesia will be required to publish all oil, gas and mining contracts and licenses that are granted, entered into or amended after 1 January 2021.
- It is unlikely that Indonesian mining contracts and licenses contain commercially sensitive information. It is also unlikely that existing confidentiality clauses preclude the publication of these documents.
- To improve access to mining contracts and licenses, the government should replace the request-based disclosure system for contracts and licenses with a system of proactive disclosure. Under such an approach, the government could publish contracts on its new MODI portal.

OVERVIEW

The disclosure of contracts and licenses in the extractive industries is a rapidly growing global norm. There are now over 44 countries that have disclosed at least some extractive industry contracts or licenses, and the new EITI Standard makes it a requirement for all implementing countries to publish contracts and licenses that are granted, entered into or amended after 1 January 2021.¹ This reflects a growing recognition among governments, the private sector and civil society organizations that disclosure of these documents helps to improve governance of natural resources and contributes to a more stable investment climate.

¹ Extractive Industries Transparency Initiative, *EITI Standard Requirement 2.4*, eiti.org/news/eiti-launches-2019-eiti-standard.

In Indonesia, long standing advocacy by civil society has resulted in notable advances.² In 2011, a decision by the Central Information Commission declared that mining contracts are open documents and a 2016 decision by the Supreme Court declared that IUP licenses are also open documents. Together with a new EITI requirement for the publication of contracts and licenses, these decisions provide the groundwork for the government of Indonesia to develop disclosure practices that will position the country at the forefront of a global trend. This brief explains why Indonesia should proactively publish these important documents, gives an overview of the documents that it should make public, and suggests a path for making publication a reality.

1. WHY DISCLOSE MINING AGREEMENTS?

The contracts and licenses agreed by the government of Indonesia and mining companies are crucial documents that set out many of the most important terms governing the operations of mining projects. Yet, while individuals can in theory make requests to obtain them on a case by case basis, in practice these documents are not accessible to the public.

Box 1. Challenges with the current request-based disclosure system

In principle, individuals can obtain Indonesian mining contracts and licenses from the Directorate General of Minerals and Coal at the Ministry of Energy and Mineral Resources (ESDM) via an online request system. However as noted in the latest Indonesia EITI report, this system has in practice not resulted in public disclosure of contracts or licenses.³ One of the key recommendations of this brief is that the government should replace this request-based system for contracts and licenses with a proactive disclosure system.

Request-based disclosure systems for contracts and licenses limit access to information in several ways. They require users to know which specific documents they need—something that is unreasonable to expect from most citizens, including even those with extractive industry expertise. They are also laborious for both petitioners and government. Petitioners must provide adequate background and detail their objectives as part of the application. Processing these requests takes up important government time, and also opens up the risk that government officials may exercise discretion in who can and who cannot access contract and license documents.

For these reasons, the global norm on contract transparency has instead centered on the proactive disclosure of contracts and licenses on public information portals. From a user perspective, proactive disclosure of contracts and licenses makes them easier to find, browse, search and use, which increases the likelihood that publication will yield real benefits. From a government perspective proactive disclosure means doing away with arduous request processes which frees up government time to work on other more pressing needs. In Indonesia, the existing Mineral One Data Indonesia (MODI) portal would be natural place for the government to proactively disclose contracts and license documents.

2 Publish What You Pay Indonesia, *Contract and Licensing Transparency in the Extractive Industry* (2017), pwyvindonesia.org/en/contract-and-licensing-transparency-in-the-extractive-industry.

3 EITI Indonesia, *Contextual Report 2016*, p.25, eti.org/sites/default/files/documents/vol.2-contextual-report-web.pdf.

There are several compelling reasons to proactively publish mining contracts and licenses in Indonesia:

(a) Indonesia already requires that public bodies must make mining agreements publicly available. The 2008 Law on Public Information Openness makes clear that the government should make public the contracts and licenses that it makes with companies. Article 11 (1)(e) of the law states that public bodies must make accessible at any time any “agreement between Public Bodies and third parties” meaning that contracts and licenses for minerals and coal are public documents. Article 13 (1)(e) of the 2010 Information Commission Regulation on Standard of Public Information Service affirms this principle. Decisions by the Central Information Commission and the Supreme Court have further confirmed the principle of publication for specific contracts and license documents:

- Following a request from Foundation of Public Information Development (YP2IP) for three mining contracts, the 2011 Central Information Commission decision 197/VI/KIP-PS-M-A/2011 confirmed that mining contracts are open documents.⁴
- Following a request from Jatam advocacy network for 700 IUP licenses in East Kalimantan province, the 2016 Supreme Court decision 614K/TUN/2015 confirmed that IUP licenses are open documents. Jatam has since received the documents, and while it does not have a public portal for access to the documents, it has told NRCI that it is able to share documents with any parties that are interested.

(b) Contract transparency is an EITI requirement. Indonesia is an EITI implementing country and gains several reputational benefits by implementing the EITI Standard. The new 2019 EITI Standard includes the following provisions on contract transparency:

- A requirement to disclose all extractive contracts and licenses that are granted, entered into or amended after 1 January 2021 and an encouragement to disclose all contracts and licenses, regardless of when signed.
- A requirement to provide a list of all active contracts and licenses indicating which are publicly available and which are not. For all published contracts and licenses the implementing country should include a reference or link to the location where the contract or license is published. If a contract or license is not published, the legal or practical barriers should be documented and explained. The government should produce these lists for all EITI reporting under the new standard.
- An expectation for EITI multi-stakeholder groups to agree and publish a plan for disclosing contracts with a clear timeframe for implementation and addressing any barriers to comprehensive disclosure. The multi-stakeholder group should integrate this into its work plans for 2020 onwards.

(c) Citizens have a right to view deals that their government makes on their behalf. The 1945 constitution of Indonesia clearly states that “natural resources within shall be under the powers of the State and shall be used to

⁴ YP2IP has since become inactive, so we were unable to confirm whether the government actually disclosed the contracts.

the greatest benefit of the people.”⁵ This means that when the government of Indonesia enters into agreements with companies over the management of natural resources, it does so on behalf of the Indonesian people. So that the Indonesian people can hold government and companies accountable for these deals, they need to be able to access the contracts and license documents in which those deals are detailed.

- (d) Publication of contracts helps government officials do their job more effectively.** An important challenge for effective resource governance in Indonesia is insufficient coordination between central and regional levels of government. The lack of easy access to contract and license information makes it difficult for all officials to know which terms companies are working under. Making agreements and associated documents publicly available is a straightforward way to ensure that all officials at all levels of government, including those based in regional governments, are able to access all rules (contained in contracts and licenses) that relate to their responsibilities. (See box 2.)
- (e) Access to contract terms facilitates public oversight and accountability.** Mining contracts and licenses in Indonesia contain terms which impact the lives of citizens including social obligations, environmental commitments, and tax & operational commitments. (See section 2 for details.) Publication of these terms allows parliamentarians, civil society, the media and the general public to better understand mining projects and to hold government and companies accountable for the terms to which they agreed and their eventual implementation. This public oversight and accountability make it more likely that the government will enforce the rules and treat companies consistently and fairly. This clearly benefits citizens affected by mining, but it also benefits responsible companies by creating a level playing field of public scrutiny.
- (f) Agreeing to publish contracts incentivizes government and companies to negotiate better, more sustainable deals.** As acknowledged by the Organisation for Economic Co-operation and Development, an intergovernmental economic organisation, when negotiators know that contracts will be subject to public scrutiny, they have powerful incentives to draft rights and obligations more carefully and agree terms that government, companies and citizens view as fair.⁶ This is important to secure sufficient benefits for the country and to create a stable investment climate. Contract disclosure can incentivize governments and companies to agree to sustainable deals from the start, reducing the risks of costly shutdowns, renegotiations and reputational damage. Industry figures increasingly recognize that publishing contracts reduces the risk that government may want to renegotiate deals. Tom Butler, CEO of the International Council on Mining and Metals (ICMM) a mining industry body including companies such as Freeport McMoRan who are active in Indonesia says, “While an open and transparent contract can also be renegotiated, such risks are reduced, as scrutiny of the contract would be public from the moment it was signed.”⁷

5 Government of Indonesia, *Constitution (Article 33.3)*.

6 OECD (2019), *Guiding principles for durable extractive industry contracts*, p.2 www.oecd.org/dev/Guiding_Principles_for_durable_extractive_contracts.pdf.

7 Extractive Industries Transparency Initiative, *Q&A with Tom Butler, ICMM CEO on contract transparency policy*, 11 July 2018, eiti.org/blog/qa-with-tom-butler-icmm-ceo-on-contract-transparency-policy.

Box 2. Significance of disclosure of contracts and licenses for regional governments

Mining contracts in Indonesia have been issued exclusively by the central government, while licenses are issued by central, provincial or district governments depending on the type of license area. Regardless of which level of government is directly responsible for the management of a contract or license, it is a fact that many clauses within contracts and licenses will be relevant for other levels of government in order for them to effectively carry out their responsibilities.

For example, contracts of work (CoW) and coal contracts of work (CCoW), which the central government issues contain several clauses that are relevant for provincial and district governments, including: environmental management and protection; community development plans; provision of infrastructure for the use of the local population; rules relating to use of Indonesian suppliers; and the payment of tax and royalties. Meanwhile, special mining business licenses (IUPKs), which also issued by the central government contain clauses on environmental management and protection; community development; settlement of land problems and other disputes; use of domestic goods, services and technology; and development of Indonesian workers.

Inadequate sharing of information on mining agreements between different levels of government has caused governance challenges in the past. For example, provincial government officials in Maluku requested additional local development funds from a mining company operating in Maluku without knowing that a clause in the company's contract with the central government meant there was already an official structure for local development spending (a community development plan) that they needed to work with the company to develop.⁸

While contract transparency offers clear benefits, there are several arguments that its detractors commonly use to oppose contract transparency.

Argument 1. Confidentiality of oil, gas and mining contracts is standard commercial practice.

While secrecy of contracts and licenses may still be common practice in Indonesia, industry practice in the rest of the world is changing. At least 44 countries have disclosed at least some extractive industry contracts or licenses, and 27 countries have laws requiring disclosure in at least one sector.⁹ Among EITI implementing countries over half have already disclosed contracts. Uptake and support have been strong among international organizations. The International Financial Corporation and the Multilateral Investment Guarantee Agency require publication of contracts and licenses for projects they support; and has been endorsed by the International Monetary Fund, the United Nations, the International Bar Association, and the Organisation for Economic Co-operation and Development.

Increasingly, the private sector also recognizes the value of contract transparency. At least 18 major extractive industry companies have made public statements supporting some form of contract transparency.¹⁰ This includes Freeport McMoRan who are active in Indonesia and have stated that they publicly file “all

8 Interview with government official, 5 December 2018.

9 See docs.google.com/spreadsheets/d/1FXEeD43jw6VYHV8yS-8KJ5-rR5l0XtKxVQZBWzr-ohY/edit#gid=0 based on Rob Pitman and Don Hubert, *Past the Tipping Point? Contract Disclosure within EITI* (Natural Resource Governance Institute, 2017), p. 2, 27, resourcegovernance.org/sites/default/files/documents/past-the-tipping-point-contract-disclosure-within-eiti-web.pdf.

10 This includes Barrick, BHP, Newmont, Rio Tinto and Vale. Furthermore, Rio Tinto actively publishes contracts with governments on its own website. See www.riotinto.com/ourcommitment/contract-disclosure-27483.aspx

material contracts regarding its business, including all material contracts with host governments, in accordance with the rules of the Securities and Exchange Commission (SEC).¹¹ As a result of this policy, the text of Freeport’s Contract of Work with the government of Indonesia is publicly available.¹²

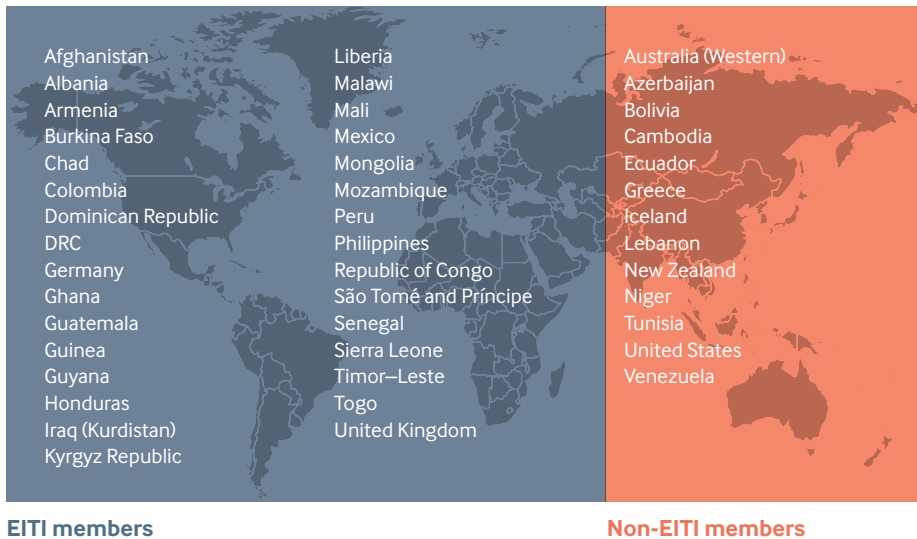


Figure 1. Governments that have published at least some extractive industry contracts¹³

Argument 2. Mining agreements contain information that can lead to competitive harm if disclosed.

Mining contracts or licenses are unlikely to contain the kinds of information that can lead to competitive harm. Our review of the legislative framework for mining agreements in Indonesia (see section 2) suggests that while some of the terms contained in agreements may be commercially sensitive when companies are bidding for or negotiating their terms, once a contract or license has been agreed or granted, it is highly unlikely that any of these terms could substantially harm the competitive position of a company if disclosed. Similarly, it is highly unlikely that agreements will contain “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.

Increasingly, companies realize that concerns about commercially sensitive information are relatively limited in scope. Speaking about commercial sensitivity in 2018, Simone Niven, Group Executive at Rio Tinto stated that “it has not prevented us from disclosing a vast majority of our contracts with governments as most of them do not contain commercially-sensitive information.”¹⁴ Similarly, Jean-François Lassalle, while in the role of senior adviser to the president (exploration and production) of Total remarked that “[a]s soon as a state wishes to publish all oil contracts... it is our view that the legal and commercial issues have been addressed.”¹⁵

11 Isabel Munilla and Kathleen Brophy, Contract Disclosure Survey 2018, Oxfam America, policy-practice. oxfam.org.uk/publications/contract-disclosure-survey-2018-a-review-of-the-contract-disclosure-policies-of-620465
 12 Republik of Indonesia and PT Freeport Indonesia Company, *Contract of Work*, www.sec.gov/Archives/edgar/data/831259/000083125901500022/exh101.txt.
 13 Contract transparency in the extractive industries, country policy and practice monitoring table: docs. google.com/spreadsheets/d/1FXEeD43jw6VYHV8yS-8KJ5-r5IOXtKxVQZBWzr-ohY/edit#gid=0
 14 “Q&A with Rio Tinto,” EITI, Jun 28, 2018, eiti.org/blog/qa-with-rio-tinto.
 15 “Q&A with Total,” EITI, Apr 10, 2018, eiti.org/blog/qa-with-total-first-major-to-adopt-contract-transparency-policy.

Argument 3. Confidentiality clauses in contracts do not permit disclosure of contracts.

Our review of the confidentiality clause for the publicly available Freeport contract suggests that confidentiality requirements in Indonesia are not intended to extend to contracts. As box 3 shows, the agreement itself is not specifically mentioned in the article as being confidential. Furthermore, in any event the clause includes important exemptions that would mean the confidentiality obligations would not prevent disclosure of the contract, even if it were interpreted as “confidential data.” Specifically, the exemption for “data in the public domain,” and “data which have been published pursuant to laws and regulations of Indonesia or of a foreign country in which a shareholder may be domiciled” mean that any confidentiality requirement does not override the legal obligations of the government of Indonesia (as described above) to disclose contracts.

Box 3. Confidentiality clause from the Freeport contract¹⁶

Article 7 REPORTS AND SECURITY DEPOSIT

6.a. Except as otherwise provided in this paragraph 6, the Government has title to all data and reports submitted by the Company to the Department or the Government pursuant to the provisions of this Agreement. Such data and reports will be treated as strictly confidential by the Government to the extent that the Company shall so request; provided, however, that data in the public domain (because of having been published in generally accessible literature or of their mainly scientific rather than commercial value, such as geological and geophysical data) and data which have been published pursuant to laws and regulations of Indonesia or of a foreign country in which a shareholder may be domiciled (such as the annual report of public bodies or companies) shall not be subject to the foregoing restrictions; provided further that the term “data” as used in this paragraph shall include, without limitation, any and all documents, maps, plans, work sheets and other technical data and information, as well as data and information concerning financial and commercial matters.

b. In respect of data relating solely to areas relinquished by the Company from the Contract Area Block B pursuant to Article 4, the foregoing restrictions shall cease to apply as from the date of relinquishment of such areas. In addition, where this Agreement has been terminated pursuant to Article 20 or Article 22, the foregoing restrictions shall cease to apply.

c. Notwithstanding the foregoing, exclusive know-how of the Company, its sub-contractors or Affiliates contained in data or reports submitted by the Company to the Department or the Government pursuant to the provisions of this Agreement and which shall have been identified as such by the Company shall only be used by the Government in relation to the administration of this Agreement and shall not be disclosed by the Government to third parties without the prior written consent of the Company. Such exclusive know-how, as long as it remains exclusive know-how of the Company, its sub-contractors or Affiliates as the case may be, remains the sole property of the Company, its sub-contractors or Affiliates, as the case may be. The provisions of this subparagraph (c) shall survive the termination of this Agreement in accordance with laws and regulations from time to time in effect relating to intellectual properties. In the case any such exclusive know-how is not patentable in accordance with such laws, the Company may request the Government not to disclose such know-how for a period of not less than three years after termination of this Agreement.

16 Republic of Indonesia and PT Freeport Indonesia Company, *Contract of Work*.

Argument 4. Both parties to a contract (government and the company) must agree on publication before disclosing contracts.

It is the government that is ultimately responsible for governing the mining sector including setting rules on transparency. It is certainly good practice for the government to discuss disclosure with companies in advance to make sure that companies are ready and able to anticipate new communications needs that might arise from publication of contracts and licenses. However, there is no requirement in Indonesia for companies to sign off on disclosures before they happen in legislation or regulations. It may be possible that contracts and licenses that the government has made with specific companies may include clauses to this effect, however this is not the case in the publicly available Freeport contract.

2. WHAT SHOULD THE GOVERNMENT PUBLISH?

The arguments of this brief apply to all agreements and associated documents that set out the terms for extractive activity in Indonesia. Given that these documents in the mining sector are relatively complex, this section provides an overview of the main categories of agreements that should be proactively published. Given that there are over 3,600 licenses and projects at the time of writing, we acknowledge that this will be a significant undertaking in the short to medium term. We therefore outline potential phased approaches for the publication of contracts and licenses in section 3 of this brief.

Box 4. Mineral One Data Indonesia

The Directorate General for Minerals and Coal has recently launched a new online mining company portal, Mineral One Data Indonesia (MODI). MODI will house public information on all mining companies in Indonesia, including company name, address, shareholders, licensing history data production data and some payment data. While MODI would be a natural place to house contract, licensing and other documents detailed in this brief, it currently does not have this functionality.¹⁷

Mining contracts

Prior to the introduction of the 2009 Mining Law, mining projects were managed through a mixed regime of contracts and licenses. Indonesia required a company to have a standardized license known as a ‘mining authority’ (KP) to carry out mining activity, but foreign companies also had to agree to lengthy contracts with the government for each project. These contracts had the status of special law and could override applicable Indonesian laws. Because each contract could be different, this system allowed for variation in the terms under which specific projects could be managed.

Contracts agreed between the government and companies typically included several terms for which a strong public interest case for disclosure could be made. These included rights and obligations on: environmental management and protection; community development plans; provision of infrastructure for the use by local population; rules relating to use of Indonesian suppliers; and the payment of tax and royalties.

¹⁷ See modi.minerba.esdm.go.id/portal/dataPerusahaan.

Even though no new contracts are being signed, existing contracts remain valid, subject to certain adjustments to bring them in line with the new law. These adjustments have centered around six strategic issues (and a strong public interest case could be made for disclosure of each), including: the size of the mining areas; the continuation of the mining operation; state revenues; the obligation to process and refine minerals in Indonesia; the obligation of shares divestment; and the obligation to utilize local goods and services.

Active contracts include:

- **Contracts of work (CoW).** Contracts for mining of minerals. Thirty-five contracts are active. All but three have been amended to in line with the adjustment obligations.
- **Coal contracts of work (CCoW).** Contracts for mining of coal. Sixty-eight contracts are active. All have been amended to bring them in line with adjustment obligations.

Mining licenses

The 2009 Mining Law ended the contract system in favor of a licensing system under which agreements with companies became more standardized. While the intention was that project rights and obligations would now follow terms set out in generally applicable laws and regulations, the Mining Law (in article 168) suggests that if the government and a company were to agree to different terms in their license, that this would override the rules set out in the law. While it is generally understood that no license deviates from the generally applicable laws in this way, it is not possible to know this for sure without reviewing the license documents.

License documents contain several project-specific terms for which a strong public interest case can be made for publication, including: environmental management and protection; community development; settlement of land problems and other disputes; use of domestic goods, services and technology; and development of Indonesian workers.

Specific license types used in Indonesia include:

- **Special mining business licenses (IUPKs).** Licenses for conducting mining in special areas which are prioritized for state-owned and regional government-owned companies. Companies wanting to extend projects currently managed under CoWs and CCoWs must do so under the IUPK framework. IUPKs are issued as exploration IUPKs and production operation IUPKs. There are currently two active IUPKs in Indonesia: PT. Freeport Indonesia and PT. Amman Mineral Nusa Tenggara (AMNT).
- **Mining business licenses (IUPs).** General mining licenses. IUPs are issued as “exploration IUPs” and “production and operation IUPs.” There are over 3,400 active IUPs in Indonesia.¹⁸

18 ESDM Figures, February 2019.

Associated documents. Important documents that are associated with contracts and licenses also include information for which a strong public interest case can be made for disclosure:

- **Environmental documents.** Before commencing any mining activities, companies must prepare and submit an environmental impact assessment (AMDAL), or for lessor projects an environmental analysis (UKL-UPL). For any project seeking environmental approval after February 2012, the company must also obtain an environmental license. Holders of environmental licenses must comply with terms in the license, report on compliance every six months and maintain collateral funds for any potential environmental restoration.
- **Workplan and budget (RKAB).** Prepared on an annual basis, the RKAB includes important information relating to operations, procurement spending, and environmental protection and management such as mine closure and reclamation plans. Many countries such as Mexico, New Zealand and the U.K. publish annual commitments set out in workplans allowing oversight actors to hold companies and government accountable to their agreements.¹⁹

Other licenses

There are a number of other licenses made in the mining sector in Indonesia which may also be of interest to the public.

- **Smallholder mining license (IPR).** License for conducting mining activities of limited size and investment. IPRs are not available to foreign investors and are managed by regional governments.
- **Processing and refining IUP-OP.** License for companies to carry out purchasing, transporting, processing and refining, as well as selling of mineral and coal commodities. Given the value that can be made or lost through the processing and refining process, these licenses may help citizens assess the value of certain processing and refining processes.
- **Transportation and sales IUP-OP.** License for companies to carry out purchasing, transporting and selling of mineral and coal commodities. Given that sales of natural resources have impacts on the state revenues that can be generated by mining activities, these licenses may help citizens ensure that Indonesian resources are generating the best value for their country.
- **Mining services business license (IUJP).** License for companies to perform core business services activities including consultation, planning and implementation work relating to mining projects. Given the prevalence of extractive industries corruption cases that involve subcontractors, these licenses may help citizens better identify problematic relationships between service companies and the companies that operate mining projects.

¹⁹ Natural Resource Governance Institute and Open Contracting Partnership, *Open Contracting for Oil, Gas and Mineral Rights: Shining a Light on Good Practice* (2018), p. 47, resourcegovernance.org/analysis-tools/publications/open-contracting-oil-gas-and-mineral-rights.

3. HOW CAN THE GOVERNMENT MOVE TOWARD DISCLOSURE?

There is already a legal mandate to publish mining contracts and licenses in Indonesia. Furthermore, as an EITI implementing country, Indonesia will be required to publish all contracts and licenses that are granted, entered into or amended after 1 January 2021. The challenge facing decision makers is therefore not whether they should make contracts and licenses public, but rather how the government should move to make them public. In this section we identify five steps that should be taken. If done well, Indonesia has the potential to mark itself out as a global leader on this fast-growing global trend.

Step 1. Agree to a plan for disclosing contracts

ESDM should develop a plan for proactively disclosing all contracts and licenses governing extractive industry projects. Given new EITI requirements on contract transparency, this could be developed in tandem with the Indonesia EITI process. In line with the requirements and expectations of the 2019 EITI standard, a plan on contract transparency should include a clear timeframe for implementation, and should contain a list of all active contracts and licenses indicating which are publicly available and which are not. This list could draw on the data already published in the MODI portal. In line with the EITI requirements, for any license or contract that is published, the ESDM should include a reference or link to the location where the contract or license is published. For contracts and licenses that are not yet published, the ESDM should explain the legal or practical barriers to disclosure if there are any. Following the development of the plan, the government should meet with stakeholders from civil society, the private sector and other relevant government officials to discuss how they will implement the plan. Indonesia's EITI multi-stakeholder group should be engaged in this process and is well placed to review the extent to which government is implementing the plan on an ongoing basis.

Step 2. Publish contracts and licenses (where there are no legal or practical barriers)

To demonstrate its commitment to the publication of contracts and licenses, the ESDM should move to quickly to publish contracts for which there are no legal or practical barriers to disclosure. The MODI portal would represent a natural place for such disclosure. Considering the sheer number of active mining contracts and licenses in Indonesia, the government may want to prioritize disclosure of specific documents to make the task more manageable. If the government takes a phased approach, we recommend starting by systematically disclosing COWs, CCOWs, IUPs and their associated documents because there are fewer of these documents. Next, they can widen the scope to include the full range of IUPs, IUP-OPs and IUPs. Under an alternative approach, the government may want to start by publishing contracts or licenses that are new or recently amended in line with requirements of the 2019 EITI standard. Another alternative approach would be to prioritize contracts and licenses relating to production and operations ahead of those relating to exploration, before finally considering other types of contract and licenses.

Step 3. Resolve any legal barriers to disclosure, and enshrine disclosure in law

For contracts that the government cannot publish as a result of legal barriers to disclosure, it should work to address those legal barriers. Where confidentiality clauses in existing contracts or licenses prevent disclosure, the government should work to amend those contracts or licenses. While it does this, in order to build trust and understanding of the specific challenges in publishing contracts and licenses, the government might want to publish the specific clauses that prevent disclosure. In addition to removing legal barriers, any renewals, extensions or renegotiations could also be an opportunity to update contract terms. Best practice would be to write a contractual provision requiring the contract to be public. Several countries including Afghanistan, Mexico and Mongolia, and the International Bar Association's Model Mining Development Agreement include such language. Looking toward the future, the government of Indonesia should work to enshrine the principle of contract and license disclosure in law or regulations. Language on such a provision should simply 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

The annex to this brief contains examples of how other countries have included contract transparency language in laws, contracts and license documents.

Step 4. Make contracts easy to find, browse, search and use

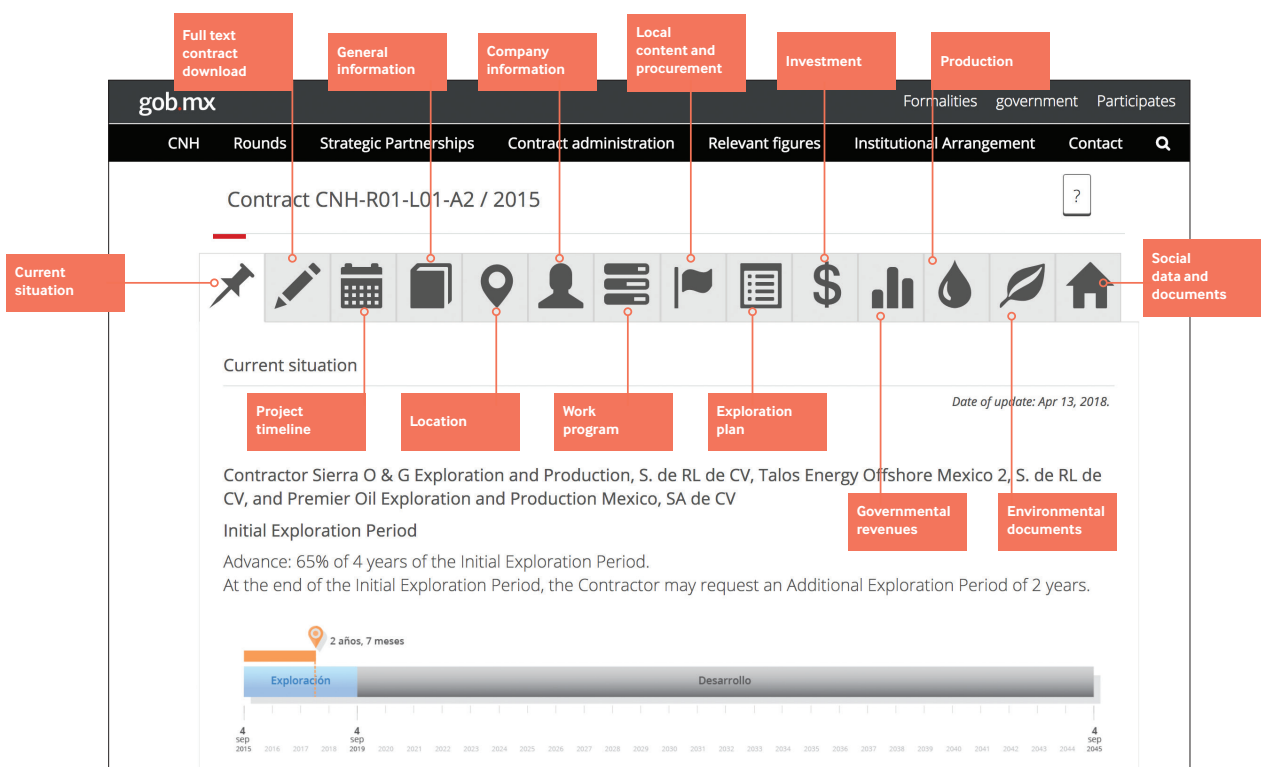
Once the government has made contracts public, it should start working to make contracts easy to browse, find, search and use. There are three important ways that it can do this, all of which could be incorporated into the MODI platform or into another free standing contracts platform.

- 1 **Use machine-readable formats.** All too often, original contract documents are disclosed as image files or “locked PDF” files with text that cannot be searched. By contrast, machine-readable formats allow keyword searches saving users from having to go through pages and pages of contract language to find what they are looking for. Technologies such as the resourcecontracts.org platform provide a ready tool that countries can use for the publication of contracts in machine-readable formats. Several countries, including the Philippines, Sierra Leone, DRC, Guinea and Tunisia are using this technology.²⁰
- 2 **Organize contracts, licenses and associated documents by project.** Organizing documents by project on a single website can make contracts and associated documents easier to browse and find. It can also provide a place for the government to present important contextual information to help users better understand the disclosures that are being made. By collaborating with other agencies and ministries, the government could add other relevant documents including environmental documents and relevant information from RKABs.

20 For example, the Philippines website is available at contracts.ph-eiti.org, while the Sierra Leone website can be viewed at www.nma.gov.sl/resourcecontracts.

3 **Incorporate data on implementation.** Given that contracts and licenses are only the starting point for defining extractive projects, these documents should be complemented by implementation information, including production and payment data and relevant project milestones. Again, the MODI platform, which has the functionality to publish production data and some payment information, appears to be a promising start in this regard. A leading example, from which the ESDM could learn is the Rondas Mexico portal developed by the Mexican hydrocarbons regulator CNH, which has a page for each petroleum project that presents full text contracts, work programs, local content and procurement rules and environmental documents including environmental impact assessments and related studies and management plans, alongside implementation data including production data, investments and government revenues. (See figure 2.)

Figure 2. Example of a project page on the Mexican hydrocarbon regulator website connecting information from a range of regulatory realms²¹



Step 5. Support use of contracts and licenses

Indonesia’s efforts should not end with the disclosure of contracts and licenses. For the government, companies and citizens to benefit from disclosure, the government of Indonesia should support initiatives to encourage the use of contracts and licenses by a range of stakeholders. This may involve informational tools such as plain-language explanations of contracts, 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.

21 See rondasmexico.gob.mx.

ANNEX. CONTRACT DISCLOSURE PROVISIONS IN SELECTED CONTRACTS AND LAWS

Country	Contract disclosure provision	Source
Language in laws		
Cameroon	SECTION 6: (1) Contracts signed between the Administration and public or private enterprises, in particular those exploiting natural resources and those operating public service concessions shall be clear and made public. These principles shall be applicable to the award procedures as well as the contents of contracts. (2) Such contracts shall be duly audited by the competent jurisdiction and the competent parliamentary commissions. (3) The involvement of the Government in the private sector shall be transparent and based on non-discriminatory rules and procedures.	Law No. 2018/011 of 11 July 2018 to lay down the Cameroon Code of Transparency and Good Governance in public finance management www.prc.cm/en/multimedia/documents/6583-law-n-2018-011-of-11-july-2018-to-lay-down-the-cameroon-code-of-transparency-and-good-governance-in-public-finance-management
Sierra Leone	40. (2) Each petroleum license, and any accompanying agreement between the State and the licensee providing details on the license conditions attached to the license, shall be published in its entirety in the Gazette and in such other manner as may be prescribed.	Petroleum (Exploration and Production) Act (2011) www.sierra-leone.org/Laws/2011-07.pdf
Language in contracts		
Mexico	29.2 Public Information. Without prejudice to the provisions of the Applicable Law, except for Technical Information and intellectual property, all other information and documentation derived from this Contract, including its terms and conditions, as well as all information relating to the volumes of Hydrocarbons Produced, payments and considerations made in accordance with it, will be considered public information. Likewise, the information that is registered by the Contractor in the computer system made available by the Fund for the determination of Considerations, may be used to comply with the existing transparency obligations in the Applicable Law, as long as it does not violate the confidentiality of the Information, Technique or intellectual property.	Contract for Area Contractual 2 rondasmexico.gob.mx/esp/contratos/cnh-r01-i01-a22015/?tab=02 (Non-official translation from google)
Mongolia	15.21. This Agreement shall be made public	Oyu Tolgoi Investment Agreement ot.mn/agreements/
Afghanistan	33.1 Transparency. The Ministry shall have the right to keep a copy of this Contract in the Hydrocarbons Register, publish and keep publicly available and distribute to provincial offices such information and reports on the Contract, related documents and the Contractor as is required pursuant to the Hydrocarbons Law and any regulations issued thereunder or pursuant to any transparency principles or policies adopted by the Government, including the EITI. Such information and reports may include production and financial data concerning all revenues from income taxes, production shares, royalties, fees and other taxes and other direct or indirect economic benefits received by the Ministry and all amounts paid by the Contractor under or in relation to this Contract. The foregoing shall not preclude the Ministry from disclosing the Contract or any information relating to Hydrocarbons Operations if the Ministry concludes that such disclosure is in the national interest or complies with the EITI or other internationally accepted norms relating to transparency in the extractive industries. 33.2 Trade Secrets. If any information referred to in Section 33.1 concerns technical devices, production methods, business analyses and calculations and any other industrial and trade secrets and are of such a nature that others may exploit them in their own business activities, the Ministry may approve that such information may rightfully be subject to confidentiality for a period of time determined by the Ministry.	Sanduqli Block, PSA www.resourcecontracts.org/contract/ocds-591adf-1045801310

FURTHER READING

Hubert, Don and Rob Pitman. *Past the Tipping Point? Contract Disclosure within EITI*. Natural Resource Governance Institute, 2017.

Mining Contracts: How to Read and Understand Them. 2014.

Munilla, Isabel and Kathleen Brophy. *Contract Disclosure Survey 2018*. Oxfam America, 2018.

Natural Resource Governance Institute and Open Contracting Partnership. *Open Contracting for Oil, Gas and Mining Rights*. 2018.

Publish What You Pay Indonesia. *Contract and Licensing Transparency in the Extractive Industry*. 2017

Rosenblum, Peter and Susan Maples. *Contracts Confidential: Ending Secret Deals in the Extractive Industries*. Revenue Watch Institute, 2009.

Smith, Erin and Peter Rosenblum. *Enforcing the Rules*. Revenue Watch Institute, 2011.

ADDITIONAL RESOURCES

Contract transparency in the extractive industries, country policy and practice monitoring table: docs.google.com/spreadsheets/d/1FXEeD43jw6VYHV8yS-8KJ5-rR5l0XtKxVQZBWzr-ohY/edit#gid=0

ResourceContracts.org contract repository: www.resourcecontracts.org

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