

Contract Transparency

Creating Conditions To Improve Contract Quality

KEY MESSAGES

- Contracts represent the agreement between the government and the extraction company about how, when and at what cost the extraction occurs. They represent the “deal” the government gets in exchange for mineral rights.
- In order for citizens, parliamentarians and oversight actors to monitor and analyze the public benefit from contract deals, contracts must be made publicly available.
- Contracts can be disclosed without threat to industry or governments.
- Contract transparency is a growing phenomenon in developed and developing economies as its benefits to all stakeholders are becoming more obvious.

*Authorities should...
publish contracts and
make them readily
available online.*

– Natural Resource Charter,
Precept 2

WHAT ARE CONTRACTS, AND WHY IS CONTRACT TRANSPARENCY IMPORTANT?

In most countries, oil, gas and minerals are the property of the nation. This means that the country and its citizens own the natural resources. When governments, as representatives of the nation, decide to develop natural resources, they usually enter into agreements with companies giving companies the right to extract the natural resources in exchange for a share of the profits. These agreements go by many names, including contracts, licenses, concessions or permits.

These documents contain lots important information that citizens, as co-owners of these resources, should have a right to know, including : the geographical area in which companies have been given the right to explore or exploit natural resources; fiscal terms, such as taxes, royalties and production shares, which can have an enormous impact on public finances; operational and production commitments, which can influence investment and government revenues; health and safety requirements that directly impact the well-being of those employed and living locally; environmental commitments that may have national and local significance; social obligations, including infrastructure, local content and consultation requirements; and stabilization provisions, which can insulate projects from changes to certain parts of the legal framework.

Publication of contracts brings benefits to all stakeholders. When citizens are able to view contracts, they can monitor extractive industry projects and see whether the rules are being followed. This reduces the risk that negligence or corruption will have adverse

This primer is intended for use in conjunction with Precept 2 of the Natural Resource Charter.

environmental and social impacts and yields benefits for both the private sector and the government. For companies, publishing contracts can be an important step toward a “social license to operate” and this can help build stronger community relationships that make projects more stable. For governments, contract transparency increases public trust that the government is working in the interests of citizens, provides valuable information that strengthens the government’s capacity to enforce the rules, and ensures that all officials have access to the agreed terms relevant to their responsibilities.

Contract transparency also 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 most especially government negotiators resist high-level political interferences and excessive industry pressure during negotiations and drafting of these contracts. These kinds of pressures, which are quite common in licensing and contract award processes in resource rich countries and can lead to the kind of lop-sided deals that result in non-compliance of the agreed terms and costly confusion which hampers operations.

While it is normal for there to be many contracts surrounding each extractive industry project, it is important to be clear that the type of contracts that are the concern of this brief, and which are the target of most international advocacy, are those made between the governments and companies. These are commonly called “state-investor” or “host government” agreements. In addition to these core contract documents, the arguments of this brief also apply to another layer of ancillary agreements, permits, approvals and studies that add or modify rights or obligations agreed in the original contract, license or permit. While the exact form that these ancillary agreements might take vary from country to country, a generalized overview list of standard documents is provided in Figure 1.

Contracts, Licenses, Permits
Main agreement
Annexes
Amendments
Environmental documents
Environmental impact assessments
Environmental monitoring plans
Environmental implementation reports
Associated environmental studies
Closure and decommissioning plans
Social documents
Local content/local employment plans
Community development agreements/ Corporate social responsibility plans (if applicable)
Implementation reports

Figure 1. What should be published? State-investor contracts and related documents.

WHY AREN'T ALL CONTRACTS ALREADY PUBLIC?

In most countries, when laws are passed, they become public documents. As such, everyone in the country knows the rules and can check whether others are following them. You may be wondering why extractive industry contracts are different. The primary reason seems to be a vestige of long-standing industry practice. Extractive industry contracts emerged from purely commercial contracts, which typically had a confidentiality clause indicating that there would be consequences if either party shared the terms with anyone else. This practice of secrecy has persevered in most oil- and mineral-rich countries, even with public contracts that govern billions of dollars of public revenues and directly impact the lives of many citizens.

Missing where it is needed most

The results of the 2017 Resource Governance Index (RGI) show that contract transparency may actually be missing where it is needed most. Jurisdictions that do not disclose royalty and tax rates in publicly available laws, regulations or policies—usually an indication that these terms are instead contained in contracts—are much less likely to publish contracts. Of 16 jurisdictions that the RGI identified as not disclosing royalty and tax rates in publicly available laws, regulations or policies, only one had ever published contracts.

THE LEGAL HIERARCHY

As discussed in the NNGI Primer on legal frameworks, contracts do not exist in a vacuum. Instead, they are part of a country's overarching legal framework for managing extractive industries. This framework can often be thought of as a hierarchy, as shown in Figure 2, that includes the constitution, laws and policies, regulations, and a model contract. While the constitution and laws apply very broadly, the contract has specific terms that apply specifically to the companies involved in one extraction site and the government.

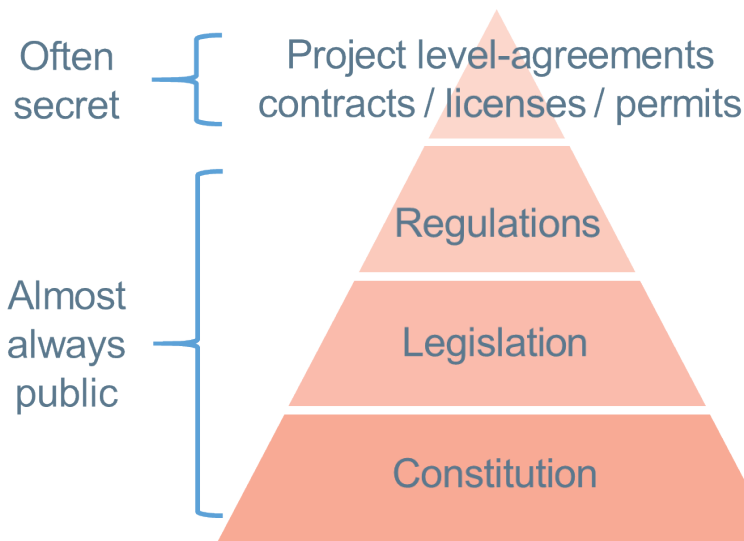


Figure 2. Contracts and the legal hierarchy

The number of issues dealt with in contracts is not the same in every country. Some countries have constitutions, laws and regulations that are very specific about the rules governing extractive industries. As a result, there might be less information in the contract and less for the government and company to negotiate on in each deal. Meanwhile, in other countries, less might specified in the constitution, laws and regulations meaning that the contract will contain more information and that more issues are decided through negotiations. In theory, law and policy is supposed to have more authority than a contract (*take precedence*, in legal speak). However, contracts can also be written to explicitly override the laws and regulations. This can have a negative overall impact on extractive industry governance, as too much variance from one project to another makes it more difficult to effectively monitor and enforce agreements. In practice, the prevalence of contract-specific arrangements means that even when legal frameworks have many details about the extractive policy, oversight is impossible unless the contract is made public.

ARGUING FOR CONTRACT TRANSPARENCY

The most common arguments against contract transparency, as demonstrated below, are fairly easy to rebut.

Argument: Contracts contain commercially sensitive information that could cause competitive harm if disclosed.

Rebuttal: *Petroleum contracts are unlikely to contain the kinds of information about a project that is commercially sensitive. 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 over time, meaning that companies go into contracts knowing that competitors will have access. Given this reality, it is highly unlikely that any company would risk writing trade secrets into any contract.*

Argument: Confidentiality clauses contained within contracts do not permit contract transparency.

Rebuttal: *In most cases, legislation and/or mutual consent can generally supersede confidentiality clauses. Further, confidentiality clauses often make room for exceptions when all parties to the contract agree. In many countries extractive industry confidentiality clauses in contracts are not written a way that expressly forbid contract disclosure. However, it is impossible to know for certain without accessing the contracts.*

Argument: Contract transparency will scare off investors.

Rebuttal: *There is no evidence that a company's or a country's commercial position has been affected due to contracts being disclosed. In fact, countries such as Liberia and Ghana have received significant investment as they have disclosed contracts, while Mexico has put contract transparency at the center of successful efforts to attract private capital to the petroleum sector post-2013.*

Argument: Contracts are too complex for the general public to understand.

Rebuttal: *There is a wealth of free educational tools available to educate policy-makers as well as civil society, the general public and media. While there is clearly a need for additional public education on how to analyze and monitor extractive industry contracts, a growing amount of experience shows that disclosure improves public dialogue and provides a strong basis for improving citizen understanding.*

GLOBAL TRENDS IN CONTRACT TRANSPARENCY

Contract transparency in the oil, gas and mining industries is fast emerging as a global norm, practiced by governments, companies and the international community. More than 1,500 contracts and other related documents are now in the public domain, according to open online contract repositories, such as ResourceContracts.org and the OpenOil repository, and this number is constantly growing. Contracts are being made public for multiple reasons:

Governments are making it their policy to disclose contracts. A 2017 NRG I report, called *Past the Tipping Point*, shows that 39 governments have officially disclosed at least some extractive industry contracts. Most of these governments have made disclosure a requirement by writing it into national laws, including extractive industry laws, freedom of information laws and, in some cases, even the constitution. Disclosure laws make contract disclosure more likely to occur. They also ensure that disclosure is systematic and standardized, making contracts easier to find, access and use. As Figure 3 shows, the number of countries with laws requiring contract transparency has risen dramatically in recent years.

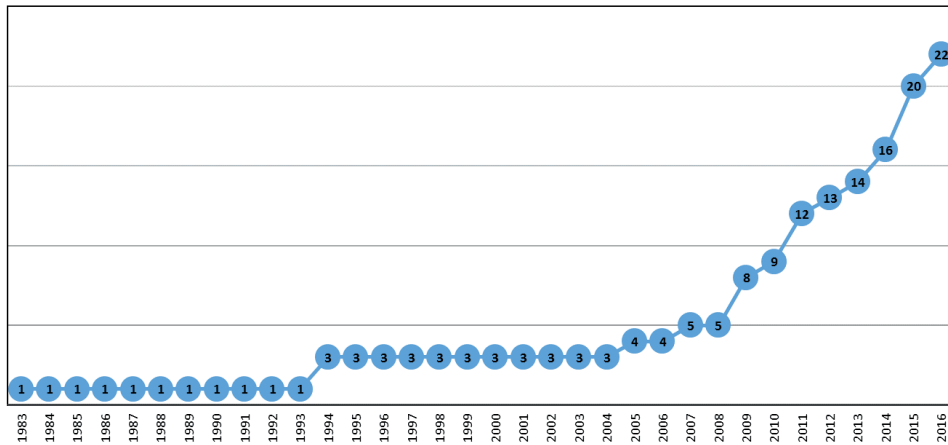


Figure 3. Number of countries with laws requiring publication of extractive industry contracts

Companies are supporting government efforts to publish contracts. A 2018 Oxfam Contract Disclosure survey of 40 leading extractive industry companies showed that 18 companies support contract transparency in some form. These include industry giants like Rio Tinto and Total, as well as progressive smaller companies, such as Kosmos Energy and Tullow Oil. (See Figure 4 for a full list.) Many other companies that have not developed policy on the issue are still disclosing as a result of host country disclosure rules. In some cases, company disclosures have taken place in countries where the government has no policy to proactively disclose all contracts. For example, in Mongolia, Turquoise Hill Resources published its investment agreement with the Mongolian government for the Oyu Tolgoi copper deposit on its company website.

LEADERS: Supportive policy available on website along with contracts	RUNNERS UP: Supportive policy available on company website or document	NOTABLE: Supportive statement made publicly or provided in response to Oxfam enquiry, but not available on company website or document	WEAK: Narrow support for contract disclosure with conditions and limitations, not available on company website or document	NO SUPPORTIVE STATEMENTS ON CONTRACT DISCLOSURE
Kosmos Tullow	PanAust Rio Tinto ■ ■ Total ■	Angkor Gold A.P. Møller - Maersk BP ■ Freeport McMoran ■ ■ ■ BHP Billiton ■ ■ ■ ■ Goldcorp ■ Newmont ■ Petrobras Repsol ■ Royal Dutch Shell ■ ■ Statoil ■	Barrick ■ Vale ■	Anadarko AngloAmerican ■ AngloGold Ashanti ■ Chevron ■ China Shenhua Energy CNOOC ConocoPhillips Eni ExxonMobil ■ First Quantum Minerals Glencore ■ Gold Fields ■ IAMGOLD KrisEnergy MMG ■ Newcrest Occidental OceanaGold Orano Group/Areva ■ PetroChina Pluspetrol Teck ■

Bold = EITI Supporting Companies ■ = EITI Board Members ■ = ICMM Members ■ = B Team Responsible Tax Principles

Figure 4. Overview of Company Positions on Contract Transparency

Source: Oxfam, 2018

International organizations are incorporating contract disclosure principles into their guidance. In 2007, the International Monetary Fund’s *Guide on Resource Revenue Transparency* called for the disclosure of extractive contracts. In 2010, the U.N.’s special representative for business and human rights, John Ruggie, included the recommendation that contract terms be disclosed among with the U.N. Principles for Responsible Contracts. In 2011, the International Bar Association released the Model Mine Development Agreement, which included a provision that “this contract is a public document.” Contract disclosure was recommended in the 2017 OECD Secretary-General’s High-Level Advisory Group (HLAG) report, *On Combating Corruption and Fostering Integrity*. Since 2013, contract disclosure has been encouraged by the EITI Standard—the global standard for the good governance of oil, gas and mineral resources.

International financing organizations have also taken note. In 2012, the International Finance Corporation (IFC)—the World Bank’s private sector lending arm—added a financing requirement that IFC-backed oil, gas and mining projects disclose the “principal contract with government that sets out the key terms and conditions under which a resource will be exploited.” The World Bank’s Multilateral Investment Guarantee Agency (MIGA), which guarantees foreign direct investments in developing countries, has similar requirements for projects it supports, while the European Bank for Reconstruction and Development established similar requirements for hydrocarbon projects in 2013.

DISCLOSURE AND BEYOND

The first step in contract transparency is for the government and the companies to agree that contracts can be shared openly. Sometimes the passage of a law requiring contract transparency can help make this happen, but it is not always necessary. When disclosing contracts, it is important that they are easily accessible by the public, including in the primary languages of the country. Best practice contract disclosure follows the following principles:

- **Publish full-text documents.** Because contracts contain many detailed and interlinked terms, publication of full-text documents (in other words, without redactions or omissions) is important to avoid misrepresentation, misunderstanding and mistrust that may arise when incomplete or inaccurate summaries of contract documents are produced.
- **Use 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.
- **Join-up documents managed by different agencies.** Full disclosure would include the complete range of contracts and ancillary agreements outlined in Figure 1. In many countries, several of these documents may be held by different agencies within a government. For example, the main contract may be managed by the sector ministry, while environmental documents may be managed by an environmental protection agency, and local content agreements may be managed by the ministry of commerce. Bringing all these documents together in one place can make it easier for users to understand the big picture and find what they need.

Once contracts are public, oversight actors then have the responsibility to use the information disclosed in the contracts, together with other publicly available information, to monitor the company’s performance and test whether it is in compliance with the contract. Civil society organizations have partnered with industry experts to put out new, easily accessible guides on monitoring and analyzing oil, mineral and gas contracts.

In a related effort, many countries are looking beyond the contracts themselves and considering the process leading up to a closed deal (e.g., information about the procedures for applying for and awarding contracts). These countries are opening up the entire process of awarding contracts and applying the Open Contracting Data Standard, a non-proprietary data standard for sharing contract information throughout the entire process. Around 20 countries are already using this standard.

QUESTIONS TO ASK

- Are contracts in my country publicly available? If not, why not? If yes, are all contracts easily accessible and public?
- Does the government oppose contract disclosure? If so, why?
- Do the companies in the country oppose contract disclosure? If so, why?
- Are there strong independent actors in the country who are able to monitor contracts to ensure companies and government do not renege on their responsibilities? If not, what are the steps that could help empower such actors to take on an effective oversight role?

ADDITIONAL RESOURCES

Peter Rosenblum and Susan Maples, *Contracts Confidential* (NRGI 2009), available at: www.revenuewatch.org/contractsconfidential

Don Hubert and Robert Pitman, *Past the Tipping Point? Contract Disclosure within EITI* (NRGI, 2017), <https://resourcegovernance.org/sites/default/files/documents/past-the-tipping-point-contract-disclosure-within-eiti-web.pdf>

Contract transparency in the extractive industries, country policy and practice monitoring table <https://docs.google.com/spreadsheets/d/1FXEeD43jw6VYHV8yS-8KJ5-rR5l0XtKxVQZBW-zr-ohY/edit#gid=0>

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

Extractive Industries Transparency Initiative, *Guidance note 7 – Requirement 2.4 Contract Transparency*, (EITI, 2017) <https://eiti.org/sites/default/files/documents/guidance-note-7-contract-transparency.pdf>

Erin Smith and Peter Rosenblum, *Enforcing the Rules*, (Revenue Watch Institute, 2011) <https://resourcegovernance.org/analysis-tools/publications/enforcing-rules>

Contract Disclosure in Using EITI for Policy Reform, Natural Resource Governance Institute Guide to the EITI Standard: <http://www.resourcegovernance.org/eitiguide/#!allocation-of-rights>

NRGI and Open Contracting Partnership, *Open Contracting for Oil, Gas and Mining Rights*, (2018) <https://resourcegovernance.org/analysis-tools/publications/open-contracting-oil-gas-and-mineral-rights>

Resource Contracts Contract Repository: www.resourcecontracts.org

Open Oil Repository: <https://repository.openoil.net/wiki/Downloads>

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