

How and Why the Myanmar Government Should Publish Petroleum and Mining Contracts

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Key messages

- Contract disclosure is a growing global norm. The Extractive Industries Transparency Initiative (EITI) board agreed to require all member governments to disclose the contracts they sign with oil, gas and mining companies beginning in January 2021. Around the world governments, companies and civil society are increasingly advocating for disclosure.
- In Myanmar, progress has been extremely slow. Despite civil society activists and several major investors supporting reforms, the government has not disclosed any petroleum or mining contracts so far.
- With new licenses expected to be issued in the petroleum, minerals and gemstone sectors, the Myanmar government should act now to keep pace with a global trend.

OVERVIEW

Contract disclosure in oil, gas and mining is rapidly becoming standard practice around the world. Over half of EITI countries have already published contracts and licenses.¹ The EITI board recently moved to make it a requirement for all implementing countries to publish any contracts and licenses that they grant, enter into or amend from 1 January 2021 onwards.² There is a growing recognition among governments, the private sector and civil society organizations that contract disclosure is an important tool for improving governance and creating a stable investment climate.³

In Myanmar, there has been little progress on contract transparency to date. The government has not published any of the contracts it has signed with oil, gas or mining companies. However, a growing number of investors in the country are supportive of disclosure. With an uptick in licensing expected in the petroleum, minerals and gemstone sectors, the short to medium term presents an important opportunity for the government to overhaul disclosure requirements and ensure Myanmar keeps pace with a growing global trend.

- 1 See Government Contract Disclosure Policy and Practice Tracker docs.google.com/spreadsheets/d/1FXEeD43jw6VYHV8yS-8KJ5-rR5IOXtKxvQZBWzr-ohY/edit-gid=0.
- 2 This rule will come into effect when the EITI board ratifies a new standard at their global conference in June 2019.
- 3 Don Hubert and Rob Pitman. *Past the Tipping Point? Contract Disclosure within EITI* (Natural Resource Governance Institute, 2017), 2 and 27, resourcegovernance.org/sites/default/files/documents/past-the-tipping-point-contract-disclosure-within-eiti-web.pdf and Natural Resource Governance Institute, and Open Contracting Partnership *Open Contracting for Oil, Gas and Mining Rights* (2018), resourcegovernance.org/analysis-tools/publications/open-contracting-oil-gas-and-mineral-rights.

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Section 1 of this briefing explains the benefits of contract disclosure and dispels some of the common myths used to argue against it; Section 2 evaluates current legal requirements and practices in Myanmar; and Section 3 sets out a potential path towards disclosure.

1. WHY DISCLOSE CONTRACTS?

The contracts signed between the Myanmar government and companies are crucial documents that set out many of the most important terms governing operations at extractive projects. The EITI will require contract disclosure starting in January 2021. (See Table 1). This practice brings important benefits to all stakeholders.

Contracts signed between the Myanmar government and companies are crucial documents. Disclosing them brings benefits to all stakeholders.

Incentivizes negotiation of better, more sustainable deals

When negotiators know that contracts will be subject to public scrutiny, they have powerful incentives to agree to terms that government, companies and citizens view as fair. Deals that secure sufficient benefits for the country are important for creating a stable investment climate. In Myanmar, several mining projects have faced calls for renegotiation over the course of the last decade. The most prominent was the Letpadaung copper mine, where community protests led the government to suspend operations in 2012. An independent investigation called for the government to revise contract terms to secure greater benefits for the country and communities. The renegotiation led to a major increase in the government's stake in the project and requirements for significant community investments.^{4,5} Contract disclosure can incentivize governments and companies to make sustainable deals from the start, reducing the risks of costly shutdowns, renegotiations and reputational damage.

Helps government officials do their jobs more effectively

A key challenge for effective resource governance in Myanmar is insufficient coordination between and within government departments. The lack of access to contract information makes it difficult for officials to know under which terms companies are working. This is particularly problematic when it comes to revenue collection. Interviewees report that officials within the Internal Revenue Department often lack access to fiscal terms and project information needed to calculate corporate income tax obligations, relying instead solely on the declarations of companies and state-owned enterprises. This means that the government may be losing out on revenues. In other cases, officials' lack of access to contracts makes it more difficult to track whether licenses have expired or whether companies are operating outside their license area. This is a challenge with small and medium-scale operators in the minerals and gemstone sectors.

Facilitates public oversight and accountability

The Union owns natural resources, and the people of Myanmar have a right to view and understand deals that are made on their behalf.⁶ Contract disclosure allows parliamentarians at the Union and state/regional level, civil society and the media to understand the rules by which projects are managed. This helps them to hold

4 Yun Sun. *Chinese Investment in Myanmar: What Lies Ahead?* (Stimson Center, 2013), 6.

5 "In Brief," Myanmar Wanbao, accessed 30 January 2019, www.myanmarwanbao.com.mm/en/about-us/company-in-brief.html.

6 Constitution of Myanmar 2008, Sec. 37(a)

government and companies accountable, making it more likely that government enforces the rules and that companies comply. Contract disclosure benefits those companies operating above board by creating a level playing field. Public oversight and accountability make it more likely that the government will enforce the rules evenly and treat companies consistently and fairly.

Box 1. New EITI requirement on contract transparency

At the 42nd EITI board meeting in Kyiv, in February 2019, the members of the EITI board agreed to significantly improve the EITI requirements on contract transparency. Once the board ratifies it at the EITI Global Conference in June, the new EITI standard will include the following provisions:

- A requirement for implementing countries to disclose all contracts and licenses that they grant, enter into or amend from 1 January 2021.
- An encouragement for implementing countries to disclose all contracts and licenses, regardless of when signed.
- 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. EITI countries will integrate this plan into their work plans from 2020 onward.
- A requirement for implementing countries 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, implementing countries should include a reference or link to the location where the contract or license is published. If a government does not publish a contract or license, the legal or practical barriers should be documented and explained.

While contract transparency offers clear benefits, critics use several easily-disproven myths to advocate against it.

Myth 1. Confidentiality is in line with standard commercial practice

While discussions around contract disclosure are still at an early stage in Myanmar, industry practice in the rest of the world is rapidly changing. The EITI recently made it a requirement for governments to publish contracts. Around the world, 44 countries have disclosed at least some extractive industry contracts, and 27 countries have laws requiring disclosure in at least one sector.⁷

Increasingly, the private sector also recognizes the value of contract transparency. A recent survey of 40 major petroleum and mining companies showed that 18 have made public statements supporting some form of contract transparency.⁸ This includes several companies active in Myanmar. Total, Myanmar's largest oil and gas investor, states on its website that it "advocates for the public disclosure by countries of their Petroleum contracts and licenses."⁹ PanAust, a mining company with exploration licenses in Sagaing, states on its website that "[w]hen legally permitted and consented to by host governments, PanAust supports making the

Many of the world's largest petroleum and mining companies have made public statements supporting some form of contract transparency.

7 See docs.google.com/spreadsheets/d/1FXEeD43jw6VYHV8yS-8KJ5-rR5I0XtKxVQZBWzr-ohY/edit-gid=0 based on Hubert and Pitman, *Past the Tipping Point?*, 2 and 27, resourcegovernance.org/sites/default/files/documents/past-the-tipping-point-contract-disclosure-within-eiti-web.pdf.

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

9 "Our Commitments," Total, accessed 30 January 2019, www.sustainable-performance.total.com/en/stakeholders/our-commitments.

material terms of its contracts publicly available.”¹⁰ Shell, which has four offshore exploration licenses with Woodside Energy, has endorsed the B-Team responsible tax principles, which includes a pledge to encourage authorities to publish tax incentives/contracts where these are not specified by law.¹¹

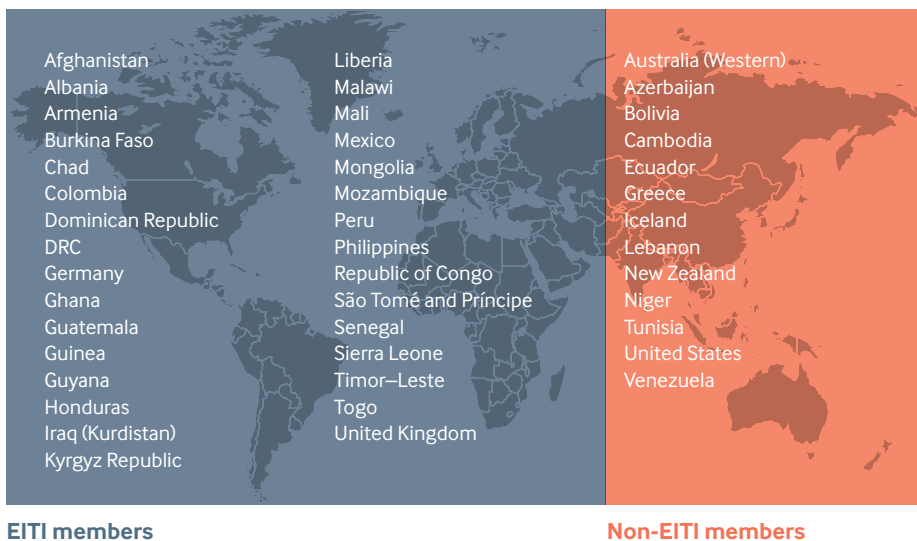


Figure 1. Governments that have disclosed at least some extractive industry contracts

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

Once government and companies have agreed upon and executed contract terms, it is highly unlikely that their publication will meaningfully impact a company’s competitiveness.

The experience of Total in Myanmar proves this. In 2004, the *Doe v Unocal* lawsuit in the United States disclosed Total’s 1992 Moattama contract, including associated MOUs, side letters and permits. This contract dictates the terms for the Yadana gas project—the most productive gas field in Myanmar to date. Total says that disclosure has had no direct impact on operations in Myanmar and has instead helped the company build confidence.¹² More recently, Total has become an industry proponent for contract disclosure. Speaking directly about the issue, Jean-François Lassalle, then Senior Adviser to the President of Exploration and Production of Total, illustrated the lack of concern around commercial sensitivity remarking 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”.¹³

10 “Sustainability matters at PanAust,” PanAust, accessed 30 January 2019, panaust.com.au/sustainability.
 11 Principle 5c, B-Team Responsible Tax Principles (B-Team, 2018), www.bteam.org/plan-b/responsible-tax/.
 12 Sebastian Sahla, “Contract Disclosure Good for Business in Myanmar, Says Total,” *The Myanmar Times*, 12 April 2019. www.mmtimes.com/news/contract-disclosure-good-business-myanmar-total-says.html
 13 “Q&A with Total,” EITI, Apr 10, 2018. eiti.org/blog/qa-with-total-first-major-to-adopt-contract-transparency-policy.

In any case, whether contracts are officially made public or not, most companies are able to access contracts and contract terms of competitors via subscription contract databases and consultancies that survey and rank contracts.¹⁴ This suggests that the main constituencies that miss out when contracts are kept secret are governments and citizens.

Myth 3. Confidentiality provisions do not permit disclosure

In most cases, confidentiality clauses in contracts are not major barriers to disclosure. A 2009 global review of oil, gas and mining contracts showed that few confidentiality clauses refer to the contracts themselves. Furthermore, in most cases, parties to the contract can agree to disclosure or government can legislate to require disclosure.¹⁵

Based on the limited information available to us, it is likely that similar considerations apply in the confidentiality provisions of many extractive contracts in Myanmar. Total's Moattama contract, for example, refers to confidentiality around data and information acquired from the Myanmar Oil and Gas Enterprise (MOGE) and during operations, rather than the terms of the contract itself.¹⁶ The same language is used in the model onshore production sharing contract (PSC).¹⁷ In addition, in both cases it is the contractor who is required to maintain information "in strictest secrecy and confidence." The language does not appear to prevent the government from making disclosures.

In the mining sector, the model exploration agreement requires "all information pertaining to the Operations" to be kept confidential. However, the agreement makes exceptions for information which must be disclosed to financial institutions or "as may be required by any applicable regulatory authority or laws and regulations."¹⁸ This suggests that the Myanmar government could compel disclosure by passing a law or amending existing regulations. The model large-scale production sharing contract prevents companies from disclosing contracts but does not appear to prevent the government from doing so.¹⁹

14 Peter Rosenblum and Susan Maples, *Contracts Confidential: Ending Secret Deals in the Extractive Industries* (Revenue Watch Institute, 2009), p.13, resourcegovernance.org/sites/default/files/RWI-Contracts-Confidential.pdf.

15 Ghana Extractive Industries Transparency Initiative and the Natural Resource Governance Institute, *Contract Disclosure in the Ghanaian Extractive Industries* (August 2017).

16 Total Myanmar Exploration and Production and Myanmar Oil and Gas Enterprise, *Moattama Area, PSA* (1992), <https://www.resourcecontracts.org/contract/ocds-591adf-6716589315/view#/pdf>. Note: confidentiality provisions are set out in Article 27.5 of the agreement. Part of this section is missing from the U.S. court disclosure. We therefore do not have a full picture of the confidentiality provisions of the contract.

17 Myanmar Oil and Gas Enterprise, *Model Production Sharing Contract for Onshore Exploration and Production of Petroleum*, Section 27.

18 Government of the Republic of the Union of Myanmar Ministry of Mines, *Model Exploration Agreement*, Article XVI. www.mining.gov.mm/DM_mm/default.asp?page=2.

19 Government of the Republic of the Union of Myanmar Ministry of Natural Resources and Environmental Conservation, *Model Large-Scale Production Sharing Agreement*, Article XXV. www.mining.gov.mm/DM_mm/default.asp?page=2.

2. WHAT IS THE STATUS OF CONTRACT DISCLOSURE IN MYANMAR?

To date, the Myanmar government has not disclosed any of the contracts it has signed with petroleum, minerals and gemstones companies. Though several major investors in the country support disclosure and key laws governing the sector do not prohibit this, the government is yet to take any initiative to bring about greater transparency. (See Table 1.)

Sector	Current laws and regulations	Current practice
Petroleum	PSCs, which currently function as the key legal documents governing Myanmar's petroleum operations, do not require contract disclosure. Parliament is currently discussing a new draft petroleum law that does not require or prohibit contract disclosure. The drafting process presents an opportunity for reform.	Model PSC is publicly available. Only one actual PSC is in the public domain, specifically the PSC between MOGE and Total, which court proceedings in the United States disclosed.
Mining (minerals)	The 2015 Mines Law and 2018 Mines Rules do not require or prohibit contract disclosure.	Model exploration and production contracts are publicly available. No actual contract of any kind is publicly available.
Mining (gemstones)	The 2019 Gemstones Law does not require or prohibit contract disclosure. However, the draft Myanmar Gemstone Policy clearly states that contracts shall be made publicly available.	Neither a model contract nor an actual contract is publicly available.

Table 1. Current laws and practice on contract disclosure in Myanmar's extractive industries

Beyond sector-specific laws, the 2016 Myanmar Investment Law includes provisions that could support a move towards disclosure. The law requires the Myanmar Investment Commission (MIC) to obtain the approval of the Pyidaungsu Hluttaw before issuing an investment permit for projects "which may have a significant impact on security, economic condition, the environment, and national interest of the Union and its citizens."²⁰ MIC has not yet defined or tested what is meant by "significant", however large-scale extractive investments would likely fall into this category. In order for parliament to undertake this scrutiny and approval role, contracts and investment agreements should be publicly available.

²⁰ Government of Myanmar, *Myanmar Investment Law* (2016), Article 46.

3. HOW CAN MYANMAR MOVE TOWARDS DISCLOSURE?

Significant developments expected across Myanmar's extractive industries in 2019 present an opportunity for the government to move towards disclosure. The following steps could help the government advance contract disclosure and meet new EITI requirements that start from 1 January 2021.

Box 2. What should Myanmar publish?

Contracts and licenses

- Main agreements
- Annexes
- Amendments

Environmental and social documents

Disclosure already obligatory

- Environmental impact assessments (EIAs) or initial environmental examinations (IEEs), and associated environmental management plans (EMPs)
- EMP six-monthly monitoring reports
- Environmental compliance certificates (ECCs)

Disclosure requirements not currently specified, but necessary

- EMPs not accompanying an EIA/IEE
- Reports on social expenditures (for any project with an MIC permit, companies should include these in the Annual Performance Report to be disclosed under Myanmar Investment Rules 196/199)

1. Agree a plan for disclosing contracts in the Myanmar EITI work plan.

In line with the expected changes to the 2019 EITI standard, the Myanmar EITI should develop a plan for disclosing all contracts and licenses governing extractive industry projects. This should include a clear timeframe for implementation. The plan should also examine any barriers to disclosure and suggest ways of addressing these. Following the development of the plan, Myanmar EITI representatives should meet with relevant government and industry officials to discuss how they will implement the plan. The EITI multi-stakeholder group should review the extent to which government is implementing the plan on an ongoing basis.

2. Write language enabling contract disclosure into new contracts.

The Myanmar government and investors should include confidentiality clauses in new contracts that explicitly allow disclosure of the contract itself. Any renewals, extensions or renegotiations could also be an opportunity to update contract terms in this regard. At a minimum, the confidentiality clauses should say that government can disclose the contract if this is required by law or a regulatory agency. The wording in the Ministry of Natural Resources and Environmental Conservation's (MONREC) model, exploration contract provides a good example of this. But 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 in petroleum and mining contracts (see Annex).

3. Incorporate contract disclosure into upcoming licensing processes.

With a new wave of licensing about to start across the extractive industries, the Ministry of Energy and Electricity (for petroleum) and MONREC (for minerals and gemstones) should establish an expectation that they will make all new contracts public. They can achieve this by writing contract disclosure requirements into standard operating procedures for licensing and/or model contracts associated with any new licensing process. In the minerals and gemstones sector, the development of a cadastre presents a great opportunity to make these contracts readily accessible to the public.

With a new wave of licensing expected, the government should establish an expectation that all new contracts will be made public.

4. Enshrine contract disclosure in the legal framework.

In the oil and gas sector, the draft petroleum law presents an opportunity to create a legal basis for disclosure. In the gemstones sector, the government recently approved a new sector law without including a contract disclosure provision. However, the national gemstone policy, which the government is currently finalizing, includes a commitment to disclosure. Once the government finalizes the policy, it will need to revise the Gemstone Law again to align it with the policy. In the minerals sector, the government recently revised laws and regulations meaning that there may be limited appetite for further changes. However, MONREC is reportedly drafting a minerals policy. This should enshrine contract disclosure and in due course, the government should revise the Mining Law accordingly.

5. Publish all contracts and associated documents.

Ultimately, the Myanmar government should publish all the contracts it signs with investors that provide the terms for exploration and production of natural resources (as well as their transportation in the case of oil and gas pipeline contracts). Disclosures should include annexes and amendments, as well as social and environmental documentation that further elucidate rights or obligations agreed to in the main contracts and licenses. (See Box 2.) The 2015 EIA Procedures already require the Environmental Conservation Department to disclose IEE reports, EIA reports and ECCs to the public via the department's website. Government should use disclosure of contracts to bolster these disclosures. Making all documents available in one place can make it easier for users to understand the big picture and find what they need.

Ultimately, the Myanmar government should publish all the contracts it signs with investors that provide the terms for exploration and production of natural resources.

Box 3. Myanmar contract transparency reform opportunities in 2019

Petroleum bill. Myanmar's government could incorporate a contract disclosure requirement into the draft petroleum legislation that was introduced to parliament in late 2018.

Petroleum licensing. The government intends to hold onshore and offshore licensing rounds, potentially starting in 2019. Government could write a contract disclosure requirement into bid round protocols and/or associated model contracts. Current discussions around renegotiation of PSCs signed in 2015 could also be an opportunity to amend contract terms to require disclosure.²⁰

Minerals licensing. As Union and state/region authorities start issuing new licenses following the promulgation of the 2018 Mines Rules, they could write contract disclosure requirements into the standard operating procedures for licensing and/or associated model contracts. In the case of medium and large-scale licenses issued by the Union government, individual contracts should be disclosed. In the case of subsistence and small-scale permitting by state and region governments, disclosure of model contracts or permit templates may be sufficient.

Gemstones licensing. If the Union government lifts the licensing moratorium following passage of the 2019 Gemstone Law, it could write contract disclosure requirements into standard operating procedures and/or associated model contracts.

Mineral and gemstone cadastre. The development of the mineral and gemstone cadastre is an opportunity to update licensing protocols and could provide a platform for publishing contracts. This would align the cadastre with global best practice.

Gemstone policy. A contract disclosure requirement is in the latest draft of the policy. The government will need to align the legal framework with these provisions in due course.

21 Chan Mya Htwe. *Govt, Investors Must Give and Take for More Oil and Gas Profit: Expert* (Myanmar Times, 28 February 2019), www.mmtimes.com/news/govt-investors-must-give-and-take-more-oil-and-gas-profit-expert.html.

ANNEX. CONTRACT DISCLOSURE PROVISIONS IN SELECTED CONTRACTS AND LAWS

Country	Contract disclosure provision	Source
<i>Language in contracts</i>		
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
<i>Language in laws</i>		
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 N° 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

FURTHER READING

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

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.

Open Oil. *Oil Contracts: How to Read and Understand Them*. 2012.

Open Oil, Vale Columbia Center, International Senior Lawyers Project, Revenue Watch Institute. *Mining Contracts: How to Read and Understand Them*. 2014.

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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