

Mongolia's Missing Oil, Gas and Mining Contracts

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The contracts and associated documents that govern the government of Mongolia's relationship with mining and petroleum companies are fundamental documents that set out important parts of the legal framework for natural resource projects. Publishing them allows the government and companies to build public trust and understanding in extractive industry projects, which can help bring much needed accountability and stability to economic activities that account for as much as a fifth of Mongolian GDP. This brief explains why Mongolia should publish natural resource contracts (Section 1), describes the different contracts that exist in Mongolia's extractive sector that should be disclosed (Section 2) and suggests a path for making natural resource contract transparency a reality (Section 3).

KEY MESSAGES

- Many of the most important contracts for publicly owned oil, gas and minerals in Mongolia remain secret, despite government promises to make contracts public.
- A review of publicly available contracts in Mongolia suggests that contracts are unlikely to contain the kinds of information about a project that are commercially sensitive. Likewise, evidence suggests that there is no reason to think that confidentiality clauses prevent disclosure of contracts.
- Contracting regimes in Mongolia are complex and therefore in many instances, it will be necessary to publish several contracts and associated documents for each project.
- There are five steps that the government can take to make contracts public: 1) explain the contracting landscape, 2) define the scope of disclosure, 3) establish a contract disclosure rule, 4) make contracts accessible, and 5) support contract use.

1. WHY SHOULD THE GOVERNMENT OF MONGOLIA PUBLISH OIL, GAS AND MINING CONTRACTS?

The government of Mongolia agreed to disclose contracts

Under the Open Government Partnership—an initiative by which civil society and government work together to agree on ways to strengthen governance—the government of Mongolia committed to the “transparency of contracts of public resource exploitation.” This is contained in commitment 11 of the government’s 2016-18 national action plan. Key milestones set by the government include the development of a contract database and ensured access to the database by the public.¹

The government has fulfilled this commitment to a limited degree. There are currently over 270 contracts publicly available on the Mongolia Resource Contracts database, which the Open Society Forum Mongolia established in cooperation with the EITI Secretariat of Mongolia and the Ministry of Mining and Heavy Industry.² These disclosures include over 260 agreements with local authorities and a set of important contracts between Rio Tinto and the central government for Oyu Tolgoi, one of the world’s largest copper and gold deposits. But beyond the Oyu Tolgoi disclosures, no other major contracts with the central government have been officially disclosed. (See Section 2.)

The legal framework in Mongolia does not preclude disclosure of contracts. In some cases, the government already has laws and policies in place to make some contracts and associated of these documents public:

- Article 3.5.2 of the 2014 Minerals Policy requires the government to publish local cooperation agreements.
- Article 57.4 of the 2006 Mining Law requires publication of environmental impact assessments, environmental protection plans and reports and information about hazardous chemicals and other substances that may impose negative effects on human health and environment.

Nevertheless, for the most important agreements, such as mining investment agreements or petroleum production sharing agreements there are no legal requirements for publication.

There are compelling reasons to publish contracts

1. Citizens have a right to view deals that the government makes on their behalf. The constitution of Mongolia clearly states that, oil, gas and minerals are “exclusively subject to the people’s control and shall be under the protection of the State.”³ This means that when the government of Mongolia enters into agreements with companies over the management of natural resources, it does so on behalf of the Mongolian people. Citizens should be able to see and assess the value of contracts that are signed on their behalf.

1 Government of Mongolia, *Open Government Partnership National Action Plan II 2016-2018*, 7 June 2016, pp. 22-23. www.opengovpartnership.org/sites/default/files/Mongolia-NAP2-Final-Eng_0.pdf

2 See the Mongolian Resource Contracts database: www.resourcecontracts.mn/

3 The Constitution of Mongolia, Article 6.1.

2. Mining and petroleum contracts contain important rules that impact the lives of citizens. Important rules hidden in contracts include:

Fiscal terms, such as taxes, royalties and production shares, as well as operation and production commitments

Fiscal terms and operation and production commitments are contained five types of mining agreement and in petroleum production sharing agreements (PSAs). These terms can have a massive impact on public finances. In 2016, extractive industry revenues in Mongolia accounted for 18.6 percent of total government revenues—a key source of funding for government programs including health, education and social programs. When the terms upon which these revenues are based are kept from the public, it is harder for citizens to understand the full benefits of extractive industries projects. This is part of the reason why debates around some projects in the past, such as Boroo Gold or PetroChina, were polarized along pro- and anti-mining sentiments rather than facts.

Environmental commitments and health and safety requirements

Project-specific terms related to environmental protection and health and safety may be included in cooperation agreements signed with local administrative bodies. They are also included in environmental impact assessments, environmental protection plans and environmental reports produced for each project. Access to these terms not only allows citizens to better understand risks presented by projects, but also enables them to contribute their expert local knowledge to developing and monitoring strategies to mitigate and prevent such risks.

Social obligations, including infrastructure, local content and consultation requirements

Social obligations may be included in a range of documents including mining investor agreements and petroleum production sharing contracts but also in local cooperation agreements. Publishing these terms helps citizens understand the social contribution made by projects, and provides them with the opportunity to shape social programs so that they work to their benefit. It also allows them to monitor and hold government and/or companies accountable to their commitments.

Stabilization provisions

Mining investor agreements contain stabilization provisions, which insulate projects from changes to certain parts of the legal framework. These terms may limit reforms, usually those relating to taxation but sometimes also extending to other issues. Publication of stabilization clauses is critical for government officials and citizens to understand whether newly passed legislation and regulations apply to existing projects. It is also important to ensure that citizens and government officials have realistic expectations of what reforms they are able to achieve.

3. Publishing contracts provides a powerful avenue to hold public officials and company representatives accountable for the terms that they negotiate.

When negotiators know that the outcome of their work will be public and subject to legal and commercial scrutiny, they have powerful incentives to draft more carefully. This helps ensure that negotiators develop contracts that companies, the government and citizens view as fair. This is particularly relevant in Mongolia

where concerns around corruption in natural resources contracting have been widespread, as indicated, for example by the controversy around the alleged use of the state-owned Erdenet Mining Corporation as collateral for USD 109 million in loans from South African Standard Bank.⁴

4. Publication of contracts makes the legislative environment more reliable and stable. When everyone is able to view and understand the rules by which companies and governments manage projects, it is more likely the government enforces the rules evenly, and that companies comply with the rules to which they are subject. Industry increasingly recognizes that publishing contracts reduces the risk that government may try to renegotiate deals. According to Tom Butler, CEO of the International Council on Mining and Metals (ICMM), a mining industry body bringing together 27 mining and metals companies, including Rio Tinto and Orano, which are active in Mongolia: “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.”⁵

The arguments against contract transparency can be easily refuted

Arguments against contract transparency in Mongolia revolve around three myths that can easily be refuted.

Myth 1: Confidentiality of oil, gas and mining contracts is in line with standard commercial practice.

While contract secrecy may still be common practice in Mongolia, industry practice in the rest of the world is changing. Forty-four countries have officially disclosed at least some extractive industry contracts, and 27 have laws requiring disclosure in at least one sector.⁶

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 governments and companies disclose contract terms in 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.” The 2017 OECD Secretary-General’s High-Level Advisory Group (HLAG) report, “On Combating Corruption and Fostering Integrity,” recommended contract disclosure. Since 2013, the EITI standard—which is the global standard for the good governance of oil, gas and mineral resources—has encouraged contract disclosure.

International financial 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

4 “Sh.Batkhuu of Just Group arrested in connection to Erdenet ownership issues,” *UB Post*, 14 Mar 2018. www.pressreader.com/mongolia/the-ub-post/20180314/281492161837337

5 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

6 Details about these countries are in this database: docs.google.com/spreadsheets/d/1FXEeD43jw6VYHV8yS-8KJ5-rR5IOXtKxVQZBWzr-ohY/edit-gjd=0. It is based on Rob Pitman and Don Hubert, *Past the Tipping Point? Contract Disclosure within EITI* (Natural Resource Governance Institute, 2017). resourcegovernance.org/sites/default/files/documents/past-the-tipping-point-contract-disclosure-within-eiti-web.pdf

conditions under which a resource will be exploited.” In Mongolia, these rules apply to the Oyu Tolgoi mine and the contracts for this project are therefore online.⁷ The World Bank’s Multilateral Investment Guarantee Agency, which guarantees foreign direct investments in developing countries, has similar requirements for projects it supports, and the European Bank for Reconstruction and Development established similar requirements for hydrocarbon projects in 2013.

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. This includes Rio Tinto, Total, Statoil, BHP Billiton, Newmont, Barrick and Vale.⁸ The ICMM also has a policy on contract transparency. (See Box 1 below.) Several more companies disclose contracts on an ongoing basis in stock exchange filings in their home countries. In Mongolia, for example, DWM Petroleum AG disclosed production-sharing contracts for exploration areas Tsagaan Els-XIII in 2009 and Zuunbayan-XIV in 2008 through stock exchange filings to the United States Securities and Exchange Commission. Storm Cat Energy Corporation also disclosed its 2004 production-sharing contract in petroleum exploration areas Nemegt-VI and Borzon-VII in stock exchange filings to Canadian Securities Administrators.⁹

Box 1. ICMM policy on contract transparency

ICMM member companies are required to commit to a set of 10 principles and eight supporting position statements. Those position statements are policy commitments that are personally signed off by the CEOs of ICMM company members.

One of those eight position statements on the Transparency of Mineral Revenues includes a provision requiring members to “Engage constructively in appropriate forums to improve the transparency [...] of contractual provisions on a level-playing field basis, either individually or collectively through ICMM.”

ICMM members in Mongolia include Rio Tinto, the majority shareholder of Oyu Tolgoi operator Turquoise Hill, and Orano, which has three operating licenses for uranium and has recently launched pilot mining operations at the Zuuvch Ovoo deposit.

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

Oil, gas and mining contracts are unlikely to contain the kinds of information about a project that is commercially sensitive. A review of public contracts for four projects in Mongolia suggests that while some terms may be commercially sensitive when companies are bidding for and negotiating their contracts, it is highly unlikely that any of these terms could substantially harm the competitive position of a company if disclosed after a contract has been agreed and executed.¹⁰

7 Oyu Tolgoi, *Agreements*. ot.mn/agreements/

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

9 See these filings at www.sec.gov/Archives/edgar/data/1074447/000106299309002609/exhibit10-51.htm and www.sec.gov/Archives/edgar/data/1074447/000106299309002609/exhibit10-52.htm. Note that these contracts have since expired.

10 These are: Turquoise Hill Investor Agreement for Oyu Tolgoi; DWM Petroleum AG production sharing contracts for exploration areas Tsagaan Els-XIII in 2009 and Zuunbayan-XIV; and Storm Cat Energy Corporation production sharing contract for Nemegt-VI and Borzon-VII.

One valid reason for keeping company documents secret could be if they 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. Yet, these kinds of terms are simply not included in publicly available Mongolian extractive industry contracts. This stands to reason: because it is common for extractive industry contracts to be signed by consortiums of companies and for the companies within those consortiums to change over time, companies usually enter into contracts knowing that competitors will have access to the contents at some point. Thus, it is highly unlikely that any company would risk writing trade secrets into any contract.

Many companies now realize that concerns about commercially sensitive information are relatively limited in scope. Speaking in 2018, Simone Niven, group executive of corporate relations at Rio Tinto, noted that confidentiality and commercial sensitivity “has not [. . .] prevented us from disclosing a vast majority of our contracts with governments as most of them do not contain commercially sensitive information.”¹¹ Similarly, Jean-François Lassalle, senior adviser to the president for 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.”¹²

Myth 3: Confidentiality clauses in contracts and confidentiality agreements signed for specific projects do not permit disclosure of contracts.

A review of publicly available contracts and the legislation and regulations around confidentiality agreements suggests that there is no reason to think that confidentiality clauses prevent disclosure of contracts. In fact, clause 15.21 of the contract for the Oyu Tolgoi mine includes a provision specifically stating that the document shall be made public.¹³

The confidentiality clauses in the three public contracts that contain them are remarkably similar. (See Box 2 for an example of a typical confidentiality clause.) What is notable is that these clauses are explicitly concerned with exploration, production and technical data and give no indication that the contract itself is covered by any confidentiality requirement. Even if the clauses are understood to apply to contracts, it is important to point out that the language of the requirement allows for disclosure to third parties where both parties to contract consent. This means that if the government and the company agree to any disclosure, they can make it happen. The clauses also allow for disclosure “to comply with applicable laws.” This is important, because it means that the government of Mongolia or any other government can compel disclosure simply by passing a law. Finally, the clauses also allow for disclosure if it required by the rules or regulations of “any stock exchange on which a party’s, or its affiliate’s, shares are listed.” This means that there is no obstacle for companies working in Mongolia to disclose their contracts in stock exchange filings as has already happened at least three times in the examples provided earlier.

11 Extractive Industries Transparency Initiative, *Q&A with Rio Tinto* (Jun 28, 2018). eti.org/blog/qa-with-rio-tinto

12 Extractive Industries Transparency Initiative, *Q&A with Total* (Apr 10, 2018). eti.org/blog/qa-with-total-first-major-to-adopt-contract-transparency-policy

13 Oyu Tolgoi, *Investment Agreement* (October 6, 2009). ot.mn/media/ot/content/about_us/IA/Oyu_Tolgoi_IA_MN.pdf

Box 2. Sample confidentiality clause, DWM Petroleum AG production sharing contract, Zuunbayan XIV Area, 2008

Clause 12: Exploration, Production and Technical Data

12.10 Confidentiality

The parties hereto shall maintain all documents and reports referred to in this Article XII as confidential and shall not divulge it to any third party without the consent of the other party hereto.¹⁴ The foregoing confidentiality obligation shall not apply to:

- 1 Disclosure by either party hereto to its employees, affiliates, consultants, prospective assignees, prospective lenders or subcontractors to the extent required for the conduct of petroleum operations; or
- 2 Disclosure by either party hereto to the extent required to comply with applicable laws, or the rules or regulations of any stock exchange on which a party's, or its affiliate's, shares are listed.
- 3 Contractor shall inform to Mineral Resources and Petroleum Authority about potential investor. The potential investor shall certify to keep information in confidential.

Companies in Mongolia are able to request that the government to enter into a “confidentiality agreement.” There is only one known such agreement in Mongolia, signed by Areva Mongol LLC. While this agreement is not public and therefore cannot be reviewed, review of the legislation that allows for such agreements to be made suggests that confidentiality agreements in Mongolia are concerned with exploration work and information with respect to mine operations and feasibility studies prepared by a license holder. (See Box 3.) There is no indication that these agreements would extend to cover contracts made between the government and companies.

Box 3. The legal basis for confidentiality agreements in Mongolia

Minerals Law (2006)

57.2 State administrative body, upon the license holder's request, shall treat reports of exploration work, information with respect to mine operations and feasibility studies prepared by a license holder as the license holder's confidential information during the valid period of the license. The license holder may conclude confidentiality agreement with the State administrative body when they hand over information and reports.

Law on Nuclear Energy (2011)

11.7. The State Administrative Body shall classify as confidential information according to its request an exploration report and Feasibility Study prepared by the license holder specified in Article 15.1.5 of this Law [concerning prospecting and exploration of radioactive minerals], and mining information and Feasibility Study prepared by the license holder specified in Article 15.1.6 of this Law [concerning exploitation of radioactive minerals] during the validated period of the license.

Law on Common Minerals (2014)

38.2. Aimag and capital city governors shall, upon request by the license holder, ensure the confidentiality of exploration reports, mine exploitation information, and feasibility studies prepared by the license holder for the duration of the validity of the license/s, and may conclude confidentiality agreements at the time of submission of information and reports.

¹⁴ This article deals with exploration, production and technical data.

2. WHAT SHOULD THE GOVERNMENT PUBLISH?

The arguments outlined so far apply to a range of contracts and associated documents used by the government. Because contracting regimes in Mongolia are relatively complex, this section maps mining and petroleum agreements that are commonly used and which contain terms that help citizens ascertain the value of contracts, or the environmental and social impacts associated with contracts. Specific types of contract and associated documents are highlighted in bold.

Contracts and associated documents in the mining sector

Mining companies have to obtain a license from the government of Mongolia to operate. Once a company has a license, it is able to explore or exploit resources according to the rules stipulated in the relevant laws. However, in practice, particularly when projects move towards production, companies often enter into multiple additional agreements with central and local governments and sometimes with Mongolian state-owned enterprises.

Exploration

To carry out exploration activities, all companies must have an **exploration license**. They must also develop an **environmental management plan and report**, detailing environmental risks and plans to address those, and an **exploration work plan**, which the Mineral Resource and Petroleum Authority has reviewed, and which contains the company's exploration commitments. Article 35.2 of the 2006 Mining Law stipulates that companies must keep copies of all these documents at the actual site of the exploration work. According to the 2018 Mineral Resources and Petroleum Statistics Report published by the Mineral Resources and Petroleum Authority of Mongolia, there were 1,405 active exploration licenses as of 31 December 2018.¹⁵

Mining

Once companies move on to the mining production phase, they must have a **mining license** and a **certificate establishing and marking the boundary of the mining area**. They must also have a completed **feasibility study** for the project, have carried out an **environmental impact assessment** and have developed an **environmental management plan** that details a strategy for how they will prevent and minimize environmental risks. Article 35.3 of the 2006 Minerals Law specifies that companies must keep all these documents as well as **property lease and sales agreements** at the mine site. According to the 2018 Mineral Resources and Petroleum Statistics Report, there were 1,673 active mining licenses as of 31 December 2018.¹⁶

Closure

Article 45 of the 2006 Mining Law sets out specific requirements for closure of depleted mines. A requirement is that companies must prepare a **detailed map showing dangerous or potentially dangerous areas** created by mining operations. It is unknown how many detailed maps have been prepared.

¹⁵ See www.mrpam.gov.mn/public/pages/131/monthly.report.2018.12.eng.pdf

¹⁶ *Ibid.*

Additional agreements

There are a number of standard additional agreements that government and companies may enter into during the mining production phase. It is important to note that since companies and the government are also free to enter into agreements on bespoke issues relating to project operations, this list is not exhaustive.¹⁷

Agreements with the central government

- **Investment agreement.** Provided for in article 29 of the 2006 Minerals law and article 30 of the Nuclear Energy Law, investment agreements are designed to stabilize the investment environment for large investors.¹⁸ Companies that invest at least USD \$50 million in the first five years of a mining project or that mine uranium can request investment agreements. At least six investment agreements have been signed, but there may be more. Only one is public: the investment agreement for Oyu Tolgoi signed in 2009.¹⁹ The remaining five are not public, but are reported to follow the *procedures for establishing an investment agreement* (government resolution 52).²⁰
- **Deposit use agreement.** Provided for under articles 5.3 and 5.4 of the 2006 Minerals law, deposit use agreements are used to determine the state share in a mining project for deposits that were discovered using state funds (largely those discovered during the pre-1990 regime). Areva Mines LLC has signed at least one deposit use agreement. This contract is not public. It is not clear how many deposit use agreements there are as none are public.
- **Shareholder/joint venture agreement.** The government is entitled to take an equity stake in projects identified as “strategic deposits.” Where this happens, shareholder or joint venture agreements are used by the government or state-owned enterprises to set out the arrangements. Notably, companies and government may sign these agreements in addition to deposit use agreements. The most notable agreement of this kind is for Oyu Tolgoi, where the government has a 34 percent stake. This agreement is public. No other shareholder/joint venture agreements are public, and it is not clear how many shareholder or joint venture agreements the government has made.²¹
- **Operator service agreements.** State-owned enterprises, most notably Erdenes Tavan Tolgoi which owns Tavan Tolgoi coking coal mine, have used service companies to extract deposits for a fee while licenses for mining remained with state companies. There is no information available on how many such contracts exist, and the government has not made any of these contracts public.

17 For example in June 2010, Oyu Tolgoi and the Mongolian Ministry of Education, Culture and Science signed a memorandum of understanding to collaborate in the development of the vocational education and training sector.

18 Historically, for this purpose the government awarded documents called “stabilization agreements” and more recently, “stabilization certificates.” Three stabilization certificates were awarded in the 1990s (all are now invalid): Ukhaa-Khudag coal deposit project, Energy Resource LLC; Tayannuur iron ore deposit project, Altain Khuder and Cathode copper production factory, Achit Ikht LLC.

19 Resource Contracts Mongolia has the main investment agreement available here: www.resourcecontracts.mn/contract/55/view; a more comprehensive set of documents is available on the Oyu Tolgoi website here ot.mn/гэрээнүүд/

20 The five non-public investment agreements are with Tsagaan Suvarga copper-molybdenum mine, Mongolian Gold MAK LLC; Khukh Tsav cement-limestone factory project, Mongolian Gold MAK LLC; Moncement factory project, Monpolimet LLC; Buuruljuut coal mine and power plant joint project, Bodi International LLC and Powerchina resources ltd; and Tavan Tolgoi power plant project investment agreement, Tavan Tolgoi Power Plant LLC and MCS Power LLC.

21 At least one joint venture agreement was signed to transfer 34 percent of the Areva Mines LLC to MonAtom, a subsidiary of state-owned enterprise Erdenes Mongol. See Erdenes Mongol SOE annual report.

- **Reimbursement agreement.** Provided for under article 60 of the Mineral Law, reimbursement agreements lay out the terms under which an exploiting company should reimburse the government for state funds that were used to support exploration work (particularly common for deposits that were discovered before 1990). It is not clear how many reimbursement agreements there are, but a model reimbursement agreement is available on the Mineral Resources and Petroleum Authority website.²²
- **Confidentiality agreement.** Provided for under article 57.2 of the Minerals Law, article 11.2 of Nuclear Energy Law, and 38.2 of the Common Minerals Law, confidentiality agreements are for companies that want to ensure confidentiality of reports of exploration work, information regarding mine operations and feasibility studies for the period of the license. (See box 3.) At least one such agreement has been signed for Areva Mongol LLC, but there may be others.

*Agreements with local governments*²³

- **Cooperation agreement.** Under article 42 of the 2006 Minerals Law, companies are required to sign cooperation agreements with local authorities to identify how they can cooperate on environmental protection, infrastructure development, mine use and employment. The terms of these agreements can be significant for local populations. While in principle there should be at least one cooperation agreement for each project, in practice there are many projects that have not yet made cooperation agreements. There are 70 cooperation agreements on Resource Contracts Mongolia. There may be more agreements that are not public.
- **Land and water use agreements.** Land and water use agreements must be signed with local authorities for all projects. There are 125 land lease agreements and 48 water use agreements on Resource Contracts Mongolia. There may be more agreements that are not public.
- **Other local agreements.** Companies also sign agreements with local authorities for artisanal and small-scale mining, local employment and local development. It is not known how many of these agreements there are or how many are public.

Special agreements for the mining of radioactive minerals

There are a number of contracts and associated documents that may be agreed for radioactive minerals. But given that there are currently no uranium projects at the mining phase in Mongolia, it is understood that the government has not yet signed any of these agreements.

- **Deposit development agreement.** Provided for under article 29 of the Nuclear Energy Law, deposit development agreements covers the key rules on development of the deposit.²⁴

²² See a model reimbursement agreement here: www.mrpam.gov.mn/article/114/

²³ For more information, see Byambajav Dalaibuyan. *Local Level Agreements in Mongolia's Resource Sector: Lessons Learned and the Way Forward* (Natural Resource Governance Institute, 2017). resourcegovernance.org/analysis-tools/publications/local-level-agreements-mongolia-resource-sector-lessons-learned-english

²⁴ This includes: grounds for exploitation of radioactive mineral deposits; the term of exploitation of radioactive mineral deposits, name and type, grade and reserves of radioactive minerals; technology, production capacity and quantity of products to be mined reflected in the feasibility Study; conditions of product sales; plan of environmental protection and reclamation, costs of its implementation; general plan of mine closure; and rights, liabilities and responsibilities of involved parties.

- **Safeguard agreement.** Provided for under article 28.8 of the Nuclear Energy Law, safeguard agreements set out obligations of mining companies to submit accurate information on matters required by the government such as quantity and amount of nuclear materials, modification, loss, depreciation, transfer and shift to the state administrative body.
- **Radiation accident plan.** Provided for under article 45 of the Nuclear Energy Law, the plan for prevention from nuclear and radiation accidents provides special safety information relating to the running of the project.

Contracts and associated documents in the petroleum sector

Companies that want to carry out exploration and production activities in the Mongolian petroleum sector must enter into a PSA with the government of Mongolia. There are currently 25 active PSAs in Mongolia, none of which are public. Historically companies have published three PSAs as a result of stock exchange filings in the USA and Canada, but all three have expired.²⁵

Exploration

To obtain an exploration license, companies must sign a **PSA** with the government detailing a range of important fiscal terms. They must also undertake an **environmental impact assessment** for the exploration period, produce **reports on environmental protection and restoration** and obtain an **approved exploration work plan** detailing company exploration obligations. If a deposit extends across two or more exploration or exploitation areas, companies must produce a **joint exploration plan**.

Production

Unlike the mining sector, when companies move on to production of petroleum, they continue to operate under the same PSA that they did in the exploration phase (although they may sign amendments to the original PSA). In addition to this PSA, companies are required to produce an **environmental impact assessment** for the exploitation period and a **report on environmental protection and restoration**. Each year they are required to submit a **work plan and budget** detailing the work that they will perform. As with the mining sector, petroleum companies are required to make **cooperation agreements** with local government bodies. There are currently three operational petroleum production sites.²⁶

25 These contracts are available at www.resourcecontracts.org/search?q=&country%5B%5D=MN&resource%5B%5D=Gas&resource%5B%5D=Hydrocarbons

26 These are Area XIX TosonUul and Area XXI Tamsag both held by PetroChina Daqing Tamsag and Area PSA-97 held by Dong Sheng Jinggong Petroleum Development Group. See Mongolia Extractive Industries Transparency Initiative, *Eleventh EITI Reconciliation Report 2016* (2017). eiti.org/sites/default/files/documents/2016_m_eiti_report_final_english.pdf

Table 1. Overview of known active contract documents and disclosure practice in Mongolia

Sector	Phase	Documents	Estimated number	Number public
Mining	Exploration	Basic documents: <ul style="list-style-type: none"> • Exploration license • Environmental management plan and report • Exploration work plan 	~1,400	0
	Mining	Basic documents: <ul style="list-style-type: none"> • Mining license • Certificate establishing and marking the boundary of the mining area • Feasibility study • Environmental impact assessment • Environmental management plan • Property lease and sales agreements 	~1,700	0
		Additional agreements with central government: <ul style="list-style-type: none"> • Investment agreement • Deposit use agreement • Shareholder/joint venture agreement • Operator service agreement • Reimbursement agreement • Confidentiality agreement 	6 ? ? ? 1 1	1 0 1 0 0 0
		Agreements with local governments: <ul style="list-style-type: none"> • Cooperation agreement • Land / water use agreement • Other local agreement 	? ? ?	70 173 ?
		Agreements for radioactive minerals: <ul style="list-style-type: none"> • Deposit development agreement • Safeguard agreement • Radiation action plan 	0 0 0	0 0 0
Closure	<ul style="list-style-type: none"> • Detailed map showing dangerous or potentially dangerous areas 	?	?	
Petroleum	Exploration	Basic documents: <ul style="list-style-type: none"> • Production sharing agreement • Environmental impact assessment • Reports on environmental protection and restoration • Exploration work plan • Joint exploration plan 	25 ?	0 ?
	Production	Basic documents: <ul style="list-style-type: none"> • Environmental impact assessment • Report on environmental protection and restoration • Work plan and budget • Cooperation agreements (with local governments) 	3	0

3. HOW CAN THE GOVERNMENT MOVE TOWARD DISCLOSURE?

Step 1: Explain the contracting landscape.

As a first step, the Ministry of Mining and Heavy Industry and the Mineral Resources and Petroleum Authority should publish an updated list of all active agreements that the government or state-owned enterprises have entered into with oil, gas and mining companies. This would help both citizens and companies better understand the contracting landscape in Mongolia and would form a strong foundation to build trust in the government's commitment to the contract disclosure process. The list could build on the summary in Table 1. Ideally it would contain the total number of each type of contract granted, provide the names of companies holding each type of contract, and specify if specific contracts have any amendments.

Step 2: Define the scope of disclosure.

Next, the Minister of Mining and Heavy Industry should define the scope and a pathway toward disclosure. There is a strong public interest case for disclosure of all of the contracts and associated documents outlined in Section 2 of this brief, and government commitments in the Open Government Partnership National Action Plan are sufficiently broad to cover all of these documents. However, understanding that publication of all these documents would be a big task, the Minister may want to prioritize disclosure of specific documents to make the task more manageable.

The government could start by systematically disclosing non-public types of contracts that have already been published for some but not all projects, including: investment agreements and joint-venture/shareholder agreements in the mining sector; PSAs in the petroleum sector; and cooperation agreements signed with local governments for both sectors. Ad hoc publication of these documents for the Oyu Tolgoi project has shown that there are few risks associated with disclosure. Systematic disclosure would ensure that the exposure to disclosure would be the same for all companies operating in Mongolia and would allay citizen suspicions about other yet undisclosed projects. The benefit of this approach is that the number of these documents is relatively few, and there is a strong public interest case for their publication. Once these documents are public, the Ministry could move to publish standardized licenses and contracts as well as model contracts.

As an alternative, the government might instead choose to focus on categories of documents that are of priority for local and national stakeholders. These might include environmental documents and cooperation agreements given local impact, investment agreements, deposit use agreements and shareholder/joint-venture agreements given national fiscal ramifications. The existing publication of the local government agreements is itself an example of this type of prioritization. Another alternative is that the government starts by publishing the basic documentation for each project as well as model contracts. The benefit of this approach is that these documents are standardized and so are unlikely to draw much criticism from those who are opposed to disclosure. Once these documents are public, the Ministry could move to publish more complex documents.

Step 3. Establish a contract disclosure rule.

As discussed in Section 1, Mongolia already has rules in place requiring the disclosure of local cooperation agreements and environmental documents. Extending these rules to the other kinds of contracts discussed in this brief, while

not necessary to compel disclosure in the short term, would be a good way to ensure that disclosure of contracts is carried out in a systematic and fair way in the long term.

The Mongolian government could establish a contract disclosure rule immediately through a government decree. The Minister of Mining and Heavy Industry could easily issue such a decree, which would allow the Ministry to quickly meet its commitments in the Open Government Partnership. However, the government would need to create a more robust rule on contract disclosure through legislation, perhaps as part of an update or amendment to the mining law. Alternatively or additionally, the government might consider including a requirement for contract disclosure in the tender protocols for upcoming licensing rounds in the minerals and/or petroleum sector. This has the benefit of ensuring that all prospective companies are aware of the policy before any application and awards are made.

Ideally a provision on contract transparency would state:

- What specifically must be disclosed (best practice is to include the full text of all “active” contracts; the full text of any annex, addendum or rider; the full text of any alteration or amendment)²⁷
- A reasonable time-frame for publication following the date of signature
- The format of the disclosed contract (searchable electronic file) and channel for dissemination

Step 4. Make contracts accessible.

While Mongolia's first priority should be to make contracts public, in the medium term the government should work to make contracts easy to browse, find, search and use.²⁸ This could be achieved by adding the following usability to the government contracts platform www.resourcecontracts.mn.

Use machine-readable formats.

Machine-readable formats make the process of using contracts much easier than the read-only image formats that are currently used. With a machine-readable contract, someone interested in finding a specific term (for example, “company royalty rates”) does not have to read each contract in full. Instead, s/he can simply carry out a keyword search for “royalties” and find what s/he is looking for. Incorporating this technology into the current site would be relatively simple given that it is a standard feature of the global resourcecontracts.org platform upon which the Mongolia website is based.²⁹

27 Full-text contract disclosure is the standard Mongolia already employs. This approach is important because contracts contain many detailed and interlinked terms. Full-text versions of contract documents therefore help to avoid issues of misrepresentation, misunderstanding and mistrust that may arise with incomplete or inaccurate summaries of contract documents are produced in place of the actual documents.

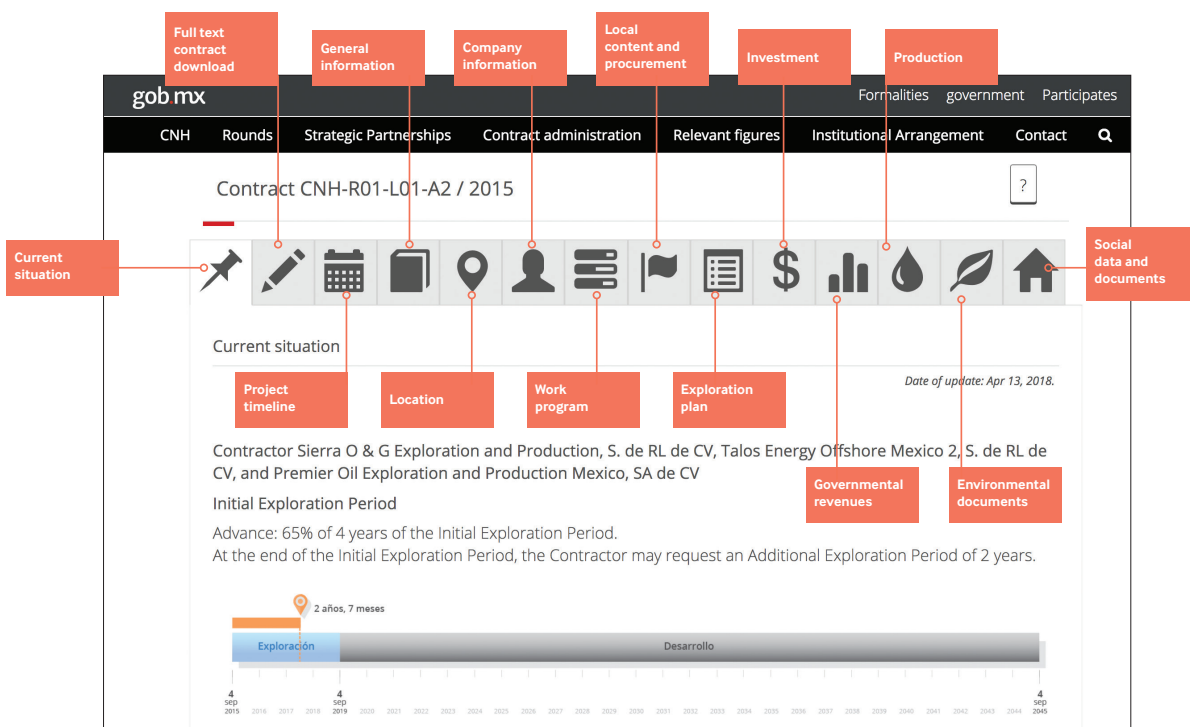
28 For an overview of global good practice in disclosures across the whole process by which contracts are allocated and managed by governments around the world see, NRG, *Open Contracting for Oil, Gas and Mining Rights* (2018). resourcegovernance.org/analysis-tools/publications/open-contracting-oil-gas-and-mineral-rights

29 See the Resource Contracts platform at: resourcecontracts.org.

Join-up documents from different agencies.

Comprehensive disclosure includes the complete range of contracts and ancillary agreements outlined in Section 2 for each extractive industry project. Many of these documents may be held by different agencies within government—for example, the Mineral Resources and Petroleum Authority manages the main contract, while local government bodies manage cooperation agreements. To make it easier for users to find what they need, many governments are linking documents held by multiple institutions in a single informational portal. Furthermore, organizing the information in these portals by project allows the government to include important contextual information alongside the disclosures to help users better understand the information presented. A leading example of this kind of disclosure is the portal developed by the Mexican hydrocarbons regulator CNH, which has a page for each petroleum project presenting full text contracts, work programs, local content and procurement rules and environmental documents including environmental impact assessments and related studies and management plans. (See Figure 1.)³⁰

Figure 1. Example of a project page on the Mexican hydrocarbon regulator website connecting information from a range of regulatory realms



Step 5: Support contract use.

Mongolia’s efforts should not end with the disclosure of contracts and licenses. For the government, companies and citizens to benefit from contract disclosure, the government of Mongolia should support initiatives to encourage the use of contracts. This may involve incorporating contract disclosure into government communication strategies as well as the use of informational tools such as plain-language explanations of contracts. The government may consider providing training and outreach to build the capacity of government officials across the central government and in local governments to better understand the nuances of extractive industry contracts and their impacts on extractive industry governance. Through public discussion forums, it may also want to extend these training activities to journalists, civil society groups and other stakeholders.

30 Rondas Mexico website (2018). rondasmexico.gob.mx

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