

Promoting Transparency and Monitoring of Contracts

KEY MESSAGES

- Members of parliament play a key role in monitoring the implementation of oil, gas, and mineral contracts. Public disclosure of such contracts is a critical prerequisite for parliamentary oversight. Contract transparency also provides an incentive for the negotiating parties to improve the quality of their agreements through increased public scrutiny.
- Contract disclosure is an emerging norm, and each year more and more governments opt to publish their agreements, and more companies and international institutions embrace the value of contract transparency.
- Parliamentarians are increasingly advocating contract transparency. They are also among its key beneficiaries as it brings about better legislative oversight, reduces corruption, and creates a stronger negotiating position for the state.

INTRODUCTION

Laws and contracts establish the rights and responsibilities of governments and the companies with which they negotiate; these determine what a country might gain from natural resource extraction. In countries in which legislators have the power to ratify petroleum and mineral contracts, it is crucial that the lawmakers scrutinize agreements objectively to maximize the benefits of projects and minimize risks. Once contracts have been finalized, members of parliament (MPs) have a critical role in monitoring implementation and ensuring that the terms of contracts and any overarching legislation are respected by all parties.

The publication of natural resource contracts is an important tool to ensure compliance with legal obligations. However, in many countries, even after signature, contracts are not disclosed to parliament or the public. This secrecy poses a problem because contracts contain important terms and conditions that affect citizens. These terms range from fiscal provisions determining what share of the resource wealth stays within the country, to social and environmental provisions particular to a given project. Contract transparency is therefore crucial to ensuring that all parties respect laws, that projects maximize country benefits, and that communities are reassured that the government is acting in the public interest.

Disclosure of oil, gas and mineral contracts is beneficial to both countries and companies. For companies, it provides stability. For countries, it ensures wealth is maximized and invested into projects that yield development.

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In addition, the knowledge that contracts will ultimately be published provides an incentive to contract negotiators to improve contract quality. If contracts are subject to public scrutiny, government officials will more likely think twice before signing a bad deal. Contract transparency also increases investment stability for extractive companies by securing balanced deals from the outset and lowering renegotiation pressures. In countries as various as Peru, Timor-Leste and the United States, contracts are not published, providing an opportunity for legislators and citizens' groups to hold their governments to account for decisions and to provide rigorous oversight of implementation.

WHAT ARE CONTRACTS?

As referred to here, a contract to extract a natural resource is the principal document between a government and a company that details the terms and conditions under which a resource is exploited. In many cases a contract supplements a license or a title. A license or title is unilateral permission from the government—usually according to a standard form—to the extractive company to exploit the resources. In contrast, contracts involve a mutually binding set of agreements among the contracting parties (usually a private company and the state, or a state-owned enterprise), and typically include extensive details. Some countries—including the United States and Norway—do not sign contracts with private companies. They simply award licenses with standard terms on a take-it-or-leave-it basis, without negotiating special terms with individual companies. In most of the developing world, however, contracts are a regular component of extractive industry projects.

Contracts often include some of the following elements:

- Financial terms, including payments, reimbursement of costs, pricing and sale of resources, and any applicable tax exemptions
- Management of operations and work obligations
- Provisions for the procurement of goods and services from within the country
- Employment and training of nationals
- Rights on access to ancillary resources such as land and water
- Confidentiality of information
- Procedures for settling any disputes between the parties
- Requirements for engaging with communities affected by exploration or extraction
- Social and environmental responsibilities

Contracts should be analyzed as part of a country's overarching legal framework for managing extractive industries, which also includes legislation, regulations and treaties. International best practice suggests that the legal framework be applied consistently, and that contracts supplement the general framework rather than contradict it. Still, many countries sign agreements that deviate significantly from generally applicable law, which can introduce dangerous discretion into the deal-making process, can render countries vulnerable to the often superior negotiating power of private companies, and can impede consistent and effective oversight.

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CONTRACT DISCLOSURE IS GROWING

While many jurisdictions have not traditionally made their oil, gas and mineral contracts available to the public, more recent developments show that contract disclosure is feasible and desirable for a wide range of countries.

NRGI’s 2013 Resource Governance Index (RGI, at www.resourcegovernance.org/rgi) found that of the 58 countries studied, 20 countries publish all or some of their extractive contracts. And in the time since the RGI was published, additional countries including Guinea, Mozambique and Sierra Leone have begun to publish their extractive industry contracts.

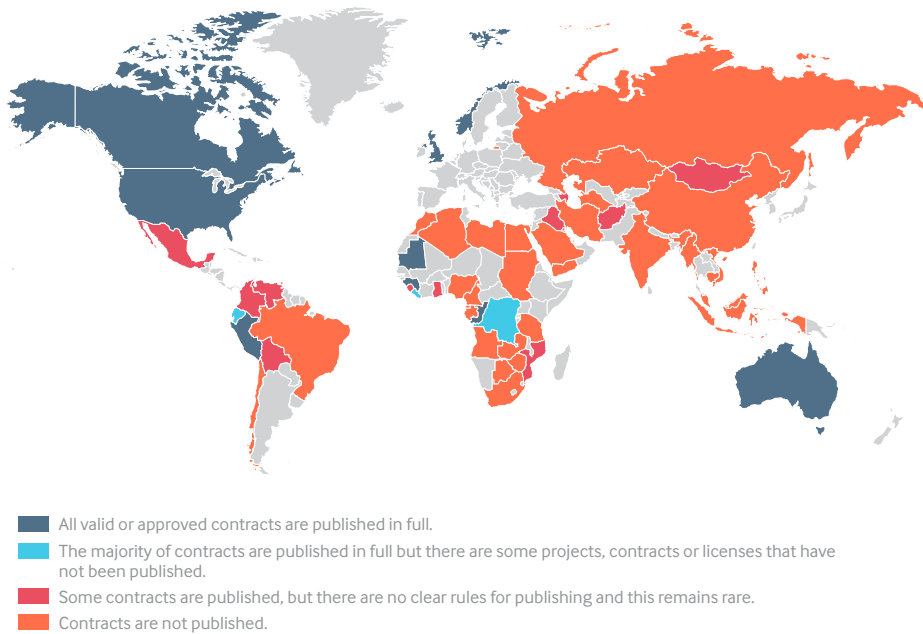


Figure 1. Global practice: public disclosure of contracts

Source: Resource Governance Index 2013.

Mexico and Niger have enshrined extractive contract transparency as constitutional requirements. Other countries, such as Liberia and Guinea, embedded contract transparency requirements in legislation governing the oil, gas and/or mining sectors. Countries such as Guinea, Liberia, Ghana and the Democratic Republic of Congo have started making their contracts available online. The Guinean website (www.contratsminiersguinee.org) is a model for others to follow, and even includes summaries of the key contract terms for easier understanding and monitoring.

In addition to country practice, contract disclosure is increasingly considered international best practice. The new Extractive Industries Transparency Initiative (EITI) Standard adopted in 2013 encourages contract disclosure. Other sources of international best practice such as the International Monetary Fund (IMF)’s Guide on Resource Revenue Transparency and the Natural Resource Charter also support contract transparency. The global database www.resourcecontracts.org contains more than 200 contracts from over 20 countries (at the time this briefing was published) and can help legislators analyze how their country’s contracts compare to others’.

In recent years, many MPs have become active promoters of contract transparency. In March 2011 the Global Organization of Parliamentarians Against Corruption (GOPAC) issued a resolution in support of contract transparency. At the national level, UK

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parliamentarians have formally signed on to a call for greater transparency from advocacy group Publish What You Pay, including the publication of contracts. And in Liberia, legislators approved the groundbreaking Liberia Extractive Industries Transparency Initiative (LEITI) law, which incorporates a commitment to contract disclosure.

MPs can also benefit from and use contract transparency to fulfil their duties. If the law requires that contracts be made public, MPs together with civil society organizations can better monitor compliance with legal obligations and ensure that contract terms have not undermined legislative work (e.g., contract terms that contravene national legislation).

WHY END CONTRACT SECRECY?

The failure to disclose extractive contracts is problematic for a number of reasons:

Contract secrecy undermines parliamentary oversight.

One of the fundamental roles of parliament is the oversight of activities conducted by government and companies. Contracts enshrine decisions made by the executive branch and private companies that can have major impacts for the country. Therefore MPs as representatives of the country's citizens need to be informed and involved. Contract secrecy creates an environment in which accountability is weak and facilitates illegal activity. As a result, parliament's legislative work starts eroding and so does its ability to scrutinize revenues flowing from contracts.

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Contract secrecy invites corruption and undermines public trust.

If contracts are not subject to public scrutiny, government officials may be more inclined towards negotiating deals in their own personal interest rather than in the public interest. Alternatively, contract disclosure helps the public to detect and deter bad deals, and can help increase public trust.

Contract secrecy weakens the government's negotiating position.

Companies have access to a large number of contracts (through their own experience and that of their advisors) and can use this to their advantage in negotiations by asking for concessions that governments have made in previous agreements. Countries, in contrast, seldom have access to company's contracts from elsewhere. Spreading disclosure as an international norm corrects this asymmetry of information and strengthens countries' negotiating position vis-à-vis companies.

REBUTTING ARGUMENTS AGAINST CONTRACT TRANSPARENCY

The arguments that companies and governments commonly make against disclosure fall short.

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

Rebuttal: *Contracts are already widely circulated within the private sector and, in any event, the types of contracts that governments should disclose do not generally contain commercially sensitive information.* Commercially sensitive information is seldom in

the primary contract that grants the right to extract. This information typically is found in other documents. (See Table 1.) Any highly truly sensitive information can always be redacted prior to disclosure.

There is no historical evidence that a company’s or a country’s commercial position has been affected by contract disclosure. On the contrary, countries such as Liberia and Ghana have secured substantial investments from international companies while disclosing contracts. Transparency, in fact, leads to more stable contracts that lower pressures to renegotiate.

Argument: Confidentiality clauses in oil, gas and mining contracts do not permit contract transparency.

Rebuttal: *Legislation and/or mutual consent can generally supersede confidentiality clauses.* Most confidentiality clauses in oil, gas and mining contracts include an exception for legally mandated disclosures, allowing governments to require transparency by law. In the absence of such a provision or law, governments and companies can always mutually agree to allow contract transparency. The political commitment of a government, or parliamentary pressure, can go a long way in convincing even hesitant companies to agree to disclosure.

Specific terms	Is this likely to cause competitive harm if disclosed?	Is this usually in a primary contract?
References to future transactions	Yes	No
Trade secrets	Yes	No
Work obligations	No	Yes
Local content	No	Yes
Employment and training	No	Yes
Financial terms of the deal	No	Yes
Parties to the contract	No	Yes

Table 1. Commercially sensitive information and primary contracts

CONTRACTS IN MYANMAR

As Figure 1 reveals, Myanmar is part of the group of countries that do not disclose any information regarding the contracts, projects or licenses of its extractive sector. As part of the country’s process for joining the EITI, the country’s EITI Multi-Stakeholder Group is currently discussing whether or not to follow the encouragement provided in the new EITI standard and include disclosure of oil or mineral contracts as a part of EITI.

In Myanmar’s oil and gas sector, operations are mainly governed by contracts between Myanma Oil and Gas Enterprise (MOGE) – a 100% State Owned Enterprise– and private operators. For this reason, the latter’s and MOGE’s contractual obligations in terms of reporting and disclosure are critical to the understanding of the country’s overall contract disclosure context. The main type of model contract between oil and gas operators and MOGE contains a confidentiality clause by which the parties agree not to disclose “data and information purchased or acquired” or obtained “during the course of operations,” but the clause does not expressly forbid disclosure of the contracts themselves. If Myanmar does decide to pursue contract publication, the EITI provides a strong platform upon which the government and its partner companies can collaborate to agree on modes and timing of disclosure.

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The EITI Standard (Requirement 3.9) requires countries to maintain a publicly available register of licenses and concessions. In order to comply with such Standard, the government of Myanmar will need to develop a public register of concessions and permits in the petroleum and mining sectors.

PARLIAMENTARY STRATEGIES FOR THE MONITORING AND ENFORCING OF CONTRACTS

In some jurisdictions, parliamentarians are well-positioned to exert effective oversight while in others their ability to effectively monitor contracts is curtailed. Nonetheless, parliamentarians can form a powerful coalition in cooperation with civil society organizations and media to critically monitor the implementation of the legal framework. Civil society and media can also raise specific implementation issues with policy makers, and promote awareness among affected communities of the legal obligations of oil, gas and mining companies.

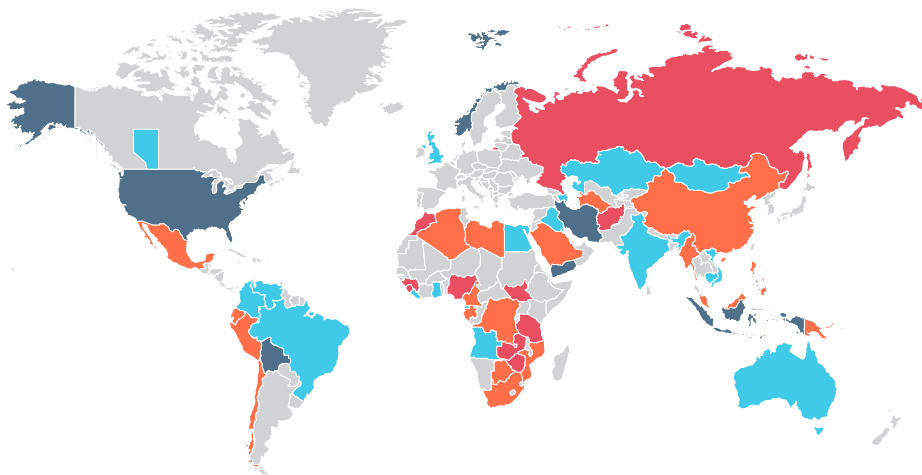


Figure 2. Parliamentary oversight of contracts

- The legislative branch receives regular reports on the award of contracts and licenses in the extractive sector and parliamentarians actively oversee compliance with relevant legislation and regulation.
- The legislative branch receives regular reports on the award of contracts and licenses in the extractive sector but there is no evidence that parliamentarians actively oversee compliance with relevant legislation and regulation.
- The legislative branch receives irregular and/or incomplete reports on award of contracts and licenses.
- The legislative branch does not receive information on the award of contracts and licenses in the extractive sector.

Source: Resource Governance Index 2013.

Using information provided in this briefing, parliamentarians can take some of the following actions:

- Seek government action on contract disclosure through oral or written parliamentary questions to the relevant portfolio minister.
- Work within party caucuses or parliamentary committees to assess the benefits of transparency and to build political pressure through outreach to civil society partners.
- Produce a committee report on countries that disclose their contracts. The objective is to demonstrate that contract transparency does not deter investment, but leads to strong relationships that benefit both the public and private sectors.

- Hold briefings and informational hearings with companies and the government to explore disclosure options (for individual contracts or selected contract terms) that will better serve the public interest.
- Introduce a private member's bill requiring contract disclosure (if the right of initiative is granted in your country's legislation).
- Interact with the media through press conferences or interviews to build public awareness and support for contract transparency.
- Work with civic groups, such as national chapters of Publish What You Pay that actively promote contract transparency.
- Sanction public access to contracts through motions or laws in countries where contracts are shared with or approved by parliament.
- Organize public hearings on the impact of mining, gas or oil extraction on local communities with a focus on implementation issues and gaps in the regulatory framework.
- Undertake a field trip to an oil, gas or mining project to get first-hand accounts of revenue management from company managers, as well as civil society and constituents.
- Hold briefings and informational hearings with companies, civil society and government to follow up on the results of CSO/media monitoring work, as well findings from field trips and hearings.
- Interact with the media through press conferences or interviews to build public awareness and appetite for contract monitoring and better enforcement of legal obligations.

QUESTIONS PARLIAMENTARIANS CAN ASK

- Are companies willing to disclose contracts collectively or individually? Are company executives willing to disclose contracts? If not, why? Can parliament refute their arguments with ideas from this briefing?
- Are any of the companies operating in your country disclosing contracts in countries where the law requires it? Could you change the law to require similar disclosure in your country?
- If confidentiality of information is given as a reason for secrecy, did you request access to confidentiality clauses to verify if they provide exceptions?
- If companies and the government say they are in favor of contract transparency but they blame the other party for lack of disclosure, can you convene them to a public hearing to hear their views at the same time?
- Are there individuals within the government in favor of contract transparency? Are there any civil groups active on this issue? Could you work together to promote disclosure?

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- Does your country have a Freedom of Information Act? Could you work with your constituents to seek disclosure through the courts?
 - What are the main contract compliance issues in your country? How would contract transparency help you and other oversight actors (e.g., civil society organizations, media) play a monitoring role?
 - What information (in addition to contracts) would you need to monitor respect of contractual clauses? How can you gain access to this information?

FURTHER READING AND ENGAGEMENT

- Read the contracts at www.resourcecontracts.org.
- Read NRGi publications on contracts and contract transparency at www.resourcegovernance.org/issues/contracts.
- Drilling Down, www.resourcegovernance.org/publications/drilling-down.
- Contracts Confidential, www.resourcegovernance.org/contractsconfidential.
- Enforcing the Rules, www.resourcegovernance.org/publications/enforcing-rules.
- NRGi's Resource Governance Index, www.resourcegovernance.org/rgi.

ABOUT THE SERIES

Technically complex and often opaque, the oil, gas and mining industries require legislation and informed, effective oversight. To ensure gains from the sector are maximised, NRGi provides background information on crucial areas for parliamentary engagement. These parliamentary briefs are available at revenuewatch.org/parliaments

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