

Promoting Transparency and Monitoring of Contracts

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 to the extractive company to exploit the resources. In contrast, contracts involve a mutually binding set of agreements among the contracting parties. Contracts should be analyzed as part of a country's overarching legal framework for managing extractive industries, which also includes legislation, regulations and treaties.

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

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) found that of the 58 countries studied, 20 countries publish all or some of their extractive contracts. Since the RGI was published, additional countries including Guinea, Mozambique and Sierra Leone have begun to publish their extractive industry contracts.

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. Guinea, Liberia, Ghana and the Democratic Republic of Congo have started making their contracts available online. The Guinean website is a model for others to follow, and even includes summaries of the key contract terms for easier understanding and monitoring.

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 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.

In addition to country practice, contract disclosure is increasingly considered international best practice. The new Extractive Industries Transparency Initiative (EITI) Standard, the International Monetary Fund (IMF)'s Guide on Resource Revenue Transparency and the Natural Resource Charter all support contract transparency.

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 parliamentarians have formally signed on to 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.

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. MPs as representatives of the country's citizens need to have access to contracts. 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.

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. 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.)

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.

“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.”

Hon. Zitto Zuberi Kabwe,
Tanzanian MP

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.

Specific terms	Is this likely to cause competitive harm if disclosed?	Is this usually in a primary contract?
References to future transactions	Yes	Unlikely
Trade secrets	Yes	Unlikely
Work obligations	Unlikely	Likely
Local content	Unlikely	Likely
Employment and training	Unlikely	Likely
Financial terms of the deal	Unlikely	Almost always
Parties to the contract	Unlikely	Almost always

Table 1. Commercially sensitive information and primary contracts

PARLIAMENTARY STRATEGIES FOR THE MONITORING AND ENFORCING OF CONTRACTS

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.

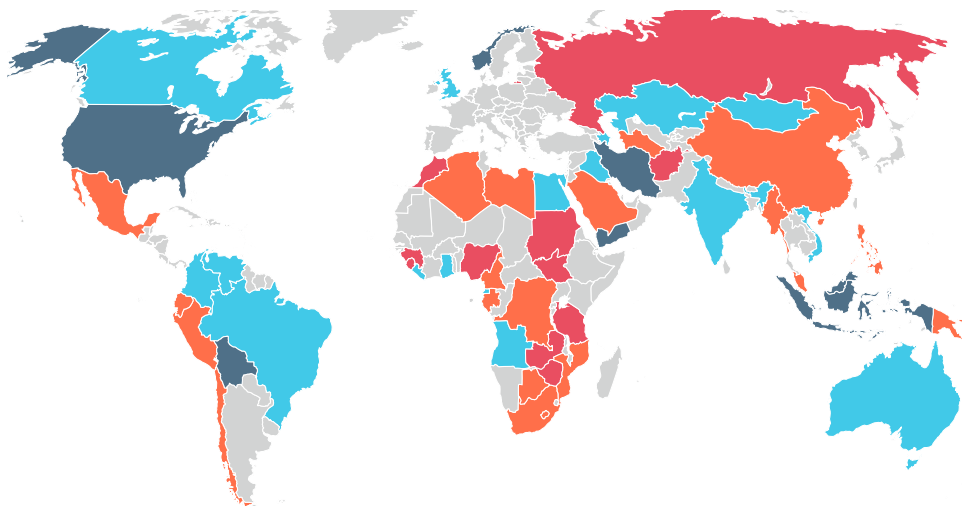


Figure 1. Parliamentary oversight of contracts

- 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 2013¹

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.

1 <http://index.revenuewatch.org/rgi/data-tool>

- 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 and better enforcement of legal obligations.
- 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.

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 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?
- 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 NRG 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
- NRG's Resource Governance Index, www.resourcegovernance.org/rgi

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Oil, gas and mining for development