

# Checklist for integrating plans for contract transparency in work plans

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## Introduction

The 2019 EITI Standard requires countries to:

- Disclose any contracts and licenses that are granted, entered into or amended after 1 January 2021.
- Document the government's policy on disclosure of contracts and licenses that govern the exploration and exploitation of oil, gas and minerals. This includes:
  - a description of whether legislation or government policy requires or prohibits disclosure of contracts and licenses
  - explanation for deviation from policy, if any
  - an explanation of where the government policy is embodied
  - documentation of the multi-stakeholder group's discussion on what constitutes government policy on contract disclosures.
  - reforms relevant to the disclosure of contracts and licenses planned or underway
  - A list of all active contracts and licenses, indicating which are publicly available and which are not.
  - For all published contracts and licenses, it should include a reference or link to the location where the contract or license is published.
  - If a contract or license is not published, the legal or practical barriers should be documented and explained.
  - explanation of legal or practical barriers where contracts cannot be published
- The 2019 EITI Standard encourages countries to disclose also the full-text of any agreement granted, entered into or amended prior to 1 January 2021 to exploit oil, gas and/or mineral resources, as well as any annexes or amendments (requirement 2.4.a).

- The multi-stakeholder group is expected to agree and publish a plan for disclosing contracts with a clear time frame for implementation and addressing any barriers to comprehensive disclosure. **This plan will be integrated into work plans covering 2020 onwards.**

As defined in the 2019 EITI Standard, the terms ‘contract’ and license refers to

- i. The full text of any contract, concession, production-sharing agreement or other agreement granted by, or entered into by, the government which provides the terms attached to the exploitation of oil, gas and mineral resources.
- ii. The full text of any annex, addendum or rider which establishes details relevant to the exploitation rights
- iii. The full text of any alteration or amendment to the documents

Below is checklist of proposed steps and activities that the MSG might wish to consider in developing their plans for contract disclosure which are expected to be included in their EITI workplan . These steps are not intended to be prescriptive or taken in the order it is presented below. Some activities may be undertaken simultaneously depending on the MSG’s preference and previous work on contract disclosure. The term contract in this checklist should be understood to also include licenses or any other form of agreement that grants the right to explore and extract oil, gas and minerals, as defined by EITI Requirement 2.4.d and e.

## 10 possible steps to plan for contract transparency

### 1. Discuss objectives for contract disclosure.

It is important for all stakeholders in the MSG to appreciate how contract disclosure could benefit their respective constituencies. Examples of objectives could include:

- Understanding the fiscal terms for each agreement, and how they can feed better projections of the timing and volume of national and subnational government revenues
- Enabling citizens and government oversight bodies to monitor compliance with legal obligations in contracts
- Enabling citizens and oversight bodies to understand the state's legal rights, obligations and limitations in the contract, including around cost auditing timing and rights, stabilization clauses and their scope, and requirements for allocations of revenues to local governments or local communities
- Addressing reputational risks for companies
- Enabling the government to negotiate for better deals
- Understanding how contract terms impact on broader strategy goals
- Ensuring realistic public and inter-agency expectations on the timing and volume of government revenues from key projects

Possible activities:

- The MSG to discuss current issues or challenges in their country's extractive sector, which contract transparency can help to address.
- The MSG to agree on a clear set of objectives for contract disclosure.

### 2. Engage key stakeholders.

Full contract transparency requires the commitment of key actors in government and industry, as well as a strong advocacy from civil society. It would be useful for the MSG to develop a plan for stakeholder engagement to ensure the support of high-level and technical officials from governments and companies and that disclosure contributes to their goals. It is also important for civil society to play an active role in explaining the importance of contract transparency to its constituency as well as to government and industry. MSGs is expected to identify challenges in securing commitment and adopt strategies on how to address them.

Possible activities:

- Engage in dialogue with relevant government agencies and companies
- Identify a champion for contract transparency both from government and industry
- Develop key messages on the importance of contract transparency targeting different stakeholder groups
- Review the global norm of contract disclosure, best practice by governments and companies in the EITI, and supportive resources available from companies, international financial institutions, donor governments, academic and other institutions
- Conduct peer learning with countries that have strong political commitment on contract transparency, including by considering participation in the Contract Transparency Network
- Reach out to companies that have expressed support or adopted policies on contract transparency to mobilise broader industry support, ask companies that are open to sharing lessons on the evolution of their support for contract disclosure to share their stories and recommendations of how to address concerns
- Survey MSG members and document key concerns around contract disclosure, compare with documented common concerns in other countries and with companies, and organize discussion to discuss the common approaches to address those concerns – aim to build trust and collectively work to reduce the list of concerns down to a small list with specific, context-specific responses and a plan to resource and address those concerns.
- Conduct trust-building activities to review and openly discuss latest research on key concerns and responses, to address apprehensions regarding misinterpretation of contractual stipulations. Engage experts in confidentiality and commercial sensitivity issues.
- Consult civil society and key user groups to identify, document and communicate citizen demands for contract transparency

### 3. Secure or produce a list of all active extractive contracts in your country, as well as potential contracts that would be entered into by 1 January 2021.

While the EITI requirement on contract disclosure will take effect on 1 January 2021, it is important for MSGs to plan ahead and keep a list of all contracts that should be

disclosed<sup>1</sup>. It would be useful for MSGs to keep track of bids that are being launched or are undergoing direct negotiations before and after 1 January 2021.

Possible activities:

- Conduct a scoping review of active extractive contracts in the country
- Identify ongoing and future bids and contract negotiations<

#### 4. Understand the current state of your country's contract disclosure practices and identify low hanging fruit.

Discussions around contract disclosure tend to be bogged down by discussions on legal barriers and confidentiality clauses. While these discussions are important, it would be useful for MSGs to first consider what is the current practice in disclosing contracts in their country by looking at what contracts are already disclosed and what could be voluntarily disclosed by government and companies. When this is done, the MSG could then have a more targeted discussion on whether there are practical or legal barriers that need to be addressed and how to address them. The MSG should also consider where the published contracts can be accessed and how the MSG can check whether the published contracts are the actual executed contracts.

Possible activities:

- Conduct a scoping exercise on government and company websites, which may be undertaken by a short-term consultant or by the national secretariat
- Engage with companies on the possibility of voluntarily agreeing to disclose contracts

#### 5. Undertake a legal review and agree on recommendations for addressing legal barriers.

It would be useful for MSGs to understand the contract regime in their country including possible legal barriers to contract transparency. However, it should be noted that legal reviews should not hold up any possible disclosures meanwhile as discussed above. If the MSG thinks a legal review is necessary because there are existing barriers, the legal review should look into a description of whether legislation or government policy requires or prohibits disclosure of contracts and licenses; explanation for deviation from policy, if

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<sup>1</sup> Contracts entered into before 1 January 2021 are encouraged to be disclosed under the EITI Standard.

any; an explanation of where the government policy is embodied; and documentation of the multi-stakeholder group's discussion on what constitutes government policy on contract disclosures. The following questions could guide MSGs in undertaking a legal review:

- What is the contracts regime in the country? What types of agreements exist? What are the differences between these agreements? What annexes and auxiliary documents should be deemed part of an extractive contract?
- Which government entity is responsible for keeping and monitoring these contracts?
- Are there legal barriers for disclosure?
  - What is the government's policy on contract disclosure? Where is this policy reflected? How is it implemented in practice?
  - Are there confidentiality clauses in existing contracts/licenses or model agreements? How are these confidentiality clauses applied in practice? What is the scope of the confidentiality clause (e.g. does it cover the entire contract or specific stipulations?) What are the arguments for having these confidentiality clauses? Are these arguments justified?
  - Will these clauses still be included in contracts that will be entered into after 1 January 2021? If so, How can the MSG ensure that these clauses are no longer included in contracts that will be entered into after 1 January 2021?
  - What are there opportunities for ensuring that these confidentiality clauses are no longer reflected in future contracts?
  - Are there laws that prohibit contract disclosure? Are there opportunities to amend these laws? What are the suggested amendments to these laws?
  - Could new licensing rounds include new model contracts that provide for public disclosure?
  - Are there transparency laws that could be used to support contract disclosure?
- What reforms are underway related to contract disclosure?

Possible activities:

- Commission a legal review or analysis of model agreements to identify legal barriers or provisions facilitating contract disclosures

- Examine agreements that have already been disclosed and study how this was done, interviewing companies and government actors with oversight authority to gather relevant lessons
- Engage parliamentarians
- Engage in dialogue with companies and ministries
- Conduct capacity building activities for the MSG to review the contractual drafting trends that promote contract transparency and to address potential arguments against contract transparency

## 6. Agree on methods for disclosure.

Different countries have various ways of publishing extractive contracts. Others have done so through dedicated platforms such as [resourcecontracts.org](http://resourcecontracts.org) (Sierra Leone, Philippines). Some are disclosing through government websites (Ghana, Mexico, Timor-Leste) or company websites. The EITI has no prescribed method for disclosure but only requires public access in open formats. In deciding methods of disclosure, the MSG might wish to consider the following questions:

- Are there opportunities for systematically publishing contracts through government websites?
- What are the key specifications on functionality that arose from stakeholder consultations to be able to use contracts, e.g. linking with cadastre systems?
- What technical, financial and administrative resources are needed to systematically disclose these contracts?
- What technical, financial and administrative resources are needed to make sure these disclosures are up to date?
- What should be the mechanism to ensure that there is full disclosure, e.g. that the full text, annexes and amendments are disclosed? How can the MSG ensure that the most recent amendments are reflected?
- Can contracts be linked to other project-level information already being disclosed? Such as payments or production? Can contracts be posted on a map or online cadaster?

Possible activities:

- Conduct a survey of current disclosure practices and available portals
- Identify gaps that need to be addressed in current disclosure practices
- Identify effective and efficient ways of disclosing contracts building on current systems

- Identify resources needed to establish and maintain systems for contract disclosure

## 7. Conduct capacity building activities.

Contract transparency should not be an end itself but should contribute to better governance of the extractive sector. Key to this is for stakeholders to understand contracts and develop skills to analyse contractual stipulations. MSGs could also consider looking into how to monitor compliance with contractual obligations.

Possible activities:

- Workshops on contract analysis
- Peer learning with other countries
- Trainings on how to link contract use with other tools to inform policy such as financial modelling, projecting revenues, etc.

## 8. Actual disclosure.

In working towards full disclosure of contracts by 1 January 2021, the MSG should consider taking steps to ensure that the disclosures are comprehensive. This requires including the full text of all active contracts and full text of any annex, addendum or rider which establishes details relevant to the exploitation and exploration rights. Implementing countries should provide a list of all active contracts and licenses, indicating which of these are publicly available and which are not. For all published contracts and licenses, it should include a reference or link to the location where the contract or license is published. If a contract or license is not published, the legal or practical barriers should be documented and explained.

Possible activities:

- Conduct a scoping exercise of active extractive contracts in the country, and compile a public list of all contracts
- Engage relevant ministries that could potentially host the contract disclosure site
- Understand how contracts are executed and amended
- Identify the agency and the person in the agency responsible for publication of contracts
- Consider whether internal regulations or other legal instruments are needed from the host agency



- Conduct peer learning activities with other countries that have implemented contract transparency or face similar implementation challenges

## 9. Identify resources.

The EITI Standard requires that all work plans are fully costed. In including activities on contract transparency, it is therefore expected that MSGs include in their work plan the staff and funding resources needed to carry out these activities, as well as plans to supply funding gaps.

## 10. Determine a feasible timeline for all activities.

MSGs are expected to identify measurable targets within a specific timeframe in carrying out these activities.