

Contract Disclosure through the EITI

Background paper for the EITI Strategy Working Group

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"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, MP, Parliament, United Republic of Tanzania

Contracts detail the commitments between governments and companies that determine the net public benefits derived from resource extraction. Without them, citizens and parliaments cannot judge (or fully know) the risks that accompany extraction, effectively monitor these agreements, or hold leaders to account for the deals they've struck.

1. Why revenue transparency needs contract transparency

Revenue and payment disclosures do not enable citizens to assess the return that they receive on the sale of public oil, gas and mineral assets. Nor do they provide context for the size and timing of certain payments, nor information about a company's operational, social or environmental obligations.

When contracts are made publicly available alongside of revenue information, citizens, legislators, the media and investors are then in a better position to assess:

- Its financial terms – i.e. what share of the wealth produced by resource development is supposed to stay in a country. Contracts are often negotiated on a case-by-case basis, and may contain terms and rates that deviate from those contained in legislation and even model contracts. Without these terms, it is impossible to assess the appropriateness and relative value of tax, royalty and other payments, for instance.
- What governments give away, in terms of tax and other incentives, in negotiated contracts. Contracts contain critical information on tax allowances related to how costs and other deductions can be calculated by companies – information that affects how profit is registered, and therefore how much a company is obligated to pay on this profit. Contracts may also award companies rights and access to ancillary resources, such as land, water, forestry or infrastructure resources.
- How a government structures/finances its own share of a project. Whether related to equity participation or joint-venture partnership, government financing obligations directly affect net revenues, and sometimes have high opportunity costs.
- The social and environmental provisions particular to a given project. Local content requirements, special compensation for local and affected communities, environmental protection and reclamation safeguards, infrastructure investments and other CSR commitments are often embedded in contracts, and citizens need to know what these provisions demand from companies.

Arguments against the mandatory disclosure of contracts endure, despite a lack of evidence that such disclosure is harmful for either companies or governments. Resistance to disclosure centers on the likely interest and ability of governments to disclose the deals they have signed with companies, and relates to concerns about possible negative effects on company competitiveness.

On the first count, it is clear that government is quickly spreading across jurisdictions. Additionally, research has shown no legal impediment to contract disclosure by governments where companies consent. Rather, most confidentiality clauses allow a contract's parties to publish information by mutual consent, and include explicit allowances for disclosure mandated by laws or other requirements, such as listing rules.

In relation to the second issue, contract transparency can offer gains to companies and may in fact improve market efficiency and their license to operate. Contracts already widely circulated within the private sector, but key revenue data from oil, gas and mining industry contracts is additionally available for sale on pay-access databases, such as those run by Wood Mackenzie. Further, these contracts don't typically contain information that can properly be called commercially sensitive. (See figure below.) And where they do, this limited information can be redacted; the IFC has allowed such flexibility in its own contract disclosure requirement.

Specific terms of development	Likely to cause competitive harm if disclosed	Found 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 (terms and payment rates)	Unlikely	Almost always
Parties to the contract	Unlikely	Almost always

Contract disclosure can provide companies with a basis for discussing the contributions they make to a country. For example, in Ghana, where Kosmos and Tullow published their oil contracts, the contract will justify why government take is currently limited given the exploration risks and costs assumed by the company.

2. Existing practices – the increasing adoption of contract transparency norms

The United States, Timor-Leste and Peru all share oil and gas contracts publicly, and other countries allow for disclosure under freedom of information laws and policies, including Colombia and to some extent, Mexico. In Iraq, the Kurdistan Regional Government has published all of its petroleum production-sharing agreements. Recently, contract transparency has recently made particular progress in Africa. Niger's 2010 constitution mandates the publication of all oil contracts, while Sierra Leone, Sao Tome and Principe and Guinea all have

embedded contract transparency requirements in oil sector legislation and codes. Ghana's Ministry of Energy has made the country's most important petroleum agreements available for download online. And the Democratic Republic of Congo has published dozens of its mineral and petroleum contracts. Liberia's 2009 EITI Law requires not just the publication of revenue information, but also the public disclosure of all contracts.

Authorities on natural resource governance other than EITI endorse contract transparency:

- The IMF's Revised Code of Good Practices on Fiscal Transparency notes that "contractual arrangements ... should be clear and publicly accessible."
- The IFC has announced its intention to "encourage governments and corporations to make extractive industry contracts public," and recently revised its Policy on Social and Environmental Sustainability to require each IFC-backed oil, gas and mining project to disclose its "principal contract with government that sets out the key terms and conditions under which a resource will be exploited."
- Precept 4 of the Natural Resource Charter, which addresses competition, also supports licensing and contract transparency.
- The International Bar Association's Model Mining Agreement states: "This Agreement and the Documents required to be submitted under Section 2.4, by any past and present Parties is a public document, and shall be open to free inspection by members of the public at the appropriate State office and at the files designated in the following subsection (e), and at the Company's office in the State during normal office hours (section 30.1(a))."

Some companies have already embraced contract transparency as a key component of sound and sustainable business practice, especially in difficult operating environments. Chris Anderson, Director of Corporate Affairs for Newmont Mining, has noted that long-term investors (such as extractive industry companies) have an incentive to build trust where they work. Anderson has thus attested publicly that he "cannot see one reason why investment agreements are kept confidential," calling "the commercially-sensitive thing... an anachronism." Some industry associations agree. The ICMM, for instance, which counts among its members 17 of the largest global mining companies, requires that its members "engage constructively in appropriate forums to improve the transparency of... contractual provisions on a level-playing field basis."

Civil society demand for contract disclosure is high and widespread. Latin America provides a few examples of how local civil society groups seek out and utilize contracts:

- Fundacion Jubileo has aided the Bolivia Ministry of Energy and Hydrocarbons in designing and launching a web page containing information regarding the localization of hydrocarbons concessions;
- Grupo Propuesta Ciudadana in Peru has launched an online service to allow all interested to access a variety of information regarding concessions (localization, ownership, investment, production, rent generation, overlap with natural protected areas and indigenous territories);
- Fundar in Mexico and Grupo Faro in Ecuador are using the Freedom of Information laws to access the new service contracts between state and companies.

3. Implementing contract transparency through EITI

EITI-implementing governments would disclose all contracts that govern their relationships with the oil, gas and mining companies that pay material revenue streams. The disclosure of new contracts would also be encouraged, even if no payments are yet made nor due during the fiscal period in question.

The contracts should be available on a single government website.

Any annex, addendum, rider, side agreement or other documentation that forms a part of the core issues (to be defined) covered by the contract should also be disclosed. It is assumed that any law, ruling, decree or regulation that would affect core issues (as defined) would already be publicly available; if this is not the case, disclosure of such rules would also be necessary.

The EITI guidelines for the disclosure of contracts should provide detailed language on the kinds of exemptions that can be made.