

Contract Transparency

Creating Conditions To Improve Contract Quality

KEY MESSAGES

- Contracts represent the agreement between the government and the extraction company about how, when and at what cost the extraction occurs. They represent the “deal” the government gets in exchange for mineral rights.
- In order for citizens, parliamentarians and oversight actors to monitor and analyze the public benefit from contract deals, contracts must be made publicly available.
- Contracts can be disclosed without a threat to the industry or governments.
- Contract transparency is a growing phenomenon in developed and developing economies as its benefits to all stakeholders are becoming more obvious.

“Authorities should . . . publish contracts and make them readily available online.”

– Natural Resource Charter, Precept 2

WHAT ARE CONTRACTS, AND WHY IS CONTRACT TRANSPARENCY IMPORTANT?

In most countries, oil, minerals and gas are the property of the nation. That means the country and its citizens own these resources. Governments, as representatives of the nation, often sign licenses or contracts with companies giving the companies the right to extract the natural resources in exchange for a share of the profits. The contract represents the terms of the agreement between the company and government. In addition to the fiscal terms, contracts often also include information about local content, environmental impact, infrastructure and production timing.

Because the citizens of the country are co-owners of these resources, they have a right to understand the terms of the extraction. When contracts remain secret, citizens and oversight actors cannot properly monitor the implementation of the deal, and the country is at high risk of corruption and leakage. Moreover, at an international level, the fact that so many contracts remain opaque puts states at a disadvantage in contract negotiations. Extractive industry companies often have access to one another’s contracts and have more sophisticated and detailed knowledge of extractive industry market conditions than most governments. Because publicly available contracts are rare, governments lack a similar basis for understanding prevailing market conditions. Finally, the fact that so many contracts remain secret reinforces a culture of impunity in which public officials are not held accountable for questionable deals they make. **Contract transparency is crucial in ensuring that laws are followed, country benefits are maximized, and communities are reassured that the government is acting in the public interest.**

This reader is intended for use in conjunction with Precept 2 of the Natural Resource Charter.

It is important to note that there are many contracts that outline the agreements between myriad parties for each oil, gas or mining project. The type of contract discussed here, and which is the target of most international advocacy, is known as the state-investor agreement, or host government agreement.

THE LEGAL HIERARCHY

Contracts do not exist in a vacuum. Instead, they are part of a country’s overarching legal framework for managing extractive industries. This framework can often be thought of as a hierarchy, as shown in the pyramid that has its foundation in the constitution. The constitution establishes the authority of the government to make and enforce laws. It may also include information about the fundamental rights and values of the country, potentially including natural resource ownership. The next level of the pyramid includes the laws and policies that govern the industry. This might include a mining or petroleum law, environmental laws, health and safety laws, tax laws and labor laws. Regulations are more specific requirements that are usually set forth in accordance with a law by an executive ministry or department. A model contract, which outlines general terms for possible contracts in the country, could be created as a regulation or as part of legislation. While the constitution and laws apply very broadly, the contract has specific terms that apply specifically to the companies involved in one extraction site and the government.

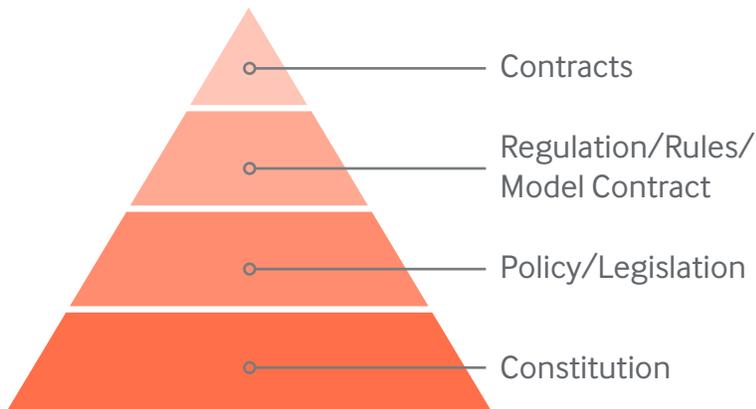


Figure 1. The Legal Hierarchy

Source: NRGi

Some countries have constitutions, laws and regulations that are very specific about the rules governing extractive industries. As a result, there may be less information in the contract and less for the government and company to negotiate about for each deal. While theoretically the laws and policy are supposed to have more authority than a contract—*take precedence*, in legal speak—contracts can also be written to explicitly override the laws and regulations. This can have a negative overall impact on extractive industry governance, as too much variance from one project to another makes it more difficult to effectively monitor and enforce agreements. In practice, the prevalence of contract-specific arrangements means that even when legal frameworks have many details about the extractive policy, oversight is impossible without the contract.

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WHY AREN'T ALL CONTRACTS ALREADY PUBLIC?

In most countries, when laws are passed, the laws become public documents. As such, everyone in the country knows the rules and can check whether others are following them. You may be wondering why extractive industry contracts are different. The primary reason seems to be a vestige of long-standing industry practice. Extractive industry contracts emerged from purely commercial contracts, which typically had a confidentiality clause indicating that there would be consequences if either party shared the terms with anyone else. This practice of secrecy has persevered in most oil- and mineral-rich countries, even with public contracts that govern billions of dollars of public revenues and directly impact the lives of many citizens.

ARGUING FOR CONTRACT TRANSPARENCY

The most common arguments against contract transparency, as demonstrated below, are fairly easily rebutted.

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

Rebuttal: *Contracts are already widely circulated within the private sector, and the types of contracts being disclosed do not generally contain information that would meaningfully impact a company's competitiveness.*

Argument: Confidentiality clauses do not permit contract transparency.

Rebuttal: *Legislation and/or mutual consent can generally supersede confidentiality clauses. Confidentiality clauses often make room for exceptions when all parties to the contract agree. Though many extractive industry contracts have confidentiality clauses that expressly forbid contract disclosure, many others do not.*

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Argument: Contract transparency will scare off investors.

Rebuttal: *There is no evidence that a company's or a country's commercial position has been affected due to contracts being disclosed. In fact, countries such as Liberia and Ghana have received significant investment while disclosing contracts.*

Argument: Contracts are too complex for the general public to understand.

Rebuttal: *There is a wealth of free educational tools available to educate policymakers as well as civil society, the general public and media. While there is clearly a need for additional public education on how to analyze and monitor extractive industry contracts, a growing amount of experience shows that disclosure improves public dialogue and provides a strong basis for improving citizen understanding.*

NRGI finds that multiple stakeholders stand to benefit from the disclosure of contracts. See the table below for more details.

Stakeholder	How contract transparency benefits each stakeholder
Civil society organizations	<ul style="list-style-type: none"> • Increased ability to analyze government decisions • Increased access to information on management of public resources • Reduced corruption or unequal distribution of wealth as contracts are made more focused on national development • Easy access to contract terms enables checks on company and government compliance with the contract
Government	<ul style="list-style-type: none"> • Increase of trust between government and citizens • Increase in independent analyses of contracts • Increased capacity in contract monitoring • Increase in government’s reputation for investors, with subsequent increase in investment, access to credit and decrease of investor risk • Increase in popular support for contract renegotiations and reviews • Increase in information to bring to future negotiations
Companies	<ul style="list-style-type: none"> • Better relationships and increased trust with communities • Decrease in community complaints • More stable contracts and decreased pressures to renegotiate • Decreased risk of corruption in negotiations and follow-up

CONTRACT DISCLOSURE IS GROWING

While many jurisdictions have not traditionally made their oil, gas and mineral contracts available to the public, more recent developments have shown that contract disclosure is feasible and desirable for a wide range of countries. NRGi’s 2013 Resource Governance Index (RGI) found that of 58 countries studied, 20 countries publish all or some of their extractive contracts.

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All or most contracts available	Some contracts available
Australia	Afghanistan
Canada	Azerbaijan
Democratic Republic of the Congo	Colombia
Ecuador	Ghana
Guinea	Iraq
Liberia	Mexico
Norway	Mongolia
Peru	Timor-Leste
United Kingdom	Venezuela
USA	Yemen

In addition to country practice, contract disclosure is increasingly recognized as a part of international best practice. The new Extractives Industries Transparency Initiative (EITI) Standard adopted in 2013 encourages contract disclosure, as does the International Monetary Fund (IMF) Guide on Resource Revenue Transparency, the International Finance Corporation’s Performance Standards, and the Natural Resource Charter.

A growing number of extractive industry companies have also begun to speak out in favor of the benefits of contract publication, arguing that it helps increase trust and their social license to operate and to more effectively manage citizen expectations. Among those that have made statements in favor of contract disclosure are oil companies Tullow and Kosmos, mining companies Newmont and Rio Tinto, and the International Council on Mining and Metals (ICMM), an association of the world's leading companies in the mining and metals industry.

BEYOND DISCLOSURE

The first step in contract transparency is for the government and the companies to agree that the contracts can be shared openly, or for the government to pass a law requiring contract transparency. Once contracts can be disclosed, it is important that they are easily accessible by the public, including in the primary languages of the country. Oversight actors then have the responsibility to use the information disclosed in the contracts, together with other publicly available information, to monitor the company's performance and test whether it is in compliance with the contract. Civil society organizations have partnered with industry experts to put out new, easily accessible guides on monitoring and analyzing oil, mineral and gas contracts.

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QUESTIONS TO ASK

- Are contracts in my country publicly available? If not, why not? If yes, are all contracts easily accessible and public?
- Do the companies in the country oppose contract disclosure? If so, why?
- Does the government oppose contract disclosure? If so, why?
- Are there strong independent actors in the country who are able to monitor contracts to ensure companies and government do not renege on their responsibilities? If not, what are the steps that could help empower such actors to take on an effective oversight role?

ADDITIONAL RESOURCES

Natural Resource Charter, Precept 2: <http://naturalresourcecharter.org/content/natural-resource-charter-pdf>

EITI Standard 2013, article 3, paragraph 12: http://eiti.org/files/English_EITI%20STANDARD_11July_0.pdf

Contract Disclosure in Using EITI for Policy Reform, Natural Resource Governance Institute Guide to the EITI Standard: <http://www.resourcegovernance.org/eitiguide/#!allocation-of-rights>

Oil Contracts: How to read and understand them (OpenOil, 2012), available at: <http://openoil.net/contracts-booksprint/>

Mining Contracts: How to read and understand them (2014), available at: <http://www.resourcecontracts.org/blog/guides-to-contract-terminology.html>

Rosenblum, Peter and Susan Maples, *Contracts Confidential* (NRGI 2009), available at: www.revenuewatch.org/contractsconfidential

Smith, Erin and Peter Rosenblum, *Enforcing the Rules* (NRGI 2011), available at: www.revenuewatch.org/publications/enforcing-rules

International collections of contracts:

- www.resourcecontracts.org
- repository.openoil.net/wiki/Downloads

Examples of public analytical documents that make use of published contracts to monitor enforcement and impact:

- Grupo Faro (Ecuador), *Análisis Económico y Socio-ambiental del Primer Contrato de Minería a Gran Escala* (2012), available at: <http://www.grupofaro.org/content/an%C3%A1lisis-econ%C3%B3mico-y-socio-ambiental-del-primer-contrato-de-miner%C3%AD-gran-escala-una-mirada-de>
- RELUFA (Cameroon), *EITI and Mining Governance in Cameroon: Between Rhetoric and Reality* (2014), available at: <http://www.reluфа.org/documents/GUIDERELUFAENdate.pdf>
- David Mihalyi, *Forecasting Ghana's Oil Revenues for the 2015 Budget* (NRGI, 2014), available at: http://www.resourcegovernance.org/sites/default/files/nrgi_ForecastingOilRevenues_2015GhanaBudget.pdf

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