

# What Confidentiality Clauses in Extractive Industry Contracts Actually Say

Companies and governments have consistently argued that confidentiality clauses keep them from disclosing information, particularly contracts. This argument is circular, of course, because the companies and governments put the clauses into the agreements themselves. However, in most cases, confidentiality clauses are not the major barriers to disclosure that parties claim. Parties can generally disclose by consent or unilaterally, pursuant to law. As it turns out, there is considerable margin for action if and when contract parties decide to make disclosures.

An important starting point is the confidentiality clause itself. Parties to a contract can choose to keep almost anything confidential. Freedom of contract permits them to keep even mundane information secret. The survey of more than 150 oil and mining contracts between companies and countries or state-owned companies conducted for this report shows that governments and companies are doing just that: using confidentiality clauses to cover a broad range of information, most of which need not remain confidential. Despite their broad reach, there are many exceptions in confidentiality clauses that allow the disclosure of information, including the contracts themselves, in many situations.

## A. Confidentiality Clauses in Extractive Contracts

One of the most important conclusions of the survey of confidentiality clauses is that they are largely generic. Such clauses look very similar across all potential variations: country, contract type (e.g., production sharing agreements, mining conventions, leases), time of contract signing, etc. A sample of the clauses surveyed is available as Appendix B.

Generic contract clauses take a standard form and are put into contracts with little or no individual adaptation. While their language may not be identical, the same elements appear in nearly the same form in all of the contracts surveyed. A typical example, from the renegotiated Liberia-Mittal Steel Mineral Development Agreement (MDA) of 2006, Article VII, includes the following:

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### Section 1 Confidential Information

All information exchanged between the Parties hereto in the context of this Agreement shall be considered and treated as confidential information, subject to Article VII, Section 2 of the MDA. The Parties hereto hereby agree not to divulge such information to any other Person without the prior written consent of the other party, which consent shall not be unreasonably withheld and/or delayed. However, the foregoing shall not be applicable to CONCESSIONAIRE's or the GOVERNMENT's bankers, advisors and all those who are, in a special way, connected with the Operations.

### Section 2 Public Information

The obligation of confidentiality set forth in Article VII, Section 1 above shall not apply either to information exchanged between the Parties hereto which is in the public domain or to information exchanged by the Parties which the CONCESSIONAIRE is required to reveal to any other Person by law applicable to it.<sup>15</sup>

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In the sections that follow, the typical features of confidentiality clauses and their implications are explained.

## 1. The Clauses Cover a Broad Range of Information

In the contracts surveyed, very few clauses diverged from the generic model illustrated above, in which confidentiality typically applies to *all* information. One significant deviation is Denmark's Model License of 2005 for Exploration & Production of Hydrocarbons, cited above, which specifically states that disclosures should be allowed if they are in the public interest (see page 12). This clause is particularly striking for its consideration of the public interest in information flowing from the contract, but also in its recognition that not all information legitimately needs to be confidential.

Some contracts cite specific examples of confidential information in addition to declaring that all information is confidential. These claims might be viewed as establishing a higher tier of information that is unquestionably secret. They focused on technical data:

All plans, maps, sections, reports, records, scientific and technical data, and other similar information relating to the operation shall be treated by the contractor as confidential even after the termination of the Contract and not disclosed by the contractor or its affiliates without prior written consent of N.I.O.C. [National Iranian Oil Corporation] except if required to prepare or publish a report by law. Both parties will fully comply with any license restrictions relating to proprietary technology contained in the license until the license restrictions terminate.<sup>16</sup>

The uniformity of confidentiality clauses in extraction agreements appears to be an exception among commercial agreements. In a survey of more than 250 confidentiality clauses in many types of commercial contracts beyond those solely concerning extractive industries, researchers found that “it is noticeable that the confidentiality provisions are often more carefully crafted than other clauses of the contract.”<sup>17</sup> While contracts in some industries contain similarly uncomplicated confidentiality clauses regarding the subject matter of the information to be kept confidential (“The term ‘confidential information’ shall mean all information disclosed under this agreement”),<sup>18</sup> contracts in many other industries are very detailed in their subject matter descriptions, specifically listing over several pages the kind of information that must be kept confidential.

Culture, practice and the absence of any recent contentious disputes on the subject may explain this widespread use of generic confidentiality clauses in the extractive industries; if no problems have arisen, there will be little impetus for change. While it may be easier to provide for blanket confidentiality than to sort through the details, it is clear from the above-mentioned survey of confidentiality clauses in other contracts that some contract parties in other industries do take the time to do this. These factors suggest that governments and extractive companies are simply not devoting much thought or time to the clauses, an implication that is supported by experienced negotiators.

## **2. There is No Standard Time When Confidentiality Ends**

The clauses surveyed for this report demonstrate a wide variation as to when the confidentiality obligation ends, ranging from the termination of the contract to a perpetual obligation to keep all information confidential.<sup>19</sup> Some interviewees indicated that time variations might reflect a difference in the competitiveness of a country’s industry, different philosophies about the disclosure of information, or some other variable. The survey suggests a simpler conclusion: the clauses appear to follow patterns within particular countries, reflecting familiarity with a certain provision.

## **3. Confidentiality Clauses Tend To Be Very Similar Within a Country’s Oil or Mining Sector**

With small variations over time, confidentiality clauses in the extractives sector follow a pronounced pattern at the country level. The clauses appear duplicated from one agreement to the next. Although the genealogy and origin of confidentiality clauses remains obscure, observers have suggested that the pervasive language may have initially been spread by international financial institutions or industry groups. The survey indicates that the basic form was fairly well settled by the 1970s. We did not find a similar transnational pattern based on the companies, which gives some support to the argument that countries, rather than companies, are dictating the terms of confidentiality clauses. On the other hand, the overbroad scope of provisions and limited variation among them makes it hard to draw any conclusion except that neither party is actively negotiating the provision.

It would not be unprecedented for government officials to exploit overbroad confidentiality clauses. In 2000, an audit commission in Victoria, Australia investigated government procurement contracts in response to allegations of inefficient and corrupt contracts signed during previous administrations. In reviewing the contracts, the commission reported evidence that confidentiality clauses inserted at the initiative of the government had been overused.<sup>20</sup> The Commission found that government officials used confidentiality clauses excessively to insulate the government from public inquiries into its decisions and operations, and to shield other government agencies and officials from investigation or disclosure of information.<sup>21</sup>

Industry and government officials interviewed for this report shared similar anecdotes about executive and legislative branches that were unwilling to disclose information, even when the law supposedly required or allowed it. These often included circumstances in which a state’s ministry of petroleum or mines was unwilling to share information with other ministries.

## B. Important Exceptions for Contract Transparency

Despite the broad range of information covered by confidentiality clauses, the clauses allow for the possibility of contract transparency. Section 2 of the Mittal Steel confidentiality clause, cited above, is a good example:

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These exceptions are explicit in many, if not most, confidentiality clauses. But even if not explicit, the exception for law would most likely be “read into” the agreement by any court or arbitral tribunal; without it, even the judges or arbitrators themselves would not be permitted access.

Other standard exceptions allow disclosure of information: to affiliates, provided they maintain confidentiality; as required by stock exchanges; to banks, insurers or other funders, usually with the provision that these parties sign confidentiality agreements; to government authorities; to arbitrators or other experts in connection with the agreement; or to bona fide prospective transferees of financial interest (merger, consolidation or sale of majority of shares).

## I. Information in the Public Domain is Not Confidential

Confidentiality clauses generally include exceptions for information that is in the public domain. At first blush this may seem rather obvious, but it is significant because the definition of what constitutes the “public domain” can be very broad. Contracts are much more widely available to private industry than to citizens; however, under US jurisprudence, industry knowledge is sufficient for information to be considered “in the public domain.” Thus, contracts in pay-for-access databases, industry publications and on industry forums and electronic mailing lists are all “in the public domain,” from a legal perspective.

## 2. Information That Must Be Disclosed by Law

Disclosures required by law are a very common exception to confidentiality clauses. Sometimes more specific legal requirements are cited as exceptions, such as disclosures required by stock exchanges, arbitration or other legal proceedings. Many provisions do not just require compliance with the law of the host state; they also usually state that the parties may make disclosures under any law to which the party is subject. Therefore, a state can require contract transparency of the companies that operate within its jurisdiction and are thus subject to its laws. Similarly, home states could also require the disclosure of contracts for their companies, though a host state may argue that this would run afoul of its sovereign right to selectively disclose information as it sees fit and regulate activity occurring within its territory.

## C. When Do Confidentiality Clauses Bar Contract Disclosure to the Public?

Based on the general confidentiality clause used in most contracts, contracts can generally be disclosed in most cases. However, if both parties are unwilling to disclose a contract, they can rely on the confidentiality clause to avoid disclosure (see chart below). As long as confidentiality clauses take the same standard form, this analysis will also apply to contracts concluded in the future.

### a) If the government and the company want to disclose a contract, they can mutually agree to do so.

If the government and the company, or consortium of companies, agree to disclose the contract, the confidentiality clause poses no impediment, except possibly a procedural one—written consent of the parties. Some clauses, such as the Mittal Steel clauses cited above, even prohibit a party from unreasonably rejecting a request for disclosure.

On the other hand, procedural requirements may serve as a pretext to mask the unwillingness of one or both parties to disclose. Governments and corporations may claim that the other is responsible for blocking disclosure. In these cases, a “blame game” may be occurring to avoid disclosure; but it is also possible that the parties may not be looking closely at the terms of the clause, or are mistaken about its meaning.

One recent example shows how suspicion, confusion and wrangling can get in the way of disclosure. In 2006, the government of the Democratic Republic of Congo (DRC) was determined to publish all mining contracts.<sup>23</sup> Prior to publishing the contracts, the Ministry of Mines had discussions with other ministries, donor countries, and outside consultants. One company in particular, Tenke Fungurume Mining (TFM), controlled by Freeport McMoRan in the United

States, actively resisted and pressured the government not to release its contract. When the contracts were published by the government, the exploitation agreement for TFM was the only noticeable absence. Over the next two years, The Carter Center, supported by Columbia’s Human Rights Institute, continually brought the absence to the attention of government and company officials. However, other members of TFM’s management expressed surprise that disclosure would create any problems, and subsequently initiated an internal process to seek release. When TFM decided in favor of release, management sought the agreement of the Congolese government under the terms of the agreement, but it was never given. High sources in the government explained that the request, coming after active efforts to prevent release of the agreement, had left them suspicious, and thus they avoided any response.<sup>24</sup> Eventually, Freeport McMoRan determined that it could release the contract unilaterally as a disclosure under securities regulations, demonstrating that companies do have options, even when a government is resistant.<sup>25</sup>

**b) If the government wants to disclose, but the company does not want to, there are options.**

Governments can require contract disclosure by law without violating the confidentiality clause of an existing agreement. However, other clauses of the agreement might interfere with disclosure. Contracts almost always permit disclosure in compliance with the law, whether explicitly stated or not. If a country were to pass a law requiring disclosure of all contracts (for example, an EITI law), it would certainly affect all future agreements. With regard to agreements in force, it is necessary to scrutinize other provisions of the agreement. A problem may arise if the contract also includes a stabilization clause that freezes the law at the time the contract is executed. In such a case, a new law mandating the disclosure of contracts may not overcome the confidentiality clause.

**c) If the company wants to disclose but the government does not want to, disclosure may be possible but is unlikely.**

If a company would like to disclose its contract but the government is opposed, there are fewer options. BP and its partner companies decided to disclose the BTC pipeline and upstream contracts at a time when they were not publicly available in Turkey, Azerbaijan, and Georgia, although by law they were supposed to be public. However, discussions with company representatives and lawyers indicate that companies are generally reluctant to take the initiative in disclosing contracts, even in such circumstances. Those interviewed felt strongly that it was not a corporation’s duty to fulfill the sovereign obligations of states, particularly since it could jeopardize their relationship with the government. In the case of the BTC consortium’s contract disclosure, some interviewees reported the strong belief that high level politicians were consulted before the contracts were released.<sup>26</sup>

**d) If the government and the company do not want to disclose, then recourse to other legal mechanisms, such as FOI law, is necessary.**

If the government and the company (or companies) are opposed to disclosing the contract, then recourse to other legal mechanisms will be necessary to gain access to the contract before the confidentiality period in the contract clause ends (if it has an ending—some clauses call for indefinite confidentiality). In countries with freedom of information laws, this may be the best option for the public disclosure of contracts.<sup>27</sup>

	Government	Company/ies	Result
Willing to Disclose the Contract?	Yes	Yes	No barrier. Contract can be publicly disclosed.
	Yes	No	Government can most likely disclose if it creates a law to do so, though some complications may arise.
	No	Yes	Company will likely not be able to disclose, unless it can find a reason why the contract should already be in the public domain.
	No	No	Contract will not be disclosed until confidentiality period ends, but FOI laws may be an option (see Chapter Three).

## D. What Are the Consequences of Breach?

It is quite difficult to determine the consequences of a breach of confidentiality. The survey of confidentiality clauses found very few contracts that included penalties for breach of such clauses. According to the survey of contracts in many industries cited above, including penalty provisions for confidentiality violations is not the usual practice in most industries.<sup>28</sup> Thus, extractive contracts are not particularly unique in this regard.

As a practical matter, disclosure of a primary contract is unlikely to motivate either party to resort to litigation or other dispute resolution mechanisms. The damage of disclosure is typically difficult to measure. In addition, most major agreements require expensive arbitration, which parties seek to avoid, except where a project has “failed.” Where states have breached the confidentiality clause, as in the massive publication of agreements by the Congolese government, no legal action was threatened or pursued.

Aside from the usual monetary damages, some industries have developed tools for obtaining other relief; these include mechanisms for injunctive relief, such as court orders to halt or retract the offending disclosures.<sup>29</sup> However, this report’s survey found no provisions referring to monetary compensation, injunctive relief, or any other specific relief for a breach of confidentiality.

Another possibility for relief is that a breach of confidentiality could entitle a party to terminate a contract altogether, or receive some other compensation. The termination clauses surveyed for this report tend to provide grounds for termination based on material default, failure to comply with performance or work obligations, or failure to make payments. There is little indication from case law or anecdotal evidence as to whether a confidentiality breach would constitute a failure to comply with contractual obligations such that it would qualify as grounds for termination. Since the contracts are generally silent on the issue of penalties for breach of confidentiality, and it is unclear whether such a breach would rise to the level of a “material breach” under the contract, it would be up to an arbitration panel or court to determine the consequences of this type of breach. However, we were unable to find any arbitration cases where breach of confidentiality was an issue. This may be because most arbitration decisions are confidential, and a party seeking redress for a confidentiality breach is likely to choose an arbitration forum with strict confidentiality, if such a choice is allowed by the contract. Alternatively, parties may try to settle such a matter internally to avoid further dissemination of the confidential information.

The only contract in our survey that specifically provided for termination in case of a breach of confidentiality is the Angolan PSA.

### ANGOLA'S CONFIDENTIALITY & TERMINATION CLAUSES

Angolan PSAs, beginning in the 1980s, are the notable exception to the confidentiality clause form. While most clauses do not include penalties for breach, a violation of the Angolan confidentiality clause is grounds for termination under these contracts.

#### *Confidentiality of the Agreement (Article 40):*

Sonangol and Contractor Group agree to maintain the confidentiality of this Agreement, provided, however, either Party may, without the approval of the other Party, disclose this Agreement:

- a) to any Affiliate or potential assignee of such Party upon such Affiliate or potential assignee giving a similar undertaking of confidentiality;
- b) in connection with the arranging of financing or of a corporate reorganization upon obtaining a similar undertaking of confidentiality;
- c) to the extent required by any applicable Law, Decree or regulation (including, without limitation, any requirement or rule of any regulatory agency, securities commission or securities exchange on which the securities of such Party may be listed);
- d) to consultants as necessary in connection with the execution of Petroleum Operations upon obtaining a similar undertaking of confidentiality.

#### *Termination of the Agreement (Article 39)*

1. Subject to the provisions of the general law and of any contractual clause, Sonangol may terminate this Agreement if Contractor Group:

[...]

- d. discloses confidential information related to the Petroleum Operations without having previously obtained the necessary authorization thereto if such disclosure causes prejudice to Sonangol or the State.

Article 33, *Confidentiality of Other Information*, is very similar to the typical confidentiality clause, stating that all information of a technical nature is considered confidential. It then lists the usual exceptions in which confidential information may be disclosed, namely: if disclosed to various people associated with the operations; as required for financing; and as mandated by applicable laws and regulations.<sup>30</sup>

While industry often cites Angola's negative reaction to BP's disclosure of the signature bonus it paid the country,<sup>31</sup> and despite the rather extreme consequences of confidentiality breaches included in Angolan PSAs, it is important to note that companies have succeeded in operating transparently in Angola. Statoil, for instance, regularly reports payments made to the Angolan government, as required under Norwegian law.<sup>32</sup> Since disclosures pursuant to law are specifically allowed by the Angolan confidentiality clauses, this type of disclosure does not trigger the termination clause.

Industry—as well as the media covering the industry—have often misconstrued confidentiality clauses, treating them as a bar to legal enforcement and a constraint on mutual release. One flagrant example of such mischaracterization arose in connection with proposed legislation in the US House of Representatives to require disclosure of revenues by companies subject to the US securities regulations. The proposed law, the Extractive Industries Transparency Disclosure Act (EITD),<sup>33</sup> would require extractive companies that are listed on a US stock exchange to disclose payments made to foreign governments. One news account conveyed this information thus: “[Representative] Frank’s proposed law [the EITD] could place the oil companies in an awkward position, **with American law forcing them to violate confidentiality provisions in their contracts.**”<sup>34</sup> On the same subject, Frank Verrastro, Director and Senior Fellow at the Center for Strategic and International Studies’ Energy Program, was quoted as saying: “If the company took the position that SEC rules trumped contract language [...] contracts could be canceled and their investment jeopardized.”<sup>35</sup>

**Such statements dramatically misstate the terms of confidentiality clauses.** Even under clauses as strict as Angola’s, securities disclosures are permissible, as are other legally mandated releases. Laws such as the proposed EITD would not “trump” existing contracts; rather they would be consistent with them.

## E. What If a Contract Is Leaked? Is the Confidentiality Clause Still a Bar? What Are the Consequences of Going Public with a Contract?

Contracts, as a general matter, only bind the parties to the contract. A third, unrelated party may have confidentiality obligations to one or both of the contract parties if such a third party signs a confidentiality agreement or has another professional responsibility requiring confidentiality, such as a lawyer-client relationship. In general though, third parties that gain access to the contracts are not bound by the confidentiality clause.

Nevertheless, there are potential risks for unrelated third parties, including NGOs and journalists, who gain access to confidential agreements and then publish them, or publish documents based on them. Companies have threatened lawsuits, typically alleging some form of defamation or inappropriate interference in business activities. The threatened suits have likely had a “chilling effect” on the press and civil society organizations, even though their underlying legal claims are often quite weak.

### SLAPP SUITS

Several companies have threatened legal action against journalists and NGOs seeking to expose confidential contract language. The actions resemble what are known in the United States as strategic lawsuits against public participation, or “SLAPP” suits. SLAPP suits are “litigation (or threats of litigation) which have, or could be assumed to have, a chilling effect on the rights and ability of people to participate in public debate and political protest.”<sup>36</sup> The goal of the party bringing the suit is not necessarily to win; it is rather to use the threat of litigation to intimidate and silence critics as well as intimidate others from participating in the debate.

### Kinross-Forrest Limited

It is unclear how the consortium of NGOs acquired the contracts, but in December 2005, three NGOs, 11.11.11, Broederlijk Delen, and Rights & Accountability in Development (RAID), and a Belgian newspaper, *Mo\**, hired law firm Fasken Martineau DuMoulin (Pty) Ltd. to analyze three joint venture (“JV”) agreements between the Democratic Republic of Congo’s state-owned mining company, Gecamines, and its joint venture partners. The law firm was asked to compare the provisions in the JV agreements to those generally found in similar JVs. One of the agreements analyzed was the February 2004 JV between Gecamines and Kinross-Forrest Limited (KFL) concerning the Kamoto copper mine.

When the consortium of NGOs received the law firm’s analysis in February 2006, they sent copies to the transitional Congolese government and the president of the World Bank, among others. RAID also posted the Fasken analysis on its website. Fasken quickly disclaimed the analysis—which was sent out from the firm on official stationery and had the form of a final opinion—stating that the analysis was sent out without partner approval and did not represent the firm’s views. Fasken ended its lawyer-client relationship with RAID and requested that the analysis be removed from RAID’s website.

Around this time, lawyers for Kinross-Forrest contacted Fasken, threatening a potential law suit: “We wish to advise you that in our view, your said letter was reckless for a number of reasons, could damage our client’s reputation and could cause our client irreparable harm . . . KFL has asked us to advise you that they are adamant that these matters be dealt with immediately, failing which KFL will consider any and all options that are available to them under the circumstances.”<sup>37</sup>

George Forrest, the major financier behind the KFL company, later brought a libel suit on behalf of KFL against the consortium of NGOs that published Fasken’s analysis. The proceedings are still ongoing in Belgium.

### Mittal Steel

The day before the *Financial Times* was scheduled to publish a story about Mittal Steel’s contract and activities in Liberia, the paper received a letter from lawyers representing Mittal Steel essentially threatening the newspaper with a suit for defamation if it published the story: “Should you choose to publish regardless, you should be aware that our client will hold the *Financial Times* and yourself responsible for any aggravated and special damage caused by these defamatory allegations.”<sup>38</sup> The reporting of the *Financial Times* was significantly reduced as a result.<sup>39</sup>

In parts of the US, SLAPP suits are becoming less feasible as law reforms take place. In the United States, twenty-six states have adopted anti-SLAPP statutes to prevent the misuse of litigation. Such laws should limit the potential negative effects of leaking a contract or making statements about a leaked contract, as far as legal action in the United States is concerned. This is not to say that non-legal harassment of citizens by companies and governments could not take place. In particularly repressive states, citizens may fear retaliation that is far worse than litigation, such as violence and imprisonment.<sup>40</sup>