CHAPTER FIVE

International Policy and Practice on Contract Transparency

A. Host Country

1. Law and Policy

To date, many countries have not yet committed to full contract transparency. Full contract transparency, as defined in this report, would require a government to make all of its contracts, past and present, in all of its extractive industries, easily accessible to the public. Ideally, access to the contracts would be free of charge and anonymous. Citizens should be able to access contracts without fear of harassment or scorn.

The chart below provides a few examples of countries that have committed to contract transparency as a policy and countries that have engaged in *ad hoc* disclosures of contracts in one of their extractive sectors.

Contract Transparency Policy	Hydrocarbon Contract Disclosures	Mining Contract Disclosures
Ghana: Committed to transparency of oil contracts	**Congo Brazzaville** **Ecuador** **Peru**	**Democratic Republic of Congo** **Liberia** **Peru**
Liberia: Contract transparency in recently passed Liberia EITI act		
Timor Leste: PSCs signed in the Timor Sea zone		

In some countries, an individual can apply to the relevant ministry or parliamentary library to gain access to contracts.[85] We have not generally included such countries as "disclosing countries" for two main reasons: one, we have only been able to determine whether this type of disclosure exists in countries where we have done field work; two, even in countries where this is nominally the case, activists and researchers cite poor record-keeping, high costs to receive contracts, and rejections of requests as being particularly common.

2. Parliamentary Approval of Contracts

Some countries have laws requiring parliamentary ratification of foreign investment contracts or the ratification of oil and mining contracts, specifically. As a matter of law, these contracts should be public documents. In most countries, the drafting and negotiation of contracts is the responsibility of executive branch ministries or state-owned enterprises. After this process, some countries require the final, negotiated contract or selected bid in an auction to be ratified by parliament for it to come into effect.

Parliamentary ratification of contracts is not grounded, as a general matter, in a government policy of contract transparency. In some instances, it is one among many tools that companies use to secure their investment and safeguard it from change and expropriation.[86] Constitutional language in some countries provides a check on executive power by giving parliament a vote on natural resources contracts in particular. In other countries, contracts with foreign countries are treated essentially as treaties, or "foreign agreements," and must be ratified by parliament as such. Even if not a part of a contract transparency policy, parliamentary ratification of contracts is yet another example of the regularity with which contracts come into the public domain with no discernable harm to the country or company.

The following countries differ in geographic area, political system, and resources produced; however, they are all states that require parliamentary vetting of contracts.

- *Azerbaijan*. The Azeri Constitution gives the Azeri Parliament the power to ratify or veto international agreements. Such international agreements include extractive industry contracts such as PSAs. All international agreements must be approved by the parliament, at which point they become Azeri law.[87]
- *Egypt*. PSCs must have legislative approval to become operational.[88]
- *Georgia*. Foreign investment contracts are international treaties and must therefore be approved by parliament.[89]
- *Kyrgyzstan*. If a foreign legal entity or individual is a party to a PSA, it should be ratified by the parliament.[90]
- *Liberia*. Parliament must ratify investment contracts after negotiation and signature by executive ministries.[91]
- *Sierra Leone*. Parliament should have access to mining contracts before they are signed, though its powers are limited to an advisory capacity, i.e., it can suggest changes.[92]
- *Yemen*. Contracts are made Acts of Parliament and become part of Yemeni law; this is required by its Constitution and the policy was recently upheld in an international arbitration proceeding against the country, after executive ministries signed and negotiated an extension to a PSA but the parliament vetoed it.[93]

Of course, while a country may have such laws "on the books," they may not be consistently followed in practice.

AZERBAIJAN

According to the Azeri Constitution, the Milli Majlis (the Azeri Parliament) has the power to ratify or denounce international agreements. Such international agreements include extractive industry contracts such as production sharing agreements.[94] All international agreements must be approved by the Milli Majlis, at which point they become Azeri law. The contracts are supposed to be available for view by Azeri citizens, though in practice such contracts do not necessarily become accessible, according to researchers in Azerbaijan.[95] We confirmed this through our own research mission as well.[96]

It is not clear how much time is given to Azeri parliamentarians to review a contract, if they do in fact receive it in its entirety. Public hearings or other access does not seem to be available to Azeri citizens during this process, either by law or in practice. The activities of government-run oil-related organizations, such as the State Oil Company of the Azerbaijani Republic (SOCAR) and the State Oil Fund of Azerbaijan (SOFAZ), are reportedly regulated largely through Presidential decree rather than by Parliament. Government power has been described in some reports as "feudal" rather than democratic.[97] While strides have been made in extractive industry transparency in Azerbaijan, contract secrecy remains an issue.[98]

LIBERIA

Parliament must ratify investment contracts, which are negotiated and signed by executive branch officials.[99] By law, parliamentarians should always have access to the full contract, though under the transitional government that preceded President Ellen Johnson-Sirleaf's administration, this was not always the case. Reports indicate that, for example, only a brief one-page summary (that was said to be inaccurate) of the major mining contract signed by the transitional government with Mittal Steel was given to parliamentarians prior to the ratification vote.[100]

Presently, Liberian parliamentarians are given full contracts for review—though parliamentarians have had some difficulty gaining access to all necessary documents relating to major mining contracts, particularly contract annexes, even under the Johnson-Sirleaf administration.[101] Contracts are to be printed into handbills, and they become public documents. Due to lack of state resources, however, the contracts are not easily available via an online database or in a single, immediately accessible location with either parliament or an executive branch ministry in Liberia. If a person would like a copy of a contract, they may make a request with the various ministries that have the contract. Those wishing to receive the contract must divulge who they are, and the company with whom the contract has been concluded will be notified of the request and the contract's subsequent disclosure. From the perspective of individuals wishing to monitor a company's activities, the notification to the company of the requester's identity is not ideal. Governments and companies have harassed or antagonized members of civil society organizations who have sought information; the potential for negative reaction to information requests is greater for activists known to be critical of government and company actions, particularly in countries where the government is not as open to criticism and debate as the present Johnson-Sirleaf administration in Liberia.[102]

Even with the parliamentary ratification of contracts, Liberia has adopted a contract transparency policy in its EITI bill and the present government appears committed to making real access to contracts a priority. Government officials say they are hoping to have a consolidated library of contracts at the National Investment Commission. The library would be accessible to the general public, not just investors.[103]

3. Contract Transparency Case Studies: DRC, Liberia, and Peru

Governments are increasingly making contracts public, though disclosures have been *ad hoc*.[104] They are characterized as "*ad hoc*" because the number of contracts disclosed has been limited. Disclosures have been made in either the minerals or hydrocarbons sectors, but not both; and not all contracts signed have been made publicly and easily accessible. While not exhaustive, the case studies in this section indicate when, why, and how various countries have made contracts transparent.

i. The Democratic Republic of Congo's Mining Contract Review

On June 11, 2007, the DRC's Ministry of Mines officially launched a review of 61 mining contracts signed during the wars of plunder (1996–2002) and the transition process (2003–2006).[105] Political demand within the country to make these contracts public and renegotiate them was high. A leaked World Bank report confirmed that the country's greatest sources of revenue, its legendary mines, had been hastily sold without knowledge of their value and to companies without the experience and financing to actually run, manage and operate industrial mines.[106] Some government officials in the DRC hoped to attract more reputable companies by canceling contracts with companies that had no intention or capacity to conduct mining operations.[107]

At the outset of the review, the Ministry of Mines committed to making the contracts under review publicly available. The Carter Center was asked to "accompany" the contract review process, and one of the Center's conditions for involvement was a commitment by the government to make the contracts public.[108] Although the government may have made the contracts public in any event, the publication of the contracts under review was the high watermark of transparency measures taken by the government. [109] The burst of transparency at the outset did not continue. Civil society involvement in the review was limited, public announcements about how the process of review was to proceed were incomplete and *ad hoc*, and updates on the renegotiation process have been even more rare.[110]

The renegotiations have occurred in secret and the amended agreements have not been made public. There has been no indication by the government that it intends to make them public. Whether or not the renegotiations are ongoing at the time of publication of this report remains uncertain; if the process is any indication of the substance, there is not much reason to be optimistic. However, while companies were unhappy with the review and renegotiation of the contracts, the negative individual reaction to the unilateral publication of the contracts never resulted in serious operational disruptions, or even threatened legal action.

ii. Peru's Hydrocarbon Contracts

Peru is a minor hydrocarbons producer, but since the discovery of the Camisea reserve, Peru has become a larger gas producer. In 2005, exports of oil derivatives were 9% of total exports.[111] Seeking to attract foreign investment, Peru has sought to create an open investment environment with a predictable, transparent and stable legal system. The oil sector has attracted more investors in successive bidding rounds, and royalties have gone up as well.[112] The public disclosure of the primary exploration and exploitation contracts does not seem to have affected companies' interests.

Peru's decision to publish its hydrocarbons contracts goes against the general perception that governments are afraid to publish contracts for fear of inhibiting their ability to attract investment.[113] According to stakeholders interviewed, one motivation was to increase foreign

investment in the sector after a period of low interest by investors. Making as much information available as possible, including contracts, was part of the strategy to increase interest.[114] Those interviewed explained that since there was a set model contract with very few bidding variables, there was little left unknown. The bidding rounds were public, and announcing the winning bids and disclosing them would not only result in companies feeling more secure in their investment, but it would indicate that the process was transparent and competitive.

Peru has also been moving towards a more transparent and open government in the post-Fujimori era. The government created a free online legal search engine, Poder Judicial de Peru,[115] making many legal documents accessible. Peruvian legislation regarding access to information for citizens to monitor public officials is considered quite robust.[116] However, the much more significant mining sector contracts are not available online. They are available to the public, but one must go to the relevant government agency to get a contract.

Despite the relatively high levels of transparency, a scandal in the oil sector came to light in late 2008, and is sometimes referred to as "Petrogate" or "PetroAudio." Fourteen officials were alleged to be involved in bribery concerning a recent oil contract bidding process. On October 22, 2008, charges were brought against one current and three former high-level officials and ten others based on allegations of bribery in the awarding of oil contracts to Discover Petroleum, a small Norwegian company.[117] These allegations of meddling and kickbacks led to the entire 17-member government cabinet stepping down. Although ten were reinstated, the Prime Minister was not. Among those charged were Petroperu's former president César Gutiérrez Pena, former general manager Miguel Celi, former director Alberto Químper, and current PeruPetro president, Daniel Saba.[118] Others associated with the scandal include five Petroperu officials who conducted the technical assessment that resulted in the decision to grant multiple oil contracts to Discover Petroleum.

More recently, Peru has faced internal strife related to its foreign investment regime, including its hydrocarbons sector. 2009 has seen nationwide strikes, the blockage of key transit routes, and violent confrontation between protestors and police in Peru.[119] The future of the hydrocarbons sector remains uncertain, though government officials remain optimistic in the press, and are pressing for continued development in the face of protests.[120]

Despite the fact that the future of the industry remains uncertain after these events, some conclusions can be drawn about contract transparency in Peru. First, companies are bidding on the contracts knowing they will be publicly available. While it is impossible to know if more companies would have bid if they were not made available, Peru has attracted more companies in successive bidding rounds, and higher royalty rates as well. Thus, contract transparency has not been a deterrent, and it may have attracted more investment. Companies operating in Peru report that the disclosure of the contracts was simply one aspect of doing business in Peru.[121]

Second, contract transparency will not prevent all forms of corruption, as the Petrogate scandal attests; but this has never been a claim by those advocating for contract transparency. Transparency is one means among many to deter corruption; it is not a panacea.

Finally, citizens, activist groups and parliamentarians are very eager to learn about the contracts in order to act as monitors and influence policy. Activist groups have written reports on various contracts, and issues surrounding the contracts receive nationwide attention in the press.[122] Contract transparency is allowing civil society to play a greater role in the nationwide debate over how to use its non-renewable resources. Again, while contract transparency will not diffuse all differences, it is providing an avenue for constructive dialogue.

iii. The Mittal Steel Iron Ore Contract with Liberia

Many contracts come into the public domain not through government policy or practice, but through the efforts of concerned citizens in host countries who use their connections to gain access to contracts.

Local concerned citizens were able to gain access to Mittal Steel's multi-million dollar iron ore contract through contacts in the government.[123] The Sustainable Development Institute (SDI), a local Liberian NGO working on natural resource issues, asked the Columbia Human Rights Clinic to analyze the contract. SDI published the memorandum that the Clinic authored in a national newspaper.[124] Mittal responded with its own newspaper ads, stating that the conclusions in the memorandum were false or that the contract had been misconstrued.[125] Mittal maintained that its agreement with Liberia "mirrored essentially like it's done anywhere else."[126] Global Witness, an NGO dedicated to exposing the corrupt exploitation of natural resources and international trade systems, authored a much more detailed analysis of the Mittal contract, adding further pressure for renegotiation.[127]

On January 16, 2006, shortly after coming into office and preceding the newspaper battle about the contract, President Ellen Johnson-Sirleaf instituted a policy to review all contracts and concessions entered into by the transitional government that preceded her.[128] The review policy was part of a national strategy to facilitate the rebuilding of Liberia after fourteen years of civil war, and it was not limited to natural resource contracts. The transitional government that preceded Sirleaf was known to be exceedingly corrupt, to the point that the international community developed a program specific to Liberia, called the Governance and Economic Management Assistance Program or "GEMAP."[129] GEMAP was designed to rebuild Liberia's institutions and oversee the process with technical expertise and oversight within government ministries. Contract review and renegotiations were already a part of this program, and Johnson-Sirleaf put this particular aspect of the program at the top of her agenda. More specifically, Johnson-Sirleaf fast-tracked the Mittal Steel contract, creating a process that was parallel but complementary to the international community's process under GEMAP.

The administration used international support for the larger contract review process and the media and NGO coverage of the Mittal contract to strengthen Liberia's bargaining position.[130] The changes in the renegotiated contract vary from increased fiscal benefits to Liberia to increased government rights and protections, particularly with regard to critical infrastructure, such as rail and ports. Although the agreement still falls short of what some civil society advocates called for in key respects, namely the confidentiality clause and Mittal's unfettered right to timber, the agreement is far better than it was previously.[131] Particularly relevant to this report, the confidentiality clause will continue to keep all information confidential between the parties, unless they mutually agree to disclose it.

The renegotiated contract is a public document, despite the restrictive confidentiality clause. Gaining access to it is not easy, though: there is no contract database housed in one government agency, nor are contracts available via Internet. However, they can be requested, and the government plans to create a single database in the future.[132]

B. Companies

Very few companies, if any, have adopted a contract transparency policy. The BTC consortium's disclosure of the BTC contracts is the most prominent example of a company taking the initiative to disclose contracts. And while that disclosure was a major step, it has not led to a permanent contract disclosure policy by BP or by any other BTC consortium company.[133]

C. Home Countries

1. Law

Home country policy on contract transparency is relatively obscure and appears unenforced. One example is the United States 2006 Foreign Operations Appropriations Bill H.R. 3057. The law restricts the allocation of funds to IFI extractive industry projects that do not require the disclosure of host country agreements and other project bidding documents. But despite the strength of the language, there is no indication that funds have been withdrawn due to a failure by IFIs to require contract transparency.[134]

2. Securities Regulations

The most significant "home country" laws that bear on contract disclosure are securities laws and regulations. Stock exchanges may require disclosure, in various forms, of "material contracts" or "material transactions." As securities regulations, the motivation behind such disclosures is to provide information to investors to value securities. These regulations are not currently related to a policy for better management of extractives through contract transparency. Nonetheless, securities regulations are important because they provide a potential source of information for the general public and they demonstrate that contracts are already routinely disclosed and publicly accessible, without significant harm to the industry, individual companies, or government counterparties.

It is difficult to track exactly which contracts become public, but a small survey conducted for this report suggests that disclosure is inconsistent and typically does not occur in the case of major mining and oil companies. Several factors contribute to this. First, securities disclosures (or "filings") are made by companies (or their agents, usually lawyers), not an independent body. The filings are overseen and audited by government regulators, but the burden is on the company to self-report. This means that companies may interpret the rules slightly differently, leading to some variation.

Second, "material contracts," when defined in these regulations, tend to mean contracts "out of the ordinary course of business." What constitutes "the ordinary course of business" is different from company to company as well. For example, a small oil company that has only one or two major contracts with governments will likely need to disclose those contracts and any changes to them, as its business is largely dependent on those contracts. Conversely, a large multinational that is listed and has many contracts around the world would not need to make similar disclosures, as they would not be "material" to its business by securities regulation definitions. Further, the contract itself is not always required to be publicly available pursuant to securities regulations on all exchanges; rather, only the major terms must be disclosed on some exchanges.[135]

EXAMPLES OF CONTRACTS ON SECURITIES DISCLOSURE DATABASES

Kazakhstan and Chaparral Resources Inc. Material contracts, if required to be disclosed, are generally found as "EX-10 Exhibits" as a part of filings required by Regulation S-K. Chaparral Resources Inc. was an American company[136] whose only operational contract was for the Karakuduk field in Kazakhstan.[137] The company's Exploration, Development, and Production Agreement with Kazakhstan is available as an EX-10 Exhibit on the US Securities Exchange Commission's database, EDGAR.[138] A review of the contract indicates no discernable redactions.

D. IFIs

The major international financial institutions—the World Bank (IBRD and IDA), the IFC and the IMF—are moving towards contract transparency policies and programs. However, despite the policies on contract transparency articulated by the major IFIs, there are still major gaps and lags.

IFI Policies on Contract Transparency		
IMF: Robust Contract Transparency Policy	**IFC: Limited Contract Transparency Policy**	**World Bank: Moving Towards a Contract Transparency Policy**
The IMF's Guide to Resource Revenue Transparency has, since 2005, recommended that oil, gas and mineral producing countries disclose their contracts (i.e., PSAs, Mining Conventions, etc.) as a part of sound fiscal policy. The second version of the Guide, published in 2007, reiterated the need for the disclosure of contracts (i.e., bids, license agreements, PSAs, etc.): "Best practices [...] in this respect are: (i) standard agreements and terms for exploration, development, and production, with minimum discretion for officials, though these terms may vary over time; (ii) clear and open licensing procedures; (iii) disputes open to (international) arbitration; and (iv) disclosure of individual agreements and contracts regarding production from a license or contract area."[139]	The IFC requires the transparency of major contract terms, though not disclosure of full contracts. The "Policy on Social and Environmental Sustainability, 2006" states: "The IFC promotes transparency of revenue payments from extractive industry projects to host governments. Accordingly, IFC requires that: (i) for significant new extractive industries projects, clients publicly disclose their material project payments to the host government (such as royalties, taxes, and profit sharing), and the relevant terms of key agreements that are of public concern, such as host government agreements (HGAs) and intergovernmental agreements (IGAs); and (ii) in addition, from January 1, 2007, clients of all IFC-financed extractive industry projects publicly disclose their material payments from those projects to the host government(s)." The IFC's commitment to contract transparency only applies to "significant" and "new" projects, i.e., those expected to account for 10% or more of government revenue.[140]	The World Bank has not announced a policy on contract transparency. In April 2008, it launched the "EITI ++" initiative that aims to apply the principles of transparency and good governance across the "value chain," i.e., contracts, revenues, budgeting, expenditures, when it becomes operational. The exact contours of the initiative are still developing, though contract transparency could be included in the program. No new announcements are on the Bank's website concerning the initiative, but reports from those working with the Bank on EITI++ say that it will likely take a country-by-country focus, and not become Bank policy.[141]

The IMF Guide on Resource Revenue Transparency ("IMF Guide") provides analysis according to the *type* of contracting procedure used, indicating how transparency of agreements should be implemented in each procedure:

- *Open bid—fixed terms*. The IMF recommends that systems using fixed term bids should make public all bids received and the final contract awarded. Furthermore, all seismic data and drilling data from the successful bidder should also become public, though no time frame is fixed. The report notes a range from eight years (Australia) to thirty-five years (US operations in the Gulf of Mexico).
- *Open bid—variable terms*. The IMF recommends disclosure of winning bids, and that bid rounds should be open to scrutiny by international observers.
- *Negotiated deals*. For these deals, which are generally characterized by a number of variable terms being up for negotiation, the IMF notes that disclosure is especially rare. While the approach can be fairly efficient, it "carries a greater risk of corruption. Good practice as far as disclosure is concerned would at least include ex post publication of contract awards and terms."[142]

The IMF Guide notes that, for the petroleum industry, open bidding is generally not possible in particularly exploratory areas. "International companies, particularly smaller ones, are not in a position to invest in exploration or release ideas about prospects to either licensing authorities or competitors. An ordinary tender for bids in the early stages or exploration of frontier or gas-prone regions, for instance, is thus likely to fail because of the high risks and up-front costs. Negotiated deals are common in these situations. **Good practice for transparency, however, would require the publication of all signed contracts**."[143]

The IMF Guide presents some explanation for the reluctance of governments and companies to follow its recommendations:

> "An often expressed concern with regard to open tendering processes is that both government and companies may lose their competitive advantage by public disclosure of winning contracts. For reasons of commercial confidentiality, therefore, negotiated contracts with non-disclosure clauses [another term for confidentiality clauses] are the practice in a number of countries. **The reason usually advanced by governments (and to some extent by companies) is that disclosure would erode their bargaining power for future contracts**. In practice, however, the **contract terms are likely to be widely known within the industry soon after signing. Little by way of strategic advantage thus seems to be lost through publication of contracts.** Indeed, it could be argued that the obligation to publish contracts should in fact strengthen the hand of the government in negotiations, because the obligation to disclose the outcome to the legislature and the general public increases pressure on the government to negotiate a good deal."[144]

This observation underscores a major conclusion of this report: that industry is far more knowledgeable about contracts and contract terms than their government counterparties. While governments may fear contract transparency for exposing corruption, incompetence, or lack of resources, they may, in fact, be missing the opportunity to get a better deal. This may also be why companies are not racing to adopt contract transparency.

Despite the movement towards contract transparency policies, implementation is lagging. According to a joint Global Witness/Bank Information Center Report, contract disclosure is largely not promoted in the IFIs' operations:

> "The disclosure of contracts is not addressed by nearly 80% of IMF operations and 90% of World Bank operations in resource-rich countries. The IMF does make contract disclosure a program benchmark or progress indicator in 12% of countries with IMF lending programs. The Bank never designates it as a program benchmark, and only one IFC EI project investment has required contract disclosure since June 2003."[145]

E. Industry

Industry groups and individual companies have yet to adopt full contract transparency policies. While contracts are bought and sold and traded among friends and colleagues, industry is reluctant to make contracts available to the public.

The most promising statement on contract transparency has come from the International Council on Mining and Metals (ICMM), an industry association. As part of its "Position Statement on Mineral Revenue Transparency," ICMM members commit themselves to "[e]ngage constructively in appropriate forums to improve the transparency of mineral revenues – including their management, distribution or spending—or of contractual provisions on a level-playing field basis, either individually or collectively through the ICMM Secretariat."[146]

While contract transparency policy endorsements are exceedingly limited—even the ICMM's endorsement is only for contractual provisions, not full contracts—contract disclosures among industry members are not. Various oil, gas and mining contracts can be bought on industry-specific websites and general contract websites. Alexander's has a Contracts & Tenders section on its website,[147] which includes a database of oil and gas contracts. The Barrows Company also has oil, gas and mining contracts in its database.[148] Neither of these databases appears to be comprehensive. Columbia Law School houses some paper copies of the Barrows "Basic Oil Laws and Concession Contracts" collection, but a review of its contents reveals no discernable pattern as to how these contracts and laws are acquired. Despite having oil, gas and minerals, some countries are not listed as having contracts in the collection, while others have many. Markings on model contracts indicate that some may have been accessed through government publications, such as federal registers or gazettes.

In addition to looking to gazettes, it is likely that these databases gain access to contracts through connections in the industry and in government. It is not unusual for participants in various industry electronic mailing lists to also ask for contracts from other participants, such as on the Oil, Gas and Energy Law forum.[149]