Conclusions and Recommendations

Contract transparency is an essential precondition to ensuring that all parties benefit from the extractive industries. Disclosure is a necessary precursor for the coordinated and effective management of the sector by government agencies. It also allows citizens to monitor contracts in areas where they may be better placed than the government to do so, such as environmental compliance and the fulfillment of social commitments. Contract transparency provides incentives to improve on the quality of contracting: government officials will be deterred from seeking their own interests over the population's and, with time, governments can begin to increase their bargaining power by surveying contracts from around the world. Secrecy hides incompetence, mismanagement and corruption—but only from the public, not from the industry that typically comes to know the terms of a deal or even the text of the putatively secret agreement.

Though contract transparency will allow governments to negotiate more effectively, investors have good reason to support contract transparency as well. Extractive industry contracts are notoriously unstable. Calls for renegotiation are regularly used as a political tool, even when it may not be warranted; politicians are adept at making companies the enemy. With contract transparency, companies cannot be the scapegoat; governments must own up to their own deals. Furthermore, as deals become more flexible in their fiscal terms—providing reasonable rates of return in more price scenarios, as more governments and long term investors are seeking—contract transparency will not result in either a "race to the top" or "race to the bottom."

This report suggests that contract secrecy is a relic from the past, retained and reflexively reproduced, even while transparency and accountability in natural resource extraction becomes accepted doctrine. Typically, extractive agreements affect a country's laws and population for extensive periods; thirty-year agreements insulated from changes in the law are not unusual. As a result, they are, in many ways, more like laws or treaties than commercial agreements, making contract secrecy deeply problematic for democratic societies.

From this perspective, secrecy is anomalous. It is at odds with national laws supporting freedom of information and with developing international human rights jurisprudence on the right to information. From a governance perspective, transparency is a central element in building public accountability and finding solutions to the long-term problem of channeling resource wealth into sustainable development.

In light of this, it is perhaps unsurprising that this report has found no strong defenders and few well-articulated defenses of contract secrecy, despite its pervasiveness. The frequent references by defenders to trade secrets or *commercially sensitive information* merely deflect attention from the issue. Trade secrets are not typically in the agreements and *commercially sensitive information* is a vague term that would apply as much to acts of corruption as to pricing information. Quite simply, the fact that some information held by a government is commercially sensitive is the beginning of the analysis, not the end.

If trade secrets and legitimate issues of *commercially sensitive information* were the only issues at stake, then the next step would be a serious discussion of which information should be removed before disclosure. But, in fact, this issue rarely comes up. There is little evidence that companies actually remove anything from such agreements even when they have the option. Within the industry, supposedly confidential contracts are bought and sold, analyzed, and even ranked. Others are shared among colleagues on electronic mailing lists. For larger projects, competitors are often co-parties to the contract, giving them *de facto* access. This suggests that arguments based on competition and commercially sensitive information are weak on their face, and only more so when the public interest in contract transparency is weighed against them.

Moreover, companies and countries operate in a diverse environment where secrecy is always relative and never certain. Massive disclosures in some countries like the Democratic Republic of Congo and periodic leaks in others like Liberia demonstrate that companies and countries can function with unexpected disclosures. Meanwhile, countries like Peru, with published model contracts and systematic disclosure of agreements, attract private investment and operate effective industries even as others insist on secrecy.

Expansive confidentiality clauses, which companies and countries point to, are a symptom and not a cause of contract secrecy. The clauses that are found in most extractive agreements are "boilerplate," incorporated wholesale from prior agreements. But though unnecessarily broad in scope and duration, they are not barriers to disclosure that is required by law or resulting from mutual consent.

Nevertheless, despite the inconsistencies and the weaknesses of their defenses, companies and countries remain resistant to systematic change. Companies have benefited from having far greater information at their disposal when negotiating contracts, and contract transparency is perceived by some to threaten investor bargaining power. Ironically, some government officials argue that disclosure of terms would reduce the government's bargaining power. Governments with the best of intentions have *real* difficulties in maintaining the support of diverse constituencies in natural resource contracting. Local communities have interests that may diverge from others; pro-investment constituencies may fundamentally disagree with equally fervent environmental activists.

On the other hand, there are less legitimate reasons for government discomfort, including fear of exposing incompetence or corruption. While this may be an underlying motivation, companies are at least as likely to take the initiative, either for their own interests or because they are preemptively providing cover for a government. In either case, the concerns may or may not be real, but they are not legitimate.

Home states have a particularly critical role to play in breaking the stalemate of contract secrecy. Home governments regularly lobby for contracts and push for "good deals," on the one hand, and call

for better governance and decry corruption on the other. These are not necessarily inconsistent, and supporting contract transparency will demonstrate a commitment to eliminating corruption, good governance, and the realization of durable deals for companies and citizens alike.

Habits are hard to break unless one or both parties recognizes the value in change. For companies, this report suggests the business case for transparency, but it would require more analysis to complete. One of the strongest arguments in support of the business case is the resilience and stability of a publicly vetted agreement. In a country like the Democratic Republic of Congo, where corruption is rife and public suspicion overwhelming, the government alone may not have the power to confer legitimacy on a deal. Subsequent governments, already more likely to seek renegotiation, will have an additional backing to return to the deal. In such a setting, a company's strongest defense against dissenting public voices and future renegotiations may be a wide public vetting.

For governments interested in stewardship of natural resources, sustainable development and democratic accountability, the arguments for transparency are overwhelming. But even the best of governments doesn't necessarily act in support of these interests without consistent pressure. A decade ago, there was little pressure from civil society or others for proper governance of extractive resources. Now this issue is the focal point of a strong international movement backed by governments and companies. Activists are seeking contracts, and regulators and international financial institutions are beginning to nudge both sides towards more disclosure. Industry is beginning to rethink its position, as evidenced by the statement of the International Council on Mining and Metals. The status quo of contract secrecy will soon be the riskier path for companies and governments. Though unquestioned for decades, contract secrecy provides no discernable benefits for any of the parties involved.

Recommendations

What is needed now is to focus attention on contract transparency and channel it towards systematic changes for the future: NGOs should continue to seek agreements and analyze them; IFIs should consolidate their position in support of transparency and apply it consistently; home states should require disclosure to protect investors, battle corruption and bring stability to energy and commodities markets; host states should implement transparency and freedom of information principles in natural resource contracting; all states should protect NGOs from frivolous law suits to prevent them from legitimately exposing agreements and challenges to agreements. The reflexive resistance to disclosure and resentment against efforts to end it should be replaced by serious efforts to determine and implement the appropriate limits of confidentiality.

More specifically with respect to the principal actors:

Natural Resource States (Host)

- Host states should incorporate contract transparency into law and practice. One effective practice employed by some states has been to adopt and publish a model contract that is vetted by the legislature. Some states require the legislature to approve major contracts. A full public vetting would include approval of both model and final contracts by the legislature.

- Host states should create robust legal regimes to govern relationships with investors instead of individual contracts. Model contracts with as few variables as possible should be adopted, and the allowable modifications should be specified. This reduces suspicion about contracts and simplifies individual contract review by civil society. It reduces transaction costs by reducing the number of costly negotiations. It further reduces the technically difficult and costly regulatory oversight required for states to fully benefit from natural resource endowments.
- Future confidentiality provisions in agreements should be carefully tailored in scope and duration in order to privilege public access to the contract and the information that it generates.
- With regard to existing contracts, states should consider options for disclosure. States should give notice to investing companies and give them the opportunity to propose redactions. But states should use their leverage to limit any such redactions. Companies are not likely to resist, as the DRC and Liberia examples demonstrate, particularly since many claim that secrecy is for the benefit of the state party.

Home States of Extractive Companies

- Home states should implement disclosure requirements through securities regulation and anti-corruption laws. Anti-corruption laws have been an important tool for countries like the United States in regulating the conduct of their companies abroad. Securities laws have played an important role in this as they have in protecting investors through rules of disclosure. The major stock exchanges and home states for extractive companies (particularly the UK, US, and Canada) already have significant disclosure rules that apply to major contracts. In some cases, companies are required to disclose the contracts themselves, though the circumstances vary and typically leave considerable discretion to the company.
- States should review their disclosure rules with a view to strengthening the requirement for contracts.
- At a minimum, the rules should clarify the circumstances for contract disclosure, favoring disclosure where already required by the laws of the host country in addition to contracts that represent material investments or risks.
- Ideally, future securities laws will track the IMF Guide and require systematic disclosure.
- Home states should demonstrate leadership by disclosing their own contracts involving public assets, and by taking immediate steps to change the confidentiality clauses in those contracts. With the exception of Denmark, most home states with domestic extractive industries have nearly identical confidentiality clauses as host states. Home state confidentiality clauses should be narrowly tailored and recognize the public interest in access to information as well.

Extractive Companies

- Companies should review their confidentiality policies, including the language in confidentiality clauses. Where companies have concerns about disclosure, they should define them narrowly and avoid recourse to blanket confidentiality.
- Industry associations, including, for example, the International Council on Mining and Metals, can continue to play a constructive role in developing sector-wide strategies that embrace transparency. Complete contract transparency should be adopted in position statements. Industry

associations are well-placed to provide valuable help with crafting confidentiality clauses that are narrowly tailored.

- Companies and industry associations should refrain from advocacy and lobbying in opposition.

The World Bank Group, the IMF and other IFIs

- The IFIs should implement the recommendations of the IMF Guide in a systematic and consistent manner.
- The WBG should promote contract disclosure through legislative reform, policy guidance and requirements of disclosure in agreements to which it (through, for example, the IFC or MIGA) is a party.
- The IMF and WBG should assist developing countries in implementing systems in which contracts can be made meaningfully available and effectively serve the purposes of the Guide.
- The IFC should immediately implement the limited requirements of disclosure that are currently in its policies. The assumptions of the IMF Guide should be incorporated in the Performance Standards through the current review.

Export Credit Agencies and Major Lending Banks

- The ECAs and lending banks should scrutinize confidentiality agreements to ensure that they are tailored to the narrow needs of an extractive agreement. The ECAs, in particular, which reflect the interests and values of the "exporting" state, should require disclosure of agreements, in keeping with their anti-corruption and public accountability commitments.
- The Equator Principles should incorporate the strongest possible mandate for contract disclosure in connection with project finance.

United Nations Agencies

- The UNDP and Office of the High Commissioner for Human Rights should actively promote contract transparency. The UN has an important role to play both through the UN Development Program (UNDP) and its human rights mechanisms, particularly the UN Special Representative on Business & Human Rights. Beyond the UNDP's general role in development activities and national coordination, it is playing an increasing role in issues related to state-investor contracts and the extractive sector. In these activities, it should play a leadership role in promoting contract transparency, following the general terms of the IMF Guide.
- The UN Special Representative on Business & Human Rights should scrutinize laws that enable companies to frustrate the goals of transparency. The Special Representative has already played an important role in bringing attention to problems in state-investor agreements that affect human rights, particularly stabilization clauses that freeze domestic law. He has brought together lawyers, business people and others with extensive experience in the extractive sector to look at contracts more generally. In keeping with his focus on the state's "duty to protect," the Representative has been critical of laws that actually undermine a state's ability to regulate corporations for human rights. In this regard, he should also examine the phenomenon of SLAPP suits and, in particular, the laws and legal practices that are exploited by companies to impede activists and journalists from engaging in legitimate efforts to promote transparency and scrutinize the deals of companies.

NGOs and Civil Society

- International and domestic civil society organizations should continue to press for disclosure of existing and future contracts involving public assets. They should encourage cooperation to continue the rapid progress towards a better understanding of the role of contracts in the value chain, the means of monitoring contract implementation and the alternatives for effective engagement on a practical and policy level.
- Civil society should advocate for contract transparency to be included in EITI implementation at the country level; advocates should also lobby the EITI International Secretariat and Board to provide guidance and encourage the incorporation of contract transparency into the EITI.
- Civil society should take immediate steps to increase contract literacy. Gross misinterpretation of contracts is a barrier to transparency efforts. Civil society should learn from the EITI experience, and place a high priority on using and analyzing information strategically.
- Citizens and civil society organizations should use FOI laws to gain access to contracts and to lobby for contract databases. Efforts by governments and companies to impede contract access should be reported to the Publish What You Pay coalition when they occur.

Recommendations for Future Research

There are many missing pieces in the study of extractive contracts. The authors of this report continue to explore the role and impact of securities regulations and national parliaments in connection with contract transparency. But transparency is only an enabling step. It should lead to contract analysis, monitoring and reform based on better knowledge and informed constituencies. This should be the goal of all continuing efforts.