

Promoting Contract Transparency

By Matteo Pellegrini

December 2011

Summary

Oil, gas and mining laws and contracts establish the terms of what a country might gain from extraction, which can affect a nation's ability to derive full benefits from its resources. While parliaments are constitutionally mandated to ratify laws, they generally do not have a role in reviewing contracts. Contracts, even when signed, are rarely disclosed to parliament or the public.

This secrecy is a problem because contracts contain important terms and conditions. In several countries, contracts may contravene national legislation or contain stabilization clauses, allowing companies to ignore changes in national law.

If contracts are not disclosed, parliaments cannot adequately monitor the sector and secure a fair share of the profits for citizens. Contract transparency is crucial to ensuring that laws are followed and gains are maximized.

Disclosure also provides an incentive to improve contract quality. If contracts are subject to public scrutiny, government officials will be deterred from seeking their own interests. With access to international contracts, government officials can engage in negotiations that will not only increase their bargaining power but also lead toward good global practices.

Contract transparency also increases investment stability for extractive companies by securing balanced deals from the outset. Countries that publish contracts, like Liberia, Timor-Leste and the United States, have attracted substantial investments from major companies.

Parliaments are well placed to advance contract transparency through legislation and oversight. In many countries, members of parliament have successfully championed this issue.

Contract terms and types

A contract is an agreement that binds two parties for a determined period of time. It usually stipulates:

- The financial terms of a deal, including terms and payment rates, payment of production costs, pricing and sale of resources, and any applicable tax exemptions
- Duration of the license and procedures to renew or terminate the contract
- Management of operations and work obligations
- Provisions for the procurement of goods and services from within the country
- Employment and training of nationals
- Rights on access to ancillary resources such as land, forestry and water

Contents

Summary	1
Contract terms and types	1
The cases against contract secrecy	2
Dismissing arguments against contract transparency	2
Legislators as champions of contract transparency	3
Parliamentary strategies for the promotion of contract transparency	3
Questions parliamentarians can ask	4
Further learning	4

Briefing

- Confidentiality of information
- Procedures for settling any disputes between the parties
- Requirements for engaging with communities in the vicinity of exploration or extraction

Three types of contracts are common in the oil, gas and mining sector: production sharing contracts (PSC), concession agreements and technical service agreements. While each works differently, they can all be structured to yield outcomes broadly similar in economic terms.

ABOUT THIS SERIES

Technically complex and often opaque, the oil, gas and mining industries require legislation and informed, effective oversight. To ensure gains from the sector are maximized, RWI provides background information on crucial areas for parliamentary engagement. These resources are available at renewatch.org/parliaments.

“Disclosure of oil, gas and mineral contracts is beneficial to both countries and companies. For companies, it provides stability. For countries, it ensures wealth is maximized and invested into projects that yield development. Join the fight for transparency.”

– Hon. Zitto Zuberi Kabwe, MP,
Parliament, United Republic of Tanzania

The cases against contract secrecy

RWI’s 2009 report *Contracts Confidential* surveyed approximately 150 international oil, gas and mineral contracts and found they were usually not made available to parliament or the public. This is problematic for a number of reasons:

Contract secrecy undermines parliamentary oversight.

Contracts often include terms and conditions unavailable in other legal documents. Secret contracts may contravene national law or contain stabilization clauses, thereby allowing companies to ignore legislative changes, such as new taxes or environmental and social requirements. Contract secrecy creates an environment in which accountability is weak and deviation from the law is allowed. As a result, parliament’s legislative work erodes, and so does its right to scrutinize the use of public resources.

Contract secrecy invites corruption.

If contracts remain shielded from the public eye, government officials may be included to negotiate deals in their own personal interests rather than in the public interest.

Contract secrecy threatens public interest.

Many companies purchase resource contracts for a large fee from commercial databases to scope out the competition and detect any concessions the government made in previous negotiations. These contracts are rarely shared. While such deals work in a company’s favor, they are often detrimental to the public interest. Disclosure increases a government’s ability to learn from these international dealings and strengthens its negotiating position with companies.

Dismissing arguments against contract transparency

The common arguments companies and governments make against disclosure can be refuted.

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

Rebuttal: *Contracts are already widely circulated within the private sector.*

Contracts do not generally contain commercially sensitive information. Commercially sensitive information is seldom in the primary contract that grants the right to extract. This information typically is found in other documents (see Table 1). Any highly sensitive information can always be redacted prior to disclosure.

Specific terms	Is this likely to cause competitive harm if disclosed?	Is this usually in a primary contract?
References to future transactions	Yes	Unlikely
Trade secrets	Yes	Unlikely

“If you’re a long-term investor, you want to build trust. I cannot see one reason why investment agreements are kept confidential. I think the commercially sensitive thing is an anachronism.”

– **Dr. Chris Anderson**, Senior Director, Corporate and External Affairs - Africa, Newmont Mining Corp.

Work obligations	Unlikely	Likely
Local content	Unlikely	Likely
Employment and training	Unlikely	Likely
Financial terms of the deal	Unlikely	Almost always
Parties to the contract	Unlikely	Almost always

When contracts are publicly available, countries and companies have secured mutually beneficial partnerships. There is no evidence that a company’s commercial position has been affected when contracts are made available. On the contrary, Liberia and the United States have secured substantial investments from international companies while disclosing contracts. Transparency, in fact, leads to more balanced deals, reducing public pressure for regular renegotiation that arises in times of high commodity prices and company profits.

Argument: Confidentiality clauses do not permit contract transparency.

Rebuttal: *Legislation or political commitments may supersede confidentiality clauses.* Most confidentiality clauses allow a contract’s parties to share information by mutual consent. However if a contract does not contain such a provision, governments and companies can agree to modify it to allow contract transparency. Confidentiality clauses also include an exception for legally mandated disclosures, allowing governments to require transparency by law. Confidentiality clauses only prevent access when neither party wants transparency. In this case, access is restricted unless some other legal mechanism, such as a request for access under a Freedom of Information Act, is used to override the resistance.

Excerpt from Liberia’s groundbreaking LEITI law

“The scope of the LEITI shall be to promote (1) revenues transparency, and (2) contract transparency in the natural resource sectors specified in Section 5.3 herein below. (Section 5.1) (...). For the purpose of this Act, contract transparency shall mean (1) public accessibility of material concessions/licenses and agreements related to the sectors within the scope of the LEITI as per Section 5.4 hereof; and (2) the post-award review and/or audit of the process by and through which concessions, contracts, and licenses are awarded for exploration and/or exploitation of minerals, forests and other resources in order to ascertain that each award was made in compliance with applicable laws (Section 5.3).”

Legislators as champions of contract transparency

While contract secrecy remains widespread, a growing number of actors, ranging from oversight groups to international financial institutions, are calling for transparency. Parliamentarians in particular have become active promoters of contract transparency.

The Global Organization of Parliamentarians Against Corruption (GOPAC) recently issued a resolution in support of contract transparency. Ugandan legislators bravely called for and obtained the partial disclosure of oil agreements to Parliament (see Box 1). UK parliamentarians have formally signed Publish What You Pay’s call for greater transparency, including the publication of contracts. Liberian legislators have approved the groundbreaking Liberia Extractive Industries Transparency Initiative (LEITI), which requires the publication of all oil, gas and mining contracts.

Box 1 | Ugandan Parliamentarians call for the publication of oil agreements

In Uganda, a group of legislators repeatedly raised the threat of voting on a petition requesting public disclosure of oil contracts. In June 2010, Uganda’s president responded by submitting seven signed oil contracts to Parliament on the condition that they not be disclosed to the public. Parliamentarians pledged to publicly disclose the contracts. Their commitment boosted the efforts of civil society and journalists seeking disclosure through Uganda’s Access to Information Act.

Parliamentary strategies for the promotion of contract transparency

Thanks to their oversight and legislative functions, parliamentarians are uniquely positioned to challenge contract secrecy. Using information provided in this briefing, they can make motions to support contract transparency:

- Seek government action on contract disclosure through oral or written parliamentary questions to the relevant portfolio minister.

Briefing

Countries that disclose contracts:

- The **United States** publishes contracts from the Gulf of Mexico.
- **Liberia's** 2009 EITI Law requires public disclosure of all contracts.
- **Timor-Leste** discloses all production-sharing contracts of the Timor Sea zone.
- **Sao Tome and Principe's** 2004 oil revenue management law requires public access to all contracts.
- **Colombia** allows disclosure under Freedom of Information legislation.
- **Denmark's** 2005 model contract allows access to contracts through the provision that "public interest outweighs confidentiality."
- **Niger's** 2010 Constitution requires publication of all natural resource contracts.
- **Peru** shares its oil and gas contracts on an ad-hoc basis.

- Work within party caucuses or portfolio committees to assess the benefits of transparency and to build political will.
- Produce a committee report on other countries to demonstrate that contract transparency does not deter investment but leads to strong relationships that benefit both the public and private sectors.
- Hold briefings and informational hearings with companies and the government to explore disclosure options for individual contracts or selected contract terms in the public interest.
- Introduce a private member's bill demanding contract disclosure, using language from the LEITI or Uganda's Access to Information Act.
- Interact with the media through press conferences or interviews to build public awareness and appetite for contract transparency.
- Work with civic groups, such as national chapters of Publish What You Pay, that actively promote contract transparency.
- Sanction public access to contracts through motions or laws in countries where contracts are shared with or approved by parliament. Contracts can be filed with parliamentary libraries for ease of public access.

Questions parliamentarians can ask

- Are companies willing to disclose contracts collectively or individually? Are executives willing to disclose contracts? If not, why? Can you refute their arguments with ideas from this briefing?
- Are any of the companies operating in your country disclosing contracts in countries where the law requires it? Could you change the law to require similar disclosure in your country?
- If confidentiality of information is given as a reason for secrecy, did you request access to confidentiality clauses to verify if they provide exceptions?
- If companies and the government say they are in favor of contract transparency but then blame the other party for lack of disclosure, can you convene them to a public hearing to hear their views at the same time?
- Are there individuals within the government in favor of contract transparency? Are there any civil groups active on this issue? Could you work together to promote disclosure?
- Does your country have an access to information law? Could you work with your constituents to seek disclosure through the courts?

Further learning

- Ask civic groups or parliamentary staff to prepare a briefing highlighting options, challenges and available tools.
- Contact peers from countries that disclose contracts to learn how they helped make contracts publicly available.
- Read publications on contracts and contact transparency at www.revenuewatch.org:
- *Drilling Down*, <http://revenuewatch.org/publications/drilling-down>
- *Contracts Confidential*, <http://revenuewatch.org/contractsconfidential>
- *Revenue Watch Index*, <http://www.revenuewatch.org/rwindex>
- Liberia Extractive Industries Transparency Initiative Act, <http://www.leiti.org.lr/doc/act.pdf>



The Revenue Watch Institute promotes the effective, transparent and accountable management of oil, gas and mineral resources for the public good. Through capacity building, technical assistance, research, funding and advocacy, we help countries to realize the development benefits of their natural resource wealth.

1700 Broadway
17th Floor
New York, NY 10019
Phone 1.646.929.9750
rwi@revenuewatch.org