

Step by Step: Closing the Implementation Gap in Senegal's Petroleum Licensing Process

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Key messages

- Historically, Senegal has experienced significant “implementation gaps” between rules and implementation of these rules in its petroleum licensing process. Causes have included lack of legal clarity, duplicative and conflicting institutional roles, and lack of institutional capacity.
- However, Senegal has made good progress on closing this implementation gap. As of 2020, Senegal's implementation gap in the petroleum licensing process as measured by the Resource Governance Index is very small and reflects recent government reforms, investments and disclosures.
- Despite major progress in closing the implementation gap in the licensing process, Senegal has significant room for improvement in the transparency of the oil and gas licensing process. Senegal's government should work to improve laws on the disclosure of assets of public officials and the disclosure of the identities of the beneficial owners of companies applying for and obtaining licenses.

1. CONTEXT: CHALLENGES WITH IMPLEMENTATION AND LICENSING GOVERNANCE

Many sub-Saharan African (SSA) countries have reformed their extractive industry legal frameworks to improve the governance of their natural resources. However, they are failing to reap the full benefits of these reforms due to the lack of implementation of the new rules, referred to here as an “implementation gap.”¹ According to Global Integrity, one of the pioneers in the concept, an “implementation gap” is the difference between a country's legal framework for good governance and anticorruption, and the actual implementation or enforcement of that same legal framework.²

Few researchers have attempted to understand the factors behind the implementation gap in the extractive sector, but a review of the existing literature indicates that implementation gaps tend to arise from the interaction of administrative constraints

1 Natural Resource Governance Institute, “Strong Laws, Poor Implementation Characterize African Resource Sector,” 15 April 2019, www.resourcegovernance.org/news/strong-laws-poor-implementation-characterize-african-resource-sector.

2 A. Nadgrodkiewicz, M. Nakagaki and M. Tomicic, *Improving Public Governance: Closing the Implementation Gap Between Law and Practice* (Center for International Private Enterprise and Global Integrity, 2012) www.paperzz.com/doc/7723040/improving-public-governance--closing-the-implementation-gap.

and political apathy or resistance.³ Administrative constraints refer to shortcomings in legal clarity, institutional coordination and policymakers' and implementers' capacity (financial, technical, and human). Political apathy or resistance can result from misaligned incentives for implementation, deprioritization of a particular reform on the political agenda, or illegitimacy of laws. Lack of transparency and absence of civic space can also contribute to implementation gaps when the public does not have the information it needs or the freedom of speech necessary to hold government officials accountable for implementing legal reforms.

The 2017 Resource Governance Index (RGI) started measuring this gap between law and practice, finding that among the 81 countries assessed, the gap was widest in countries exhibiting the worst overall extractive sector governance. In most SSA countries, resource governance practices lag improved legal frameworks.⁴

While no RGI assessment was conducted for Senegal in 2017, Senegal has historically struggled to implement the licensing requirements of its 1998 Hydrocarbon Code and regulations, as detailed further below. But the 2021 RGI found no significant implementation gap in Senegal's hydrocarbons sector, including in the licensing process, reflecting recent government efforts to address the root causes of this gap. However, while Senegal's practices in oil and gas licensing are now in line with its legal framework, the licensing transparency and disclosure requirements in the legal framework itself are still insufficient.

This briefing:

- Explores significant implementation gaps shown by Senegal's hydrocarbon sector licensing regime since the discovery of significant hydrocarbon reserves in 2014.
- Details the steps the government took to reduce those gaps.
- Highlights areas for further improvement to the petroleum licensing process.

Senegal's mining sector has been in operation for several years, while oil and gas activities and the hydrocarbon sector's legal framework are still developing. In recent years several activists and civil society organizations have publicly protested about the hydrocarbon sector, particularly concerning the award of concessions.⁵⁶

As the first step in developing natural resources, the award of exploration and production licenses presents a critical opportunity to set the course of governance for the entire lifecycle of a project. The fairness and competitiveness of licensing processes are crucial to capturing the economic benefits of extractive industries.⁷ An effective licensing process can ensure the selection of competent partners who will explore and extract efficiently and in keeping with international industry standards; it can also rule out companies that pursue natural resource titles for speculative

3 Amir Shafaie, Moses Kulaba and Kaisa Toroskainen, "Politics Are Holding Back Implementation of Extractive Sector Transparency Rules," Natural Resource Governance Institute, 29 September 2021, www.resourcegovernance.org/blog/politics-are-holding-back-implementation-extractive-sector-transparency-rules.

4 Natural Resource Governance Institute. 2017 Resource Governance Index. www.resourcegovernance.org/sites/default/files/documents/2017-resource-governance-index.pdf#page=17

5 Radio France Internationale, "Gaz et pétrole : au Sénégal, mobilisation pour la transparence en demi-teinte." 14 September 2019. www.rfi.fr/fr/afrique/20190914-senegal-marche-transparence-gestion-contrats-gaz-petrole

6 Business & Human Rights Resource Centre, Sénégal: La société civile manifeste pour exiger plus de transparence dans la gestion du pétrole et du gaz. 17 September 2019. <https://www.business-humanrights.org/fr/derni%C3%A8res-actualit%C3%A9s/s%C3%A9n%C3%A9gal-la-soci%C3%A9t%C3%A9-civile-manifeste-pour-exiger-plus-de-transparence-dans-la-gestion-du-p%C3%A9trole-et-du-gaz/>

7 Natural Resource Governance Institute. "Granting Rights to Natural Resources," 2015. www.resourcegovernance.org/sites/default/files/nrgi_Granteeing-Rights.pdf

purposes without any intention of exploiting them. Transparency is at the heart of good practice when it comes to licensing/contracting procedures.⁸ Transparency helps assure both reputable companies and the public of a fair process and disincentivizes corruption or mismanagement.

While the 2021 RGI shows that Senegal has taken significant steps in recent years to address implementation gaps in its hydrocarbon sector, the country's oil and gas sector licensing regime scored just 63 out of 100 points in the relevant 2021 RGI subcomponent, which is the lowest score of the subcomponents. This shows that on 31 December 2020, the closing date of the evaluation, the government still had room to make the licensing process much more transparent and efficient.

2. HOW DID SENEGAL CLOSE THE IMPLEMENTATION GAP IN THE LICENSING PROCESS?

Historically, Senegal has struggled to implement the licensing requirements of its 1998 Hydrocarbon Code and regulations, particularly in two areas. First, although the legal framework required license applicants to demonstrate technical and financial capabilities in the direct negotiation process for petroleum licenses, the government awarded licenses to at least two companies, Total SA and PetroTim, without an assessment of technical and financial criteria.⁹ Second, the framework also required the administration in charge of oil operations to disclose the petroleum contracts register, but it did not do so.

There were two main reasons for these implementation gaps:

- *Design shortcomings and lack of legal clarity.* The licensing process was broadly set out in the code but not detailed in regulations; for example, no regulation specified what the technical and financial criteria should be and how they should be proven by applicant companies. There was a lack of specificity of how companies could demonstrate competence. In addition, the code gave the minister in charge of hydrocarbons the power to negotiate contracts and gave the Direction Générale des Hydrocarbures¹⁰ (DH) an independent regulatory role to manage the sector and advise the minister. The code also allowed the minister to appoint a commission to advise him on licensing and to delegate regulatory activities to the national oil company, PETROSEN. These duplicative and conflicting roles resulted in a lack of institutional coordination.
- *Implementation blockages* related to a lack of capacity in the DH. The DH lacked the resources to exercise regulatory oversight, which drove it to delegate licensing activities to PETROSEN. As a result, the licensing process suffered from a lack of shared information between the different parties involved, especially the DH and PETROSEN. Regarding the petroleum register, the DH did not receive updated information from PETROSEN to maintain an up-to-date license register.

More recently, the Senegalese government implemented some reforms that have addressed the root causes of these implementation gaps in the licensing process and have reduced them. In 2019, the government adopted a new petroleum code, which changed the licensing process from a “direct expression of interest” model to one that

8 Natural Resource Governance Institute. *Open Contracting for Oil, Gas and Mineral Rights: Shining a Light on Good Practice*, June 2018. www.resourcegovernance.org/analysis-tools/publications/open-contracting-oil-gas-and-mineral-rights

9 Initiative pour la Transparence des Industries Extractives (2019). *ITIE Senegal rapport por l'annee 2018*. www.itie.sn/rapport%20itie%202018.

10 Website of the Ministry of Oil and Energy, www.energie.gouv.sn/les-services-interne

allows for both a direct expression of interest and competitive bidding.¹¹ Article 10 of the code requires the establishment of criteria for awarding titles based on technical and financial capabilities, which are spelled out in its implementing decree. During the last licensing round launched in 2019, the ministry in charge of hydrocarbons specified the qualification requirements for companies.¹²

Regarding the gap related to the establishment of an updated petroleum register, the new legal framework further clarifies the roles of the different institutions, and increased government investments led to the implementation of an online cadaster on 18 May 2021.¹³

The 2021 RGI did identify one implementation gap in the licensing phase, which concerns the disclosure of contracts. Article 20 of the 2019 Petroleum Code and its implementing decree (Art. 13, 19, 21, 26, 29 and 36) require full disclosure of petroleum contracts. The same is true of the Public Finance Transparency Code, which establishes the obligation to disclose contracts between the public administration and companies, whether public or private, including natural resource companies and companies operating public service concessions.¹⁴ However, contract amendments and transfer agreements signed with new entrants were not publicly available in 2020. As of 2021, these amendments have now been published on the EITI website.¹⁵

All these reforms and disclosures have contributed to closing the licensing implementation gap and improving the overall transparency of the licensing system. The EITI National Committee has played an important role in the implementation of contract disclosure policies, and has been an important forum for oversight actors such as civil society organizations to push for publication. The government has committed to establishing favorable conditions for the implementation of EITI standards in sector policies and legislation.

3. NEXT STEPS TO IMPROVE THE TRANSPARENCY OF THE LICENSING PROCESS

Despite the progress made, including on the implementation of previous reforms, Senegal can make the licensing process more transparent and efficient still.

For each stage of the licensing process, there are international good practices that if implemented could make it more efficient.¹⁶ These practices include transparency around:

- Methods for license allocation
- Rules and execution of a licensing process
- The companies applying, including their beneficial owners
- Identity of individuals involved in the decision-making process
- Results of a licensing process, including the contract

11 Code Pétrolier 2019, Loi n°2019-03 du 1er février 2019. www.itie.sn/reglementation

12 Website of Initiative pour la Transparence des Industries Extractives for Senegal, www.itie.sn/appel-doffres-blocs-petroliers/

13 Online cadaster, www.cadastre-petrolier.senegal.revenue.gov.org/dashboard

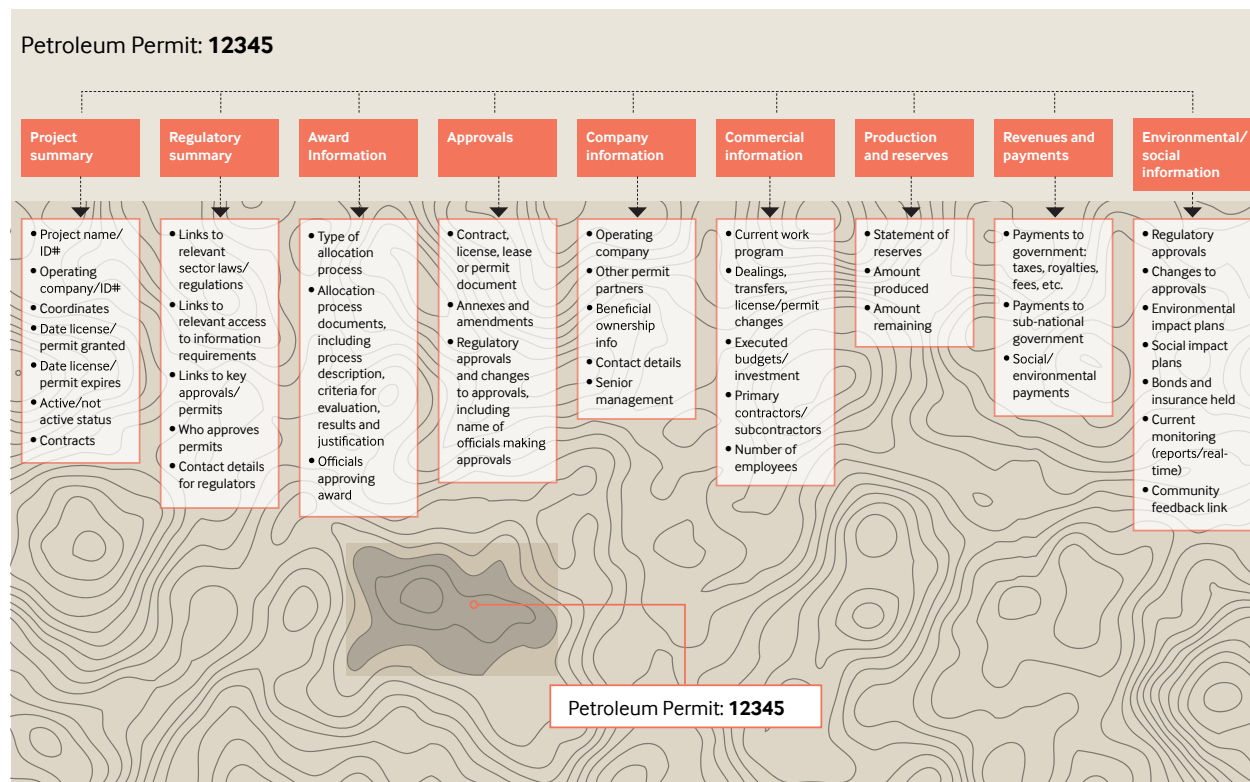
14 Code de Transparence dans la Gestion des Finances publiques, Loi n° 2012-22 du 27 décembre 2012. www.jo.gouv.sn/spip.php?article9605

15 Website of Initiative pour la Transparence des Industries Extractives for Senegal, www.itie.sn/contrats-petroliers.

16 Natural Resource Governance Institute (2018).

Figure 1 below draws on these good practices to provide a detailed project-level approach to joined-up regulatory transparency of a licensing process from design to award to implementation.

Figure 1. Model for petroleum licensing disclosures¹⁷



The Senegalese authorities and all stakeholders in the sector could focus on several good practices, some of which are EITI requirements, to improve the transparency and performance of the petroleum licensing process. Senegal’s RGI results highlighted two possible areas for reforms:¹⁸

- Disclosure of public officials’ assets
- Beneficial ownership disclosure of companies that apply for and are awarded licenses

3.1. Disclosure of public officials’ assets

One of the international standards for transparency in licensing is disclosure of public officials’ assets. More generally, declarations of assets and interests are a standard for governance and the fight against corruption. According to Transparency international, these declarations help to guard against the accumulation of illicit wealth by allowing the public to monitor the financial activities of politicians and senior officials and also to monitor and prevent conflicts of interest.¹⁹ In the extractive sector, when an

17 Open Contracting for Oil, Gas and Mineral Rights: Shining a Light on Good Practice in figure 9 https://www.open-contracting.org/wp-content/uploads/2018/06/OpenContracting4EI_Web.pdf

18 EITI International Secretariat (2019), EITI Standard 2019, www.eiti.org/document/eiti-standard-2019#r2.

19 Transparency International (2020), Recommendations on asset and interest declarations for OGP Action plans. www.opengovpartnership.org/wp-content/uploads/2020/07/Recommendations-on-Asset-and-Interest-Declaration-for-OGP-Action-Plans.pdf

official who can influence the selection process has a conflict of interest, there is a greater risk that they will use the power entrusted to them in a way that compromises the integrity and fairness of the contract award.²⁰ Conflict of interest occurs when a public servant has multiple roles and interests in the licensing process, which may create a conflict between their personal interests and their official duties. The risks associated with conflict of interest are also incurred when business interests are held by a member of the public servant's family or associates. To guard against this risk, many countries including Colombia, Ghana, Guinea, Mexico, Mongolia, Peru and Uganda have laws in place that require the declaration and disclosure of the assets and financial interests of public officials involved in licensing processes. Out of 81 countries evaluated in the 2017 RGI, 24 required public asset disclosure and another 40 required disclosures to a government authority.

In Senegal, the Public Finance Transparency Code and its regulations require the declaration of assets by elected public officials or senior civil servants upon entering and leaving office. **However, the list of people subject to this declaration is very limited and the declarations are confidential. Senegalese authorities should strengthen the law on the declaration of officials' assets by requiring public disclosure of these declarations and expanding the list of persons subject to this declaration to include public officials involved in the licensing process.**

3.2. Beneficial ownership disclosure of companies

Another challenge for Senegal is to publicly identify who applies for and receives the rights to extract natural resources. Beneficial owners of oil, gas and mining companies have many means to hide their interests, such as: substituting natural persons²¹, inserting opaque entities such as shell companies into the ownership structure, holding assets and sending payments offshore.²² There may be many legitimate reasons for a company to have a complex ownership structure, such as reinforcing management control, corporate finance concerns, divestment preparation and choice of law considerations.²³ However, such structures complicate identification the beneficial owners of companies operating in the sector, which is needed to prevent conflicts of interest, tax avoidance and evasion, and corruption risks.²⁴ As an EITI requirement, implementing countries must require extractive companies to publicly disclose beneficial ownership information.²⁵ In a review of nearly 50 mining and oil laws NRG found that an increasing number of countries are developing legal frameworks and systems for collecting and disclosing beneficial ownership information.²⁶

20 A. Sayne, A. Gillies and A. Watkins, *Twelve Red Flags: Corruption Risks in the Award of Extractive Sector Licenses and Contracts*. Natural Resource Governance Institute, April 2017, 6.

www.resourcegovernance.org/analysis-tools/publications/twelve-red-flags-corruption-risks-award-extractive-sector-licenses-and

21 One or more people stand in as shareholders for the beneficial owner. These can include family members, fronts or aliases.

22 "Disclosing beneficial ownership information in the natural resource sector." OGP Openness in Natural Resources Working Group, 2016. www.opengovpartnership.org/wp-content/uploads/2019/05/FIN200GP20Issue20Brief20BO20Disc1.pdf

23 A. Sayne, E. Westenberg and A. Shafaie). "Owning Up: Options for Disclosing the Identities of Beneficial Owners of Extractive Companies," Natural Resource Governance Institute, August 2015. www.resourcegovernance.org/sites/default/files/nrgi_Beneficial%20Owners20150820.pdf

24 EITI official website, www.eiti.org/beneficial-ownership#eiti-guidance-and-publications-on-beneficial-ownership

25 EITI International Secretariat (2019), EITI Standard 2019, www.eiti.org/document/eiti-standard-2019#r2-5.

26 E. Westenberg and A. Sayne. "Beneficial Ownership Screening: Practical Measures to Reduce Corruption Risks in Extractives Licensing," Natural Resource Governance Institute, May 2018. www.resourcegovernance.org/analysis-tools/publications/beneficial-ownership-screening-practical-measures-reduce-corruption

In Senegal, Decree 2020-791 on the register of beneficial owners requires in its Article 4 the declaration of a certain amount of information relating to beneficial owners, including identification of “politically exposed persons.”²⁷ However, key information on the nature of the beneficial ownership including beneficial owners’ level of ownership and details on how this ownership or control is exerted are not required. Moreover, Article 12 specifies that the information contained in the register of beneficial owners shall only be accessible to people who request it (from the judge responsible for the supervision of the register) and who can demonstrate a legitimate interest. The burden of complying with these procedural requirements can pose barriers to public access and use of this public interest information and do not comply with the EITI requirement for public disclosure.

Senegal’s government should revise article 4 of the decree to expand the key beneficial ownership information that must be disclosed in accordance with EITI requirements, including beneficial owners’ level of ownership and the details on how this ownership or control is exerted. The government should also revise Article 12 of the decree to lift the procedural constraint to public access that requires applicants to file with the judge in charge of overseeing the Register of Beneficial Owners and to demonstrate a legitimate interest.

CONCLUSION

Senegal’s petroleum licensing process has historically suffered from implementation gaps mainly caused by lack of legal clarity, the resulting duplicative and conflicting institutional roles and lack of institutional capacity . In recent years, the government of Senegal has reduced the implementation gap in licensing procedures through legal reforms to improve clarity and investments in disclosure. However, Senegalese authorities should strengthen the transparency requirements of the legal framework by making disclosure of officials’ assets mandatory and expanding the list of persons subject to asset disclosure. Authorities should also broaden the key information that extractive companies must disclose about beneficial owners and allow for unrestricted public access to this information.

27 Decree No. 2020-791 on the Register of Beneficial Owners, <https://www.resourcedata.org/document/rji21-dcret-n-2020791-relatif-au-registre-des-bnficiaires-effectifs>

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