

Five Steps to Disclosing Contracts and Licenses in EITI

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INTRODUCTION

Section 3.12 of the EITI Standard encourages EITI-implementing countries to “publicly disclose any contracts and licenses that provide the terms attached to the exploitation of oil, gas and minerals.” There is significant interest among many EITI-implementing countries in following this encouragement, but members of the multi-stakeholder groups (MSGs) have also raised numerous questions about how to incorporate contract and license disclosure into EITI in practice and how to respond to perceived risks. This note seeks to address these questions, and to outline concrete steps that implementing countries can take to make contract disclosure a part of their EITI process in a way that advances national governance objectives.

Disclosing contracts and licenses is one of the most important steps that EITI implementing countries can take to promote more effective management of their extractive resources. Contract transparency promotes constructive relationships between citizens, companies and governments, which can reduce conflict and promote stability in the sector. It helps set realistic expectations about the terms of and timelines for extraction, which facilitates accurate government revenue collection and forecasting. The disclosure of contracts also provides enhanced opportunities for stakeholders to monitor adherence to obligations, which encourages all parties to act responsibly in project implementation.

Contract/license disclosure also enhances the utility of other EITI disclosures by providing context that facilitates the analysis and understanding of revenue flows and other data. For example, Section 4.1 (e) of the EITI Standard requires the disclosure and, where possible, reconciliation of material social expenditures that are mandated by law or contract. Without contract disclosure, it is difficult to determine whether contractual social payment obligations even exist, let alone accurately collect and reconcile information on them.

The note begins by looking at how an MSG can start **discussing contract and license disclosure**, followed by how countries can approach **defining the scope of disclosure**. Next, we cover mechanisms for **assembling and verifying documents** and establishing **public access** to this information. Finally, the note outlines options for **maximizing public education and outreach**. Throughout the note, we base the discussion on lessons learned from the experiences of the growing number of countries that publish their extractive industry contracts and licenses.

STEP 1: DISCUSSING CONTRACT AND LICENSE DISCLOSURE

The EITI Standard contains encouragements and requirements regarding contract/license disclosure. As such, each implementing country’s MSG should undertake a thorough evaluation of whether and how contract/license disclosure could contribute to the realization of national policy objectives.

Q: When should the MSG consider the issue of contract/license disclosure?

Section 3.12 of the EITI Standard encourages implementing countries to publicly disclose any contracts and licenses that provide the terms attached to the exploitation of oil, gas and minerals. The EITI Standard also says that EITI reports are required to document the government’s policy on disclosure of extractive contracts and licenses that govern the exploitation *and* exploration of oil, gas and minerals, including relevant legal provisions, actual disclosure practices and any reforms that are planned or underway. The EITI Standard states that, where applicable, the EITI Report should provide an overview of the contracts and licenses that are publicly available, and include a reference or link to where these are published.

As such, the MSG should consider contract/license disclosure at several points in the EITI process.

EITI Stage	MSG Considerations
Developing the objectives and national priorities contained in the EITI work plan	<p>Would contract/license transparency help address certain objectives/priorities?</p> <p>Does the work plan include activities related to Section 3.12 of the EITI Standard?</p>
Commissioning scoping studies	Do scoping plans include an assessment of the existence and/or feasibility of contract/license disclosure?
Preparing reconciler terms of reference	If there is information regarding contracts/licenses that the MSG wishes the Independent Administrator (IA) to collect, is that made clear in the terms of reference?
Undertaking data collection and reconciliation	<p>If the MSG intends to collect contract/license information through a mechanism other than the IA, have clear plans been made?</p> <p>What information will be collected, by whom, from whom, and in which format?</p>
Developing annual EITI reports	<p>Does the EITI report include the government’s policy on disclosure of contracts and licenses? Does the EITI report include all relevant legal provisions, actual disclosure practices and any reforms that are planned or underway, as well as links to existing public contracts/licenses?</p> <p>If the MSG has decided to undertake contract/license disclosure, how will the contracts/licenses be displayed? If they are online, does the EITI report include a link to the relevant website?</p>
Drafting annual activity reports	Does the annual activity report include an evaluation of progress made on contract/license-related plans?
Making recommendations about broader policy reforms based on analysis of EITI data	<p>Do EITI reports contain recommendations related to contract/license issues?</p> <p>Are publicly available contracts/licenses being used to understand policy issues?</p>

Q. How can a MSG consider the benefits of contract/license disclosure?

As the MSG discusses what the national EITI reporting process should entail in order to be of most relevance within their country context, they should consider the pros and cons of contract/license transparency. First, the MSG should consider the existing policy and practice in their country with respect to contract/license disclosure.

Certain countries require the disclosure of contracts/licenses via the constitution or legislation. Other countries have expressed support for contract/license disclosure being a central part of EITI implementation. In these countries, the MSG should develop a plan for how the current EITI process can advance the goals regarding contract/license disclosure that the country has already expressed.

Constitutional/legal requirements	EITI contract disclosure supporters ¹	
Colombia (legislation)	Albania	Liberia
Guinea (legislation)	Burkina Faso	Mongolia
Liberia (legislation)	Chad	Mozambique
Mexico (constitution)	Congo	Norway
Niger (constitution)	Ghana	Tanzania
Sao Tome & Principe (legislation)	Guatemala	Timor Leste
Sierra Leone (legislation)	Guinea	Togo
Tanzania (legislation)	Indonesia	Yemen
	Kyrgyzstan	

However, the above-mentioned policies and positions do not always mean that adequate contract/license disclosure takes place in practice. Moreover, some countries do not have policies that promote contract/license transparency. If a country does not currently disclose contracts/license or the scope of disclosure is inadequate (*see section 2 below for more information on scope*), the MSG should consider the benefits that contract/license disclosure can bring to all constituencies.

Disclosing contracts/licenses through EITI allows the **government** to:

- Build trust, including within host communities, that the state is pursuing the public interest;
- Develop consensus and reduce tensions around the respective obligations of operating companies and the state, thereby promoting stability and reducing risk to investors; and
- Increase future revenues by making it difficult for any single official/agency to sign deals with limited long-term advantages.

1 <http://eiti.org/files/Consultation%20on%20contract%20transparency.pdf>

Disclosing contracts/licenses through EITI allows **citizens** to:

- Be aware of the net returns that the country receives from the exploration and extraction of its natural resources;
- Understand the source and nature of the revenue data that is released by EITI, including variations in company obligations and contributions over time (e.g. low tax payments during cost recovery periods); and
- Understand the existing local content, environmental and social obligations that guide company and government behavior in their communities.

Disclosing contracts/licenses through EITI allows **companies** to:

Establish contracts/licenses that are more stable, with broader country buy-in, a stronger social license to operate and lower pressure to renegotiate;

Lower risks of corruption in the negotiation of contracts/licenses;

Explain why revenues may not meet unrealistic public expectations (such as when exploration costs are being recouped); and

Reduce the bargaining leverage of unskilled or unscrupulous companies that seek to sign deals that are out-of-step with international standards.

Q. How can a MSG analyze the concerns most commonly expressed in relation to contract/license disclosure?

Concern 1: Do contracts/licenses contain commercially sensitive information that could cause competitive harm to petroleum or mining companies if disclosed?

Discussion: The types of information whose disclosure is most typically associated with competitive harm to a participating company—trade secrets, production techniques, proprietary practices—are virtually never contained within the kinds of contracts and licenses that would be disclosed pursuant to Section 3.12 of the EITI Standard. These contracts/licenses typically lay out the obligations that a company owes the producing state and its citizens (and vice-versa), including those related to expected fiscal payments, environmental and social responsibilities and plans for developing the resource. The contracts do not provide details on a company's technology or how it executes its strategy. This is part of the reason for which the countries mentioned above have been comfortable disclosing entire contracts and licenses, and why many companies have published their contracts unilaterally subject to stock exchange requirements to publish materially-relevant information.²

Some MSG members may contend that fiscal terms contained within a contract represent commercially sensitive information that should not be disclosed, as the publication of a deal that a company signed in one country could diminish that company's negotiating flexibility in another country. If such a concern is raised within the MSG, the group should weigh the benefits accruing to the companies from this

² CAMAC Energy, for example, recently published its production-sharing contract with the government of Kenya on the U.S. Securities and Exchange Commission's website (http://www.sec.gov/Archives/edgar/data/1402281/000143774914004260/cak20131231_10k.htm), and Tullow Oil published its agreements with the Government of Ghana (http://www.tullowoil.com/files/pdf/petroleum_agreement_deepwater_tano.pdf).

asymmetric access to information at a global level against the rights of citizens to access information on the fiscal terms accorded by their governments and the other benefits from disclosure discussed above. The countries that have already decided in favor of contract/license disclosure have determined that arguments against making fiscal terms public are not sufficient to justify non-disclosure. Just as they have determined that data on payments from taxes, bonuses and other fiscal flows are in the public interest, they have decided in favor of the public's right to information on the contracts and licenses upon which those payments are predicated.

Concern 2: Do confidentiality clauses prevent disclosure?

Discussion: Many oil, gas and mining contracts contain confidentiality clauses that prevent parties from disclosing certain types of sensitive information to third parties. Where a MSG has decided to implement Section 3.12 of the EITI Standard, its members should examine any confidentiality clauses contained in the relevant contracts or licenses, to determine whether they explicitly preclude the publication of the contract/license itself.

Where there is a confidentiality clause that precludes publication of the contract/license, the members of the MSG should work together to address it. Most confidentiality clauses allow a contract's parties to share information by mutual consent, which would enable the MSG to use the EITI process to secure the consent of contracting parties to publication pursuant to an EITI commitment. However, if a contract does not contain such a provision, governments and companies can agree to modify the contract to allow for transparency, including by a standard-form amendment. Confidentiality clauses also include an exception for legally mandated disclosures, allowing governments to require transparency by law.

STEP 2: DEFINING THE SCOPE OF DISCLOSURE

If, pursuant to the considerations addressed above, a MSG decides to implement the disclosures encouraged under Section 3.12, it must then decide *which* licenses and contracts to disclose, and *when* to disclose them.

Q: What kinds of licenses and contracts?

Section 3.12 of the EITI Standard encourages the disclosure of “any contract, concession, production-sharing agreement or other agreement granted by or entered into by, the government which provides the terms attached to the exploitation of oil gas and mineral resources,” as well as “any license, lease, title or permit by which a government confers on a company or individual rights to exploit oil, gas and/or mineral resources.”

The precise terminology used in different EITI implementing countries will vary. Among countries that include substantial portions of these core conditions in contracts, national commitments to disclosure have resulted in the publication of documents using the following terminology:

- Production sharing agreements (e.g., Mauritania – <http://www.petrole.gov.mr/MinesIndustrie/Documents/Contrats/listedescontrats.htm>), Iraqi Kurdistan - <http://www.krg.org/p/p.aspx?l=12&p=1>, Afghanistan – <http://mom.gov.af/en/page/1384>)

- Concession agreements (e.g., Liberia - <http://www.leiti.org.lr/contracts-and-concessions.html>)
- Investment agreements (e.g., Mongolia - <http://www.mmdaproject.org/presentations/MMDA%20Mongolia%20Ivanhoe%20Agrt-1.pdf>)
- Investment promotion and guarantee contracts (e.g., Peru – <http://www.minem.gob.pe/descripcion.php?idSector=1&idTitular=188&idMenu=sub154&idCateg=188>)
- Mineral development agreements (e.g., Liberia - <http://www.leiti.org.lr/contracts-and-concessions.html>)
- Petroleum agreements (e.g., Ghana – http://www.energymin.gov.gh/?page_id=218)
- Service contracts (e.g., Mexico - http://www.cnh.gob.mx/_docs/Contratos/Contratos.pdf)
- Foundation contracts (“Conention de Base”) (e.g., Guinea - <http://www.contratsminiersguinee.org/>)
- Leasing contracts (e.g., Afghanistan - <http://mom.gov.af/en/page/1384>)

Regardless of the precise contract form, these examples exhibit the central feature of the Standard’s definition, which is that the documents to be disclosed are those which establish the core conditions upon which the right to exploit the resource is based.

The exploitation license is a government form which grants the right to a company or group of companies to exploit the resource. In some countries (such as Liberia, which has disclosed mineral licenses at <http://www.leiti.org.lr/contracts-and-concessions.html>), the license is accompanied by a longer contract. In others, such as the United Kingdom (which has disclosed petroleum licenses at <http://tools.decc.gov.uk/en/content/cms/tools/oglicences/oglicences.aspx>), there is no separate contract, and the license provides all of the relevant details attaching to exploitation.

In addition to the original text of contracts and licenses, the Standard encourages the publication of the full text of “any annex, addendum or rider that establishes details relevant to the exploitation rights” and of “any alteration or amendment.”

The EITI Standard does not refer to licenses that only cover exploration. Nor does it refer to the wide array of contracts that fix financing conditions attaching to extractive projects, establish the terms of interaction of shareholders within a joint venture or establish subcontracting details between a state-owned enterprise and service providers, unless those elements are linked to the core conditions of exploitation.

Q: What text to publish?

The Standard encourages implementing countries to publish the documents in their “full text” form. The reason for this is that including the full text and the relevant signatures represents the best path for countries to realize the benefits of disclosure: increased trust among citizens, companies and government; ability to monitor enforcement; strong connections to EITI revenue data; and enhanced incentives to sign contracts in the long-term public interest. As such, the EITI Standard is in line with emerging global best practice. More than 25 countries have begun to publish oil and

mineral contracts and/or licenses in full and industry groups such as the International Council on Mining and Metals have voiced their support for full text disclosure.

Some EITI participants have expressed concerns about the kind of full-text publication encouraged by the EITI Standard, and expressed a view in support of a middle-ground approach whereby the country publishes contracts with key information redacted, or publishes summaries of key terms but not the texts themselves. Some MSGs in countries where opposition to full disclosure remains strong may be well-served to consider such an approach, which certainly provides more transparency than a de facto standard of total contract opacity.

Where a MSG is debating this sort of limited approach to contract transparency, we recommend that it analyze whether there is a legitimate and significant case for business harm arising from the kind of full-text disclosure encouraged by the EITI Standard. Global research has shown that trade secrets and proprietary processes are virtually never contained in the sorts of contracts that are subject to the standard.³ This is why many countries have decided to publish contracts in their entirety.

This is not to suggest that plain-language summaries of key terms cannot be useful as a tool for public understanding of contracts and licenses. The use of summary texts as a supplement to the contract documents is discussed in detail in Step 5, below.

Q: How many contracts to publish? Which ones?

The EITI Standard encourages publication of all contracts and licenses (“any [contract/ license. ...which provides the terms attached” to exploitation). Such an approach—which is put into practice by countries including Liberia, Peru and the United States—promotes consistency, equal treatment and maximum public information on extractive industry management.

In some countries, MSGs may determine that immediate disclosure of all contracts is not feasible and that some sort of staged approach to disclosure may be necessary. In this case, there are several possible principles on which a country could base decisions about what to disclose first:

- *Prioritizing licenses and contracts attached to projects meeting EITI reporting thresholds* can facilitate good linkages between the various components of EITI as well as deep public understanding of the most important revenue-generating projects.
- *Prioritizing “new” contracts or licenses at the time that they enter into force* can serve as an important commitment by a government to be held accountable to its people for its contracting decisions. The tradeoff is that existing, rather than new, contracts in many cases represent the bulk of the revenues and impact on the extractive sector.
- *Prioritizing existing contracts* would counteract the problem mentioned above by emphasizing the known universe of deals. The tradeoff is that it would deemphasize new oil or mining projects, which are sometimes important sources of public concern.
- *Prioritizing either petroleum or mining*, depending on which is the most important sector, or the one with the fewest immediate obstacles to disclosure, could generate significant impacts on accountability while building toward full disclosure.

³ See, e.g., *Contracts Confidential: Ending Secret Deals in the Extractive Industries*, <http://www.revenuewatch.org/publications/contracts-confidential-ending-secret-deals-extractive-industries>.

STEP 3: ASSEMBLING AND VERIFYING DOCUMENTS

Once a MSG has decided on the scope of its contract/license disclosure, it will need to put together the documents and prepare them for disclosure, or work with another entity to do so. In most countries this will be straightforward. With authorization from the proper levels of government, the MSG or the EITI national secretariat can coordinate with the ministry or agency that is the signatory of the contract or issuer of the license, to ensure that the correct and complete documents are collected.

It is important to ensure that the companies that are recipients of the licenses or signatories of the contract are informed of the pending disclosure and have an opportunity to voice any concerns about the authenticity of the documents being disclosed. The EITI process provides an ideal forum in which this process can be carried out, because it provides opportunities for regular communication among all stakeholders. The MSG should ensure that all companies—not just those that are representatives on the MSG itself—are aware of the decisions taken around the scope of disclosure. Further, either the MSG or the EITI Secretariat should share each copy of the contract or license to be disclosed to the relevant company, with a fixed time period before the publication date during which the company has an opportunity to raise any questions about whether it is the final and official version.

STEP 4: DEFINING THE MODES OF PUBLIC ACCESS

Best practice in most countries will involve publishing copies of the contracts online, on a website that is accessible free of charge and without a registration requirement or other technological barriers. Where possible, posting the contracts on the country's EITI website itself can facilitate strong linkages between contract disclosure and other required disclosures. See the following section for a discussion of public education and outreach.

In some countries with low internet penetration, and where there is a high demand for access to the contract/license documents, the MSG may consider also making a limited number of copies available in hard-copy format at the office of the national EITI secretariat or another official entity, ideally free of charge or for a limited printing fee.

STEP 5: MAXIMIZING PUBLIC EDUCATION AND OUTREACH

As with all elements of EITI implementation, the disclosure of contracts and licenses should not represent the end point of a country's efforts. Public communication is critical if a country is to derive the maximum governance benefits from disclosure. Contracts and licenses are frequently subject to widespread misunderstanding, and the combination of disclosure of the documents with an effective commitment to public education opens up tremendous opportunities for greater trust and stronger oversight.

Developing strategies around public communication can be incorporated into a MSG's work plan for contract/license disclosure from the earliest stages. Among the tools that implementing countries can consider are:

Technological/information tools:

- *Plain-language explanations to facilitate broader understanding.* EITI MSGs have an opportunity to promote wider understanding of contract terms by linking the contracts and licenses to plain-language summaries of key terms, which gives

visitors to the site an opportunity to more easily sort through large documents and zero in on and analyze the aspects of the contract that they are particularly interested in. The government of Guinea pioneered this approach via www.contratsminiersguinee.org, which builds on technology developed by the global www.resourcecontracts.org project. The World Bank Institute, Columbia Center on Sustainable Investment (CCSI) and the Natural Resource Governance Institute (NRGI) are available to work with interested MSGs to help develop similar sites tailored to their specifications.

- *Linkages between contract terms and other EITI reporting data.* As noted previously, contract disclosure enhances the utility of other EITI information by providing context that facilitates the analysis and understanding of revenue flows and other data. MSGs should consider how the information in contracts can be displayed alongside other EITI data in order to increase usefulness and comprehensibility. Plain-language summaries can facilitate such linkages.
- *Linkages to registry of licenses.* Section 3.9 of the EITI standard requires that implementing countries maintain a publicly available register or cadaster system that contains timely and comprehensive information on each license holder, the coordinates of the license area, the date of application, award and termination of the license, as well as on the type of commodity being produced. Disclosing the full text of licenses (and associated contracts) as part of such a register or cadaster system could streamline the disclosure process.

Training and outreach:

- *Public forums to discuss contract terms and their implementation.* Disclosure of contracts provides an opportunity to organize public meetings where key constituencies, including community groups, have an opportunity to raise questions to better understand the implications of contract language and how projects are progressing. Such forums provide particular opportunities for company and government officials to share key facts with citizens and build public trust.
- *Trainings.* MSGs and their partners can also organize trainings to help local government officials, journalists, civil society groups or other constituencies better understand the nuances of extractive industry contracts and their impact on extractive industry governance. These events can help dispel common myths about petroleum and mineral contracts and can facilitate more constructive public-private dialogue. Several international firms and organizations are available to help interested MSGs develop such trainings.

For more information on contract/license disclosure in EITI contact:

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