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Contract Disclosure in the Ghanaian Extractive Industries

Contract disclosure is rapidly becoming standard practice in the extractive industries. At least 39 countries now disclose contracts. Since 2013, the EITI Standard has “encouraged” implementing countries to publish contracts. Yet, while Ghana has made significant progress on transparency issues, extractive industry contracts are still not disclosed in a systematic and ongoing way. This brief explores the issue in more detail and suggests recommendations for the path ahead.

WHY DISCLOSE CONTRACTS?

Contracts signed between the government of Ghana and oil, gas and mining companies are crucial documents that citizens within and outside the government need to fully understand the rules by which petroleum and mining projects are governed. Disclosing contracts brings important benefits to all stakeholders.

Stakeholder	Benefits of contract disclosure
Government	<ul style="list-style-type: none">• Supports effective and honest communication about resource projects, helping to build public trust and manage citizen expectations• Ensures officials can view parts of contracts that relevant to their responsibilities, enabling effective enforcement of rules and regulations• Provides a powerful incentive for officials to negotiate strong contracts
Private sector	<ul style="list-style-type: none">• Helps build a “social license to operate,” leading to stronger community relationships that make projects more stable• Sends an important message to investors that the agreed terms are above reproach, improving investor confidence in extractive projects
Citizens	<ul style="list-style-type: none">• Facilitates understanding of the nature of resource projects that have an impact on citizens' lives• Enables monitoring of contract terms to ensure that government and private sector actors uphold their agreements• Reduces the risk that corruption will result in contractual terms that undervalue national assets

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WHAT COMMITMENTS HAS GHANA'S GOVERNMENT MADE?

The government of Ghana increasingly recognizes the importance of contract disclosure and has made several recent commitments to improve open contracting in the extractive industries.

- **2016 U.K. Anti-Corruption Summit.** The government committed to “work toward making government public procurement ‘open by default’—beginning with Open Contracting Data Standards for high value contracts and contracts in the oil, gas and mining sector.”¹
- **2016 New Patriotic Party election manifesto.** Regarding the petroleum sector, the New Patriotic Party (NPP) committed to “a transparent, accountable and efficient management of the country’s petroleum resources for the benefit of all Ghanaians.”² In the mining sector, the NPP committed to “increasing transparency in the allocation of mineral rights and the utilization of mineral revenues at national and community levels.”³
- **2017 “100 Days of Change.”** In a recent document outlining the achievements of President Nana Addo Dankwa Akufo-Addo’s first 100 days in office, the government notes that “a team of experts has been constituted to work with the Petroleum Commission to develop regulations for the transparent allocation of petroleum blocks as provided by Act 919.”⁴
- **2017 Africa Open Data Conference.** The deputy minister of energy in charge of petroleum, Mohammed Amin Adam, announced that by the end of 2017 a publicly available petroleum register will contain the full text of all petroleum agreements, licenses, permits and authorizations.⁵

CURRENT PRACTICE AND LAW

At present Ghana does not systematically disclose oil, gas and mining contracts in a timely manner. The experience to date differs across the petroleum and mining sectors—each has different legal and institutional frameworks.

Sector	Current practice	Current law
Petroleum	Partial disclosure. Following initial disclosure by companies, the government of Ghana officially disclosed several contracts. These contracts were published on the ministry responsible for petroleum’s website, but they are now no longer available on government websites.	Pending regulations. Section 56 of the 2016 Petroleum (Exploration and Production) Act requires a public register of petroleum agreements, permits and authorizations. However, further details about the registry, including whether it will include full-text copies of contracts with annexes and amendments, is pending the development of upcoming petroleum regulations.
Mining	No disclosure.	No legal requirement for contract disclosure (under the 2006 Minerals and Mining Act).

Arguments against contract disclosure in Ghana and responses

1. Contracts contain commercially sensitive information that could cause competitive harm if disclosed. Analysis of contracts reveals that primary contracts do not usually contain information commonly cited as commercially sensitive.⁶ Contracts that are disclosed do not generally contain information that would meaningfully impact a company's competitiveness.

2. Confidentiality clauses in contracts do not permit disclosure. In most cases, confidentiality clauses are not major barriers to disclosure. A 2009 review of oil, gas and mining contracts showed that few confidentiality clauses actually refer to the contracts themselves. Furthermore, in most cases room is made for exceptions when parties to the contract agree to disclose or when legislation requires disclosure.⁷

3. Contract transparency might scare away investors. Currently at least 39 countries have disclosed contracts. Among these countries there is no evidence of investors deciding not to invest because contracts were slated to be public. Furthermore, many companies also disclose contracts in stock exchange filings.

4. Disclosure of contract terms will make it more difficult for governments to negotiate good deals. There is an argument that contract secrecy benefits government negotiators by giving them an information advantage, since companies are unable to see the deals that governments have negotiated with other companies. However, this ignores the fact that most contracts are generally available through expensive paywalled sites.⁸ So while contract secrecy does not prevent financially strong companies from being able to access contracts, it does prevent governments from being able to access contracts signed elsewhere around the world. There is also a powerful argument that contract disclosure actually makes good deals more likely. This is because when government and company negotiators know that the outcome of their work will be public, they draft more carefully to ensure that the terms are able to withstand public and commercial scrutiny.

5. Ghana's parliament approves contracts. Therefore, contracts are already public. While it is true that Ghana's parliament approves contracts, parliamentarians only receive access to summaries of terms rather than the full contracts as part of their review, and contracts are not published in the national gazette.

6. Contracts are too complicated for the public to understand. Extractive industry contracts are complex. However, while the public may not fully understand the complexities of the extractive sector, accountability initiatives such as the Ghana Extractives Industry Transparency Initiative (GHEITI) and Public Interest Accountability Committee (PIAC), and civil society organizations, such as the African Centre for Energy Policy (ACEP), are building public capacity to understand industry contracts. Risks of misunderstanding are minimal, but risks of opacity are great. In the long run, contract disclosure ensures that corruption or mistakes relating to contracts are more likely to be caught and corrected earlier.

WHAT SHOULD BE DISCLOSED?

Large extractive sector projects typically involve dozens of contracts, mostly between private parties. Contract disclosure does not entail disclosing each and every one of these documents. Rather, it refers to full-text disclosure of state-investor agreements made between the government and extractive companies. These documents contain the following rights and obligations that are of interest to the public: (a) company rights to natural resources; (b) fiscal terms, including taxes and royalties; (c) social obligations, including infrastructure and local content requirements; (d) environmental obligations; (e) worker health and safety; and (f) stabilization clauses, which insulate resource projects from some or all changes to legal framework.

Contracts and related documents in Ghana's extractive sector of interest to the public	
<p>Petroleum sector contracts:</p> <ul style="list-style-type: none"> • Petroleum agreements • Commodity sales agreements • Annexes and other related permits, leases and authorizations, including those relating to extensions, changes in ownership, assignment, relinquishments, work obligations and production commitments, coordination of activities and unitization 	<p>Mining sector contracts:</p> <ul style="list-style-type: none"> • Mining leases • Stability agreements • Development agreements • Annexes and other related permits, leases and authorizations, including those relating to extensions, changes in ownership, assignment, relinquishments, work obligations and production commitments, and coordination of activities
<p>Environmental documents for both sectors:</p> <ul style="list-style-type: none"> • Environmental impact assessments • Environmental monitoring plans • Environmental reports • Associated environmental studies • Closure and decommissioning plans <p>Social documents for both sectors:</p> <ul style="list-style-type: none"> • Local content/local employment plans • Local content reports • Community development agreements/Corporate social responsibility plans (if available) 	

RECOMMENDATIONS

The government of Ghana should work with extractive industry companies and civil society groups to make contracting in the oil, gas and mining sectors “open by default,” as per its commitment at the 2016 U.K. Anti-Corruption Summit. For each extractive project, this entails disclosing the complete set of full-text contracts and related documents of interest to the public. The government of Ghana should take the following specific steps:

- 1 Encourage discussion.** The government should work with companies and civil society groups to identify specific user needs and concerns relating to disclosure. This will ensure that disclosures are optimized to benefit all parties. Given their multi-stakeholder set-up, GHEITI and PIAC could be useful forums for this discussion.
- 2 Establish disclosure rules.** The government should establish effective disclosure rules as soon as possible. For the petroleum sector, the petroleum regulations provide a timely opportunity to put disclosure commitments in law. The Freedom of Information Bill, the GHEITI bill and proposals to update the Minerals and Mining Act and develop a Minerals Revenue Management Act present important opportunities that could also target mining sector disclosures.
- 3 Make contracts accessible.** The government should build a disclosure regime that makes contracts and associated documents easy to find, search, browse and use. This should include the publication of electronic copies of contracts online with paper-based options available to increase accessibility for communities lacking Internet access. Best practice would involve the development of a dedicated online “one-stop-shop,” bringing together disclosures with respect to each extractive project made by different government institutions, including sector ministries and the environmental protection agency, and company disclosures. The contract documents themselves should be published in line with open data principles.⁹

- 4 **Support contract use.** The country's efforts should not end with the disclosure of contracts and licenses. For the government, companies and citizens to benefit from contract disclosure, the government of Ghana should support initiatives to encourage the use of contracts. This may involve technological and informational tools such as plain-language explanations of contracts, or training and outreach including participation in public forums to discuss contract terms, and trainings to build the capacity of local government officials, journalists, civil society groups and other stakeholders to better understand the nuances of extractive industry contracts and their impacts on extractive industry governance.

Contract disclosure as an emerging global norm

In recent years, the publication of extractive industry contracts has emerged as a global norm, practiced by governments, oil, gas and mining companies, and the international community. More than 1,500 contracts and other related documents are now in the public domain, according to open online contract repositories, such as ResourceContracts.org and the OpenOil repository,¹⁰ and this number is growing. Contracts are being made public for multiple reasons:

Governments are making it their policy to disclose contracts because they contain rights and obligations that are of interest to the public. Recent research by the Natural Resource Governance Institute (NRGI)¹¹ shows that 39 governments have disclosed at least some extractive industry contracts. Most of these governments have made disclosure a requirement by writing it into national laws, including extractive industry laws, freedom of information laws and, in some cases, even the constitution. Disclosure laws make contract disclosure more likely to occur. They also ensure that disclosure is systematic and standardized, making contracts easier to find, access and use.

Companies are publishing their contracts. Some do so in stock exchange filings, such as Kosmos Energy and Tullow Oil, which published their Jubilee field contracts in Ghana as part of filings made with the United States Securities and Exchange Commission.¹² Others disclose contracts on their own websites as important background information on projects, like Turquoise Hill Resources, which published its investment agreement with the Mongolian government for the Oyu Tolgoi copper deposit.¹³ As companies experience the benefits of disclosure, several are also developing policy statements supporting the publication of contracts. These include Kosmos Energy, Rio Tinto, Tullow Oil and the International Council on Mining and Metals (ICMM)—a global mining industry body comprising several member companies and associations active in Ghana including AngloGold Ashanti, Gold Fields, Newmont Mining and the Ghana Chamber of Mines.¹⁴

International organizations are incorporating contract disclosure principles into their guidance. In 2007, the International Monetary Fund's Guide on Resource Revenue Transparency called for the disclosure of extractive contracts.¹⁵ In 2010, following four years of extensive multi-stakeholder consultations, the U.N.'s special representative for business and human rights, John Ruggie, included the recommendation that contract terms be disclosed among core "Principles for Responsible Contracts."¹⁶ In 2011, the International Bar Association released the Model Mine Development Agreement, which included a provision that "this contract is a public document."¹⁷ Since 2013, the EITI Standard has encouraged contract disclosure.¹⁸

International financing organizations have also taken note. In 2012, the International Finance Corporation (IFC)—the World Bank's private sector lending arm—added a financing requirement that IFC-backed oil, gas and mining projects disclose the "principal contract with government that sets out the key terms and conditions under which a resource will be exploited."¹⁹ In Ghana, this rule will apply to Eni's Sankofa project, which the IFC has agreed to finance.²⁰ The European Bank for Reconstruction and Development established similar requirements for hydrocarbon projects in 2013.²¹

Notes

- 1 Government of Ghana, *Ghana Country Statement* (2016), 1, accessed 27 July 2017, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/522707/Ghana.pdf.
- 2 New Patriotic Party, *Manifesto for Election* (2016), 44, accessed 27 July 2017, <http://newpatrioticparty.org/docs/2016-manifesto-full.pdf>.
- 3 New Patriotic Party, *Manifesto*, 94.
- 4 Government of President Nana Addo Dankwa Akufo-Addo, *100 days of change* (2017), 11, accessed 27 July 2017, http://businessdayghana.com/wp-content/uploads/2017/04/100-days-of-change_JoyFM_final.pdf.
- 5 See <https://resourcegovernance.org/blog/ghanaian-government-commits-full-text-disclosure-all-petroleum-contracts>, accessed 27 July 2017.
- 6 Peter Rosenblum and Susan Maples, *Contracts Confidential: Ending Secret Deals in the Extractive Industries* (Natural Resource Governance Institute, 2009), 36, accessed 14 July 2017, <https://resourcegovernance.org/sites/default/files/RWI-Contracts-Confidential.pdf>.
- 7 Rosenblum and Maples, *Contracts Confidential*, 29.
- 8 For an example of a pay-for-access international reference library for oil, gas, and mineral laws and contracts, see <https://www.barrowscompany.com>.
- 9 For a list of open data principles, see <https://sunlightfoundation.com/policy/documents/ten-open-data-principles>, accessed 27 July 2017.
- 10 For Resource Contracts, see www.resourcecontracts.org; for the OpenOil repository, see http://repository.openoil.net/wiki/Main_Page (both accessed 27 July 2017).
- 11 Don Hubert and Robert Pitman, *Past the Tipping Point? Contract Disclosure within EITI* (Natural Resource Governance Institute, 2017), 2 and 27, accessed 9 July 2017, <https://resourcegovernance.org/sites/default/files/documents/past-the-tipping-point-contract-disclosure-within-eiti-web.pdf>.
- 12 For an example of a contract released by Kosmos Energy as part of a stock exchange filing, see https://www.sec.gov/Archives/edgar/data/1509991/000104746911001716/a2201620zex-10_2.htm, accessed 27 July 2017.
- 13 Mongolia – Ivanhoe Mines Mongolia Inc. LLC, Ivanhoe Mines Ltd., Rio Tinto International Holdings Ltd., Oyu Tolgoi Deposit-6708A-6710A, Investment Promotion Agreement (2009), Article 15.21, accessed 14 July 2017, <http://www.turquoisehill.com/s/investagree.asp>.
- 14 For Kosmos Energy, see <http://www.kosmosenergy.com/responsibility/transparency.php>; for Tullow Oil, see <http://www.tulloil.com/sustainability/shared-prosperity/transparency>; for Rio Tinto, see http://www.riotinto.com/documents/RT_taxes_paid_in_2014.pdf, p. 6; and for ICMM, see <https://www.icmm.com/en-gb/society-and-the-economy/governance-and-transparency/contract-transparency> (all accessed 14 July 2017).
- 15 International Monetary Fund, *Guide on Resource Revenue Transparency* (2007), 17, accessed 9 July 2017, <https://www.imf.org/external/np/pp/2007/eng/051507g.pdf>. See also the latest draft of the Natural Resource Fiscal Transparency Code (Natural Resource FTC), accessed 1 August 2017, <http://www.imf.org/external/np/exr/consult/2016/ftc/pdf/050916.pdf>.
- 16 United Nations Human Rights Office of the High Commissioner, *Principles for responsible contracts* (United Nations, 2015), 32, accessed 9 July 2017, http://www.ohchr.org/Documents/Publications/Principles_ResponsibleContracts_HR_PUB_15_1_EN.pdf.
- 17 International Bar Association, *Model Mine Development Agreement* (2011), 130, accessed 9 July 2017, http://www.mmdaproject.org/presentations/MMDA1_0_110404Bookletv3.pdf.
- 18 Extractive Industries Transparency Initiative, *The EITI Standard* (2016), 20, accessed 9 July 2017, https://eiti.org/sites/default/files/migrated_files/english_eiti_standard_0.pdf.¹⁹ International Finance Corporation, *Policy on Environmental and Social Sustainability* (2012), 11–12, accessed 9 July 2017, http://www.ifc.org/wps/wcm/connect/7540778049a792dcb87efaa8c6a8312a/SP_English_2012.pdf?MOD=AJPERES.
- 20 See <http://ifcextapps.ifc.org/IFCExt/pressroom/IFCPressRoom.nsf/0/0A27DB6985F2AE6F8525808A00522061>, accessed 27 July 2017.
- 21 European Bank for Reconstruction and Development, *Energy Sector Strategy* (2013), 60, accessed 9 July 2017, <http://www.ebrd.com/what-we-do/sectors-and-topics/ebrd-energy-strategy-transparency.html>.