

# CONTRACTS CONFIDENTIAL:

Ending Secret Deals in the Extractive Industries





# **CONTRACTS CONFIDENTIAL: Ending Secret Deals in the Extractive Industries**

By

**Peter Rosenblum & Susan Maples**

Copyright © 2009 by Revenue Watch Institute. All rights reserved.

ISBN: 978-0-9823566-1-6

Library of Congress Cataloging-in-Publication Data  
A CIP catalog record for this book is available upon request.

Published by the Revenue Watch Institute  
1700 Broadway, 17th Floor  
New York, NY 10019 USA  
Tel: +1 646 929 9750  
[www.revenuewatch.org](http://www.revenuewatch.org)

Design and layout by Judit Kovács | Createch Ltd.  
Printed in Hungary

Cover photo by Kevin Cruff | Getty Images



# Contents

The Authors .....	5
Acknowledgments .....	7
List of Acronyms .....	9
Executive Summary .....	11
<b>Chapter One</b>	
Why Contract Transparency? .....	15
<b>Chapter Two</b>	
What Confidentiality Clauses in Extractive Industry Contracts Actually Say .....	23
<b>Chapter Three</b>	
Commercially Sensitive Information and the Public Interest .....	33
<b>Chapter Four</b>	
Policy Arguments and Counter Claims .....	41
<b>Chapter Five</b>	
International Policy and Practice on Contract Transparency .....	47
Conclusions and Recommendations .....	57
Appendix A: “Best Practice” Confidentiality Clauses .....	63
Appendix B: Global Survey of Confidentiality Clauses .....	65
Appendix C: Countries with FOI Laws .....	87
Endnotes .....	89
Index .....	101



## **The Revenue Watch Institute**

The Revenue Watch Institute ([www.revenuewatch.org](http://www.revenuewatch.org)) is a non-profit policy institute and grant-making organization that promotes the responsible management of oil, gas and mineral resources for the public good. With effective revenue management, citizen engagement and real government accountability, natural resource wealth can drive development and national growth. RWI provides the expertise, funding and technical assistance to help countries realize these benefits.

## **Human Rights Institute—Columbia Law School**

Founded in 1998, the Human Rights Institute serves as the focal point of international human rights education, scholarship and practice at Columbia Law School. The Institute fosters the development of a rich and comprehensive human rights curriculum and builds bridges between theory and practice, between law and other disciplines, between constitutional rights and international human rights, and between Columbia Law School and the worldwide human rights movement.



# The Authors

## Peter Rosenblum

Peter Rosenblum is the Lief, Cabraser, Heimann & Bernstein Clinical Professor in Human Rights Law at Columbia Law School and Faculty Co-Director of the Human Rights Institute. Much of Rosenblum's current work focuses on the intersection of human rights with trade and investment regimes. He has served as a human rights officer with the Geneva-based precursor to the Office of the UN High Commissioner for Human Rights, a program director of the International Human Rights Law Group and a researcher for Human Rights Watch and the Lawyers' Committee for Human Rights. Prior to joining Columbia, Rosenblum was Associate Director of the Human Rights Program at Harvard Law School. He holds an A.B. (Columbia), LL.M. (Columbia Law School), J.D. (Northwestern), and D.E.A. (University of Paris).

## Susan Maples

Susan Maples is a Post-Doctoral Research Fellow at Columbia Law School's Human Rights Institute and Legal Fellow at The Revenue Watch Institute. Her research consists primarily of comparative analysis of extractive industry contracts and legal regimes from a human rights-based perspective. Working with Columbia's Earth Institute and the European Commission, Susan assisted the government of Liberia in its contract review and renegotiations. More recently, she was a member of The Carter Center's team providing independent analysis and technical assistance to the Democratic Republic of Congo's Ministry of Mines as it conducted a review and renegotiation of its mining contracts. Maples has conducted field research, training and project work in Azerbaijan, Cameroon, the Democratic Republic of Congo, Georgia, Ghana, Liberia, Nigeria, Peru and South Africa. She received a B.A. in Philosophy from the University of Georgia and a J.D. from Columbia Law School.







# Acknowledgments

It is hard to talk about secrets. Neither governments nor investors like to give much detail when asked to describe the kind of information that is kept secret and the reasons why. Yet that question is critical to understanding the barriers to contract transparency in the extractive industries.

Thus, we reached out to engineers, lawyers, bankers, government officials and industry analysts—anyone who might have knowledge about commercial dynamics and secrets in the extractive industries. Many people did speak with us, though most often off the record. These discussions, both formal and informal, were invaluable in gaining insight into the subject. Some interviewees even shared their thoughts on the much more difficult and critical question: What is the difference between the information that governments and companies *want* to keep confidential versus the information that *needs* to be confidential? Their frankness was crucial to answering our research question, and we cannot overstate our gratitude. Perhaps these same sources will lead the way in future, open discussions about contract transparency in the extractive industries.

In addition to those who offered up their expertise in the industry, there are many who supported and participated in our research along the way. Numerous students at Columbia provided invaluable assistance. Members of the Publish What You Pay coalition always answered the call when contacts, advice, information and editorial assistance were needed. In particular, members of Global Witness, Oxfam America, Bank Information Center and Pacific Environment were critical partners in researching and drafting this report. Civil society organizations generously offered their time and insights as well; these include: Green Alternative/Bankwatch; Public Finance Monitoring Center; FAR Center; Assistance to Economic Initiatives; Georgia Young Lawyer's Association; *Grupo Propuesta Ciudadana*; *Asociación Pro Derechos Humanos (APRODEH)*; *Derechos, Ambiente y Recursos Naturales (DAR)*; *Cooperacion*; Center for Development Studies and Promotion (DESCO); Sustainable Development Institute; Green Advocates; Legal Resources Centre; Platform; and the Institute for Security Studies.

We owe an enormous debt to Andrea Shemberg, Legal Analyst for the UN Special Representative on Business and Human Rights, who charted new territory in writing about contract language. This report has benefited enormously from her guidance. Heike Mainhardt-Gibbs of the Bank Information Center has also done outstanding work on contract transparency; in this report, we seek to build and expand on her work. We also extend special thanks to Aisha Weaver; her outstanding research assistance and editorial expertise were critical to the publication of this report.



This report would not have been possible without access to the Barrows Company collection and the efforts of the librarians at The Arthur W. Diamond Law Library at Columbia Law School who facilitated access to this collection, as well as Gordon Barrows, who provided access to the online collection.

Finally, The Revenue Watch Institute management, staff, regional coordinators and board have all gone far beyond the call of duty. While it is tempting to forego professional convention and gush about the incredible individuals and contributions of RWI, we will use restraint and simply say that this report would not have been possible without your support and guidance. And, of course, any mistakes and errors are the authors' alone.



# List of Acronyms

BLM	Bureau of Land Management
BP	British Petroleum
BTC	Baku-Tblisi-Ceyhan
DRC	Democratic Republic of Congo
EBRD	European Bank for Reconstruction and Development
ECAs	Export Credit Agencies
EITI	Extractive Industries Transparency Initiative
EITD	Extractive Industries Transparency Disclosure Act
EU	European Union
FDI	foreign direct investment
FOI	freedom of information
FOIA	Freedom of Information Act
GEMAP	Governance and Economic Management Assistance Program
HGA	host government agreement
IBRD	International Bank for Reconstruction and Development
ICMM	International Council on Mining and Metals
IDA	International Development Association
IFC	International Finance Corporation
IFIs	international financial institutions
IGA	intergovernmental agreement
IMF	International Monetary Fund
JV	joint venture
KFL	Kinross-Forrest Limited
LOTAIP	Organic Law on Transparency and Access to Public Information
MDA	mineral development agreement
MIGA	Multilateral Investment Guarantee Agency
NGOs	non-governmental organizations
PSA	production sharing agreement
PSC	production sharing contract
PWYP	Publish What You Pay
RAID	Rights and Accountability in Development
RWI	The Revenue Watch Institute
SDI	The Sustainable Development Institute
SEC	Securities and Exchange Commission
SLAPP	strategic lawsuit against public participation

SOCAR	State Oil Company of the Azerbaijani Republic
SOFAZ	State Oil Fund of Azerbaijan
TFM	Tenke Fungurume Mining SARL
UN	United Nations
US	United States
WBG	World Bank Group



# Executive Summary

The laws of contract and international commercial relations generally suppose two corporate entities doing business with each other, both seeking profits and answering to shareholders. This makes sense, unless one of the parties is not a corporate entity, but rather a government, answerable to citizens. Even as they conduct business, governments have duties, obligations and interests that go well beyond pure profit maximization. As such, the same secrecy afforded to contracting parties in commercial law is out of place in such contracts. Governments must be held accountable for all contracts they enter, be they for the provision of roads or the purchase of goods. And when the contracts concern non-renewable resources, the need for scrutiny is even more pressing.

In this light, the growing interest in mining, oil and gas contracts on the part of concerned citizens around the world makes a great deal of sense. There are increasing calls for transparency in state-investor contracts in many sectors, though none are so acute and urgent as the appeals in regard to non-renewable resource wealth. Given the history of government corruption and mismanagement of extractives, along with the environmental degradation, community displacement, violent conflict, and human rights abuses, it is no wonder that the calls for better government management of and more corporate responsibility in the extractive industries have never been louder.

One of the primary goals of this report is to promote a serious conversation among industry, governments (host and home), investors, banks and civil society organizations about disclosure and confidentiality in extractive industry contracts. The report articulates the points of resistance to contract disclosure by governments and companies, analyzes their validity from a law and policy perspective, and comes to conclusions about whether contracts can be made public legally. We seek to identify what information may legitimately and reasonably be kept confidential, and how the issue can be addressed more effectively by civil society institutions. We have relied on interviews with experts and analysts, as well as extensive documentary research and personal experience, but do not claim to base our results on statistically significant samples.

But most importantly, this report argues that contract transparency is critical to addressing better resource management and bringing contract stability to an industry that sees its contracts renegotiated more than any other.<sup>1</sup> Over the long term, governments will be able to negotiate better deals, as the information asymmetry between governments and companies closes. In the shorter term, contract transparency will help government agencies responsible for managing and enforcing contracts, of which there are many, work in tandem. With contracts publicly available, government officials will have a strong incentive to stop negotiating bad deals, due to corruption, incompetence, or otherwise.

Citizens will better understand the complex nature of extractive agreements if they are out in the open and explained by the contract parties. States and companies may not be hiding anything of great import, but so long as contract disclosure is scattered and leaked materials suggest hidden horrors, that perception will persist—providing easy fodder for demagogues and politicians to make calls for expropriation and renegotiation in cases where it is not merited. Contract transparency will result in more stable and durable contracts, both because they are less subject to the population’s suspicions and because the incentives for governments and companies to negotiate better contracts will be increased. In short, contract transparency is a necessary element of any effort to promote the responsible management of natural resources for growth and economic development.

Despite the many benefits that contract transparency offers, there continues to be resistance to providing systematic access to extractive industry contracts. Some of this may be due to a misunderstanding—or a mischaracterization—of what contracts are and what they contain.

Contracts are necessary to give precise detail and legal specificity to the obligations of a state and the company or consortium of companies involved in an extractive project. The details may be as simple as a few lines added to a model agreement or as complicated as a new set of laws on investment, tax and the environment. The importance of vetting the details of each agreement varies accordingly. For example, national law may dictate most of the terms of an agreement and restrict derogations, while a published “model contract” may do even more. On the other hand, a contract might—and, from what we have learned thus far, *many* in this sector *do*—establish important tax, environment and investment provisions with major implications for the state. No one would challenge the need for treaties, laws and regulations in this sector to be public; but where contracts fulfill the same function, openness is not the rule.

In fact, secrecy in the extractive industries is so commonplace that until recently, neither states nor companies have felt compelled to develop sophisticated arguments to defend it. States and companies blame each other for the blanket secrecy that covers agreements; specific claims about trade secrets or commercially sensitive information are not typically supported in fact; and none of the major actors openly discusses issues of corruption, power dynamics or raw incompetence, all of which the disclosure of contracts has been known to expose.

The most common arguments in support of secrecy are rooted in commercial practice, where parties to contracts routinely set the terms of disclosure within the bounds of the law. These are not negligible arguments, but they overlook the special obligations of governments and the democratic right to information. In a survey of more than 150 confidentiality clauses in oil and mining contracts worldwide conducted for this report, only one recognizes that the public interest in information should outweigh the company’s interest in confidentiality. Denmark’s Model License of 2005 for Exploration & Production of Hydrocarbons states:

**[Information can be disclosed if]** no legitimate interest of the Licensee requires the information to be kept confidential; **essential public interests outweigh Licensee’s interest in maintaining confidentiality**; information of a general nature is furnished in connection with issuance of public statements [...]”<sup>2</sup>

Instead, confidentiality clauses, a common and legitimate feature in contracts between private parties, are being used to prevent information from coming into the hands of public groups; while in practice, contract secrecy among private entities is relative. Within the industry, supposedly confidential contracts are bought and sold, analyzed, and even ranked. Some contracts, or essential details of their terms, are disclosed to investors pursuant to securities regulations. 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 information asymmetry, with companies having much more access to contracts than governments do, may be one reason why companies have not raced to embrace contract transparency. When a company has such an advantage over a counterparty, it will logically seek to keep it in order to negotiate a more favorable deal.

As discussed in Chapter Two, even in their current form, the confidentiality clauses most commonly used in the industry do not fully prevent most forms of disclosure, despite the contrary claims of some companies and states. Yet state and private actors continue to insist on interpretations that allow the clauses to serve that purpose, a stance that is at odds with strongly held values of democratic accountability. It is in stark contrast to the international jurisprudence on the right to information, which increasingly supports the disclosure of agreements, as well as domestic freedom of information laws in countries across the world, which begin with the presumption that government documents should be public. These two trends in international and domestic law offer important tools of argument and procedure in breaking the barrier to disclosure while balancing other legitimate interests.

The most legitimate arguments for secrecy insist on the need for protection of commercially sensitive information for an investor and the prevention of a “race to the bottom” by governments. Companies should not be required to release certain sensitive information that will undermine their competitiveness; states should not be pressured to match less attractive deals. But even the strongest of these arguments do not support the current levels of secrecy. In fact, they may not apply to contract disclosure in any significant way: as discussed in Chapter Three, some commercially sensitive information is not deserving of protection—since much of it is already subject to disclosure under other laws, including laws for publicly listed corporations—and little is actually disclosed in the agreements themselves.

For countries, it may be embarrassing to disclose a “bad deal,” but it is not destructive in the long term. A number of recent disclosures appear to have had only neutral or positive effects.<sup>3</sup> Moreover, the existence of contract databases, sporadic publication of contracts and *ad hoc* leaks and disclosures do not appear to have created any lasting harm for companies or host states. The current international policy and practice on contract transparency is described in more detail in Chapter Five.

In light of these counterarguments, state and private actors have not offered any valid reasons as to why they continue to resist contract transparency. Corruption may be the cause; but it is just as likely that disclosure will expose gaps in competence, embarrassing oversights, or awkward compromises. Governments and companies may fear that disclosure will lead to second-guessing and calls for renegotiation. Given the broad impact of the agreements, there are likely to be constituents who will be disgruntled about some terms of an agreement, particularly in the case of the state party. In this context, it is not surprising that companies and states would seek to avoid disclosures that

would contribute to more controversy. Chapter Four discusses these various policy arguments against contract transparency and why they are misguided.

In the current context, resisting disclosure may actually exacerbate controversy. 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. The arguments for contract transparency are substantial, and the counterarguments look weak under scrutiny.



# Why Contract Transparency?

There is a growing movement for contract transparency, supported by an increasing number and diversity of organizations and institutions. Civil society organizations such as RWI and the Publish What You Pay campaign are among those calling for further openness. Among international financial institutions, the World Bank, the IMF and the IFC are beginning to encourage contract transparency; the strongest of these proponents is the IMF, which has endorsed contract transparency as key to the good governance of extractives.<sup>4</sup> Governments in a number of countries require oil, gas or mining contracts to be voted on publicly by the parliament, while other countries without such parliamentary requirements—including East Timor, Peru and Ecuador—have nonetheless made contracts publicly available in one or more of their extractive sectors. A few countries explicitly support contract transparency as a fundamental principle in managing their extractive sector; examples include Liberia, in its EITI bill, and Ghana, in its nascent but rapidly developing oil sector. While not an exhaustive list, the following are some of the recurrent arguments for contract transparency.

**Contract transparency is essential for the responsible management of natural resources and the potential for growth and economic development that those resources can provide.** Governments, citizens, and investors all have much to gain from contract transparency. Governments will be able to negotiate better contracts if they have access to contracts other than their own, as industry certainly does. Coordination among government agencies in enforcing and managing the contracts will be made easier. Citizens' suspicions of the hidden horrors will decrease, creating a more stable contract that is less likely to be subject to calls for renegotiation and better relationships with communities.

**Citizens have a *right* to know how their government is *selling their resources*.**<sup>5</sup> In most countries around the world, sub-soil resources such as minerals, oil, and gas are the property of the nation, not the individual property owner of the surface rights.<sup>6</sup> Citizen ownership is not such a simple proposition when it comes to particulars, however; in countries with mineral and hydrocarbon resources, the ways in which the region, community and nation divide the benefits of these resources can be highly controversial. Accordingly, contracts involving oil, gas and mineral resources may cover a range of information to which citizens should rightly have access, as the owners of such resources. The “value” of a contract cannot be captured in a single number; contracts typically contain information about fiscal terms and the allocation of risk that are essential to understanding the benefits and risks—the real value—of the deal. Beyond the fiscal aspects that are necessarily involved, contracts may also contain provisions covering many other areas that directly affect citizens, including (but not limited to) environmental mitigation and protection measures, sections on land use and rights, and provisions dealing with the displacement of local communities and their rights.

**It is *undemocratic* for these contracts to be kept secret.** Contracts are essentially the law of a public resource project, and a basic tenet of the rule of law is that laws shall be publicly available. The size and scope of many extractive projects is so large that they directly affect the lives, livelihoods and living conditions of a large population for decades. The contracts governing these projects may constitute the most significant rules affecting the surrounding populations. Where contracts create their own law—because they modify existing laws, freeze the application of those laws, or elaborate on outdated or incomplete laws—it is all the more important to disclose their contents for democratic accountability.

**In the legal framework that regulates the extractive industries, contracts are an essential missing piece.** Contracts are one piece in understanding the “value chain” of multiple, interconnected points for natural resource development. At each point in the chain—from the decision to exploit the resources to the exploration and exploitation, revenue collection, and eventual state expenditure of the revenues—there are critical opportunities to improve or undermine the value for the population. Contract transparency will not be the panacea for improving the use of resources for broad-based growth and development. But without access to contracts, a full picture of the value chain is impossible, and meaningful citizen participation in the process is undermined. Transparency is particularly critical for the effective enforcement of contracts, most crucially for potential social and environmental violations, where the citizens are best placed to monitor compliance.

**Without contract transparency, fears of the worst flourish, and mistrust and conflict are magnified among stakeholders.** Following several high-profile reports on contracts, national debates in a number of countries, and campaigns by international organizations like Oxfam, Amnesty International and Global Witness, citizens and local civil society organizations are increasingly aware of the critical role of contracts and some of their worst excesses. Amnesty International’s reports on the Baku-Tblisi-Ceyhan (BTC) and Chad-Cameroon pipeline contracts, and various civil society reports on the Mittal Steel contract in Liberia, played an important role in raising international awareness.<sup>7</sup> National campaigns in Liberia and the Democratic Republic of Congo brought attention to the problems of contracts concluded without transparency during protracted war and hesitant transitions. In the face of mounting calls for transparency, those who fail to disclose, or to provide a plausible explanation for nondisclosure, are seen to have something to hide.

**Contract transparency will help governments get a better deal for their resources, provide an incentive for governments and companies to make more durable deals, and deter corruption.** Extractives are imperfect markets where governments are often at a disadvantage when negotiating with companies. The asymmetry of information can lead to sub-optimal deals, even if the government is negotiating in the interest of its citizens. Contract transparency is one important factor in creating a level playing field between companies and governments.

But governments may not behave in their citizens’ best interests, not necessarily for nefarious reasons, but because of the “principal-agent” problem. When citizens have more information about government policy and actions, the government has a greater incentive to respond to the citizens’ interests, thus reducing the principal-agent problem. Public access to contracts and greater contract literacy will provide governments with an incentive to satisfy as many constituencies as possible; this will in turn lead to more durable contracts and lessen the need for renegotiation over time.

Finally, the systematic publication of contracts will deter special provisions in contracts that are the product of corruption. This is especially true when countries have model contracts with few variables. Significant deviations in contracts, while not conclusive evidence of corruption, may indicate that special favors were negotiated.

**Effective government management of the industry will be enhanced by contract transparency.** Conflict over natural resource issues can extend to branches or agencies of the government—such as legislatures or taxing authorities—that are bypassed when natural resource contracts are treated as the exclusive preserve of one agency, as they sometimes are. Transparency would enhance coordination within government and enable its various branches and agencies to fulfill their respective legislative and regulatory obligations to ensure accountability.

**Why not?** While some countries publish contracts systematically, contract transparency is not the norm.<sup>8</sup> Most of the counterarguments made by industry and states are relatively undeveloped, and will be discussed further in the following chapters. As previously noted, these include:

- The need to protect commercially sensitive information;
- A fear of having to match concessionary deals, or competing in a “race to the bottom;” and
- The desire to avoid antagonizing constituents and exposing incompetence or corruption.

While these factors may have contributed to secrecy in the sector, the most significant reasons for the current practice may lie elsewhere. One of the strongest explanations may be that *no one asked*. Confidentiality is a deeply ingrained industry practice, and one that hardly harms companies, as they have far greater access to contracts than their government counterparts. No one wants to take the risk of diverging from the practice without a strong incentive; in fact, for most of recent history, none was provided. From the period of nationalizations and corruption scandals that ended in the 1970s until the post-Cold-War boom in oil and natural resource prices in the 1990s, there was little systematic pressure on companies or countries to disclose contracts. Even as more attention turned to the social, environmental and human rights impacts of extractive projects, contract transparency was not a focus issue.

Activism around the Chad-Cameroon pipeline project illustrates the evolution in citizen interest in contracts. In 1998, World Bank financing was sought for the Chad-Cameroon pipeline. Local and international advocacy groups rose to stop or alter the project to ensure that the benefits would not simply reinforce a corrupt dictatorship. The controversial upstream and pipeline projects resulted in myriad mechanisms intended to prevent such an outcome, including unprecedented revenue transparency and restrictions on expenditures with both national and international oversight. But while the pipeline contracts, funded directly by the World Bank, were made public, the upstream exploration and exploitation agreement—completed a decade earlier with a private consortium—was not. Nor was the latter agreement high on the advocacy agenda, which was almost exclusively focused on the World Bank and the government of Chad.

The transparency in Chad did eventually contribute to calls for the disclosure of state-investor contracts. Perhaps most notably, activists called for the disclosure of the BTC pipeline contracts when financing from the IFIs was sought for that project.<sup>9</sup> In 2003, Amnesty International published its analysis of parts of the pipeline contract, *Human Rights on the Line*, the first time contracts were the central focus

of a human rights report. Amnesty International criticized the contract, primarily for insulating the project from domestic law and indemnifying the companies for any changes that might occur. As Amnesty reported on the effect on human rights legislation in Turkey:

The agreements place a substantial price on signing up fully to international standards. Turkey may well find itself having to enter reservations exempting the pipeline from each new international undertaking it makes—so pushing those affected by the project more deeply into second-class status. Alternatively, it may decide to push ahead and apply the new standards, in which case it could face a claim for heavy damages from the consortium. This prospect will have a chilling effect on Turkey’s willingness to meet its human rights obligations.<sup>10</sup>

With this report, the importance of contracts, and stabilization clauses in particular, became clearer to activists. For some, more shocking than any individual contract provision was the fact that secret contracts could subvert national law. Contract transparency became an urgent issue.

Advocates then began to pursue the upstream Chad-Cameroon exploitation contract. Representatives of Exxon-Mobil refused to disclose the contract, though they never actually claimed that it was confidential. Technically, it was not, since Chad—like a number of countries discussed in this report—requires its parliament to ratify contracts. Although no record existed, the parliament had apparently voted on the contract in 1988. Eventually, Chadian civil society organizations obtained the contract; the version distributed around the world bears the name stamp of one of the leading activists working on oil issues in Chad, Gilbert Maoundanodji.

This example illustrates two important findings of this report: while there may be very few countries with laws requiring the systematic disclosure of contracts, other laws, albeit parliamentary, may indirectly require contracts to be public; whether these laws are followed is another matter.<sup>11</sup> Further, contracts do find their way into the hands of industry insiders, government officials and tenacious activists.

## A. Which Contracts?

This report is concerned with the contracts between governments and companies, often referred to as state-investor agreements or Host Government Agreements (HGAs). Large investment projects are built upon a series of contracts, and require many more during implementation.<sup>12</sup> Some experts estimate that a typical large international project has “forty or more contracts uniting fifteen parties in a vertical chain from input supplier to output purchaser.”<sup>13</sup> Resource extraction projects are no exception: one expert interviewed estimated that a typical oil project could have around 100 contracts supporting and flowing from the project. Most of these contracts are between private parties, such as contractors and sub-contractors, private banks, and individual financiers.

Among these contracts, there is one “primary” contract between the state (or state-owned company) and the company (or consortium of companies) that is superior to the other contracts. However, there does not appear to be a standard industry term for this concept. As used in this report, the “primary contract” is the contract concerned with exploration or exploitation of the resource. There

are some differences among commentators as to the categorization of extractive industry contracts; however these distinctions are generally considered to be a matter of political rhetoric, not salient legal difference, in most cases. Accordingly, primary contracts generally take one of four basic forms, or some combination of these forms: concession agreements, license agreements, production sharing agreements and service agreements. Additionally, if a government holds an equity stake in a project, then the shareholders' agreement between the government and the company would also be a kind of "primary contract."

Under these broader headings are various other types of contracts with many different names, such as exploration and exploitation agreements, development agreements, bids, licenses and leases. Primary contracts can also vary in complexity and length, ranging from an eight-page license agreement for exploration that is identical from company to company, with the only variable being the company's name, to a model contract with one fiscal term as a variable, such as the royalty rate, to 200-page mineral development agreements in which all terms are negotiable. While there are other contracts for financing, operating and managing an extractive project, the primary contract addresses (or at least should address) the broad issues within these other contracts, to the extent that it is not already established in law. Where the laws and regulations set out most of the rights, duties and obligations of extractive companies, the contract serves mostly to grant a particular company, or group of companies, legal title to a particular area of land. For purposes of this report, the term "contract" includes licenses, leases and agreements.

## B. Information in "Primary Contracts"

Discussions with various stakeholders (government, civil society and industry) indicate confusion about the breadth of information that is typically in the primary contract between the state or state-owned company and the extractive company. This confusion could be a barrier to contract transparency, as individuals may believe that certain information is in these contracts when in fact it is typically not.

All primary contracts tend to have a similar form and include the following information. How much detail is included in the contract is generally a result of how much is already established by law.

### (a) *Recitals/Preamble*

The beginning of the contract typically describes the parties involved, the effective date, and the general purpose of the contract. It summarizes, generally in slightly less legalistic language, the main reasons for entering into the contract.

### (b) *Definitions*

Early in the contract, there will be a section defining the key terms used in the contract.

### (c) *Grant of formal legal title*

Formal legal title is granted from the state to the company.

(d) *Oversight*

Contracts may include provisions on how decisions regarding operations will be made by the government and the company. These provisions may set up a technical committee, advisory committee or other body empowered to make such decisions, and may provide information about how this body will operate (voting rights, quorum, etc.), what decisions are under its jurisdiction, when it will meet, and other details concerning its powers and responsibilities and how they will be fulfilled.

If the state has equity participation in the project, a contract may specify the structure and level of financing of the participation, resource allocation (i.e., how much of the commodity the state will receive in-kind pursuant to its share in the project), operational control, and provisions on how decisions will be made, much as described in the above paragraph (voting rights, allocation of seats on the board, minority shareholder protections, etc.).

(e) *Rights, Duties, and Obligations*

This section may contain provisions on:

- *Obligations*: work obligations or expenditure requirements; infrastructure, local and foreign employment requirements; training, health and safety standards; reporting and accounting standards; environmental standards and harm mitigation measures; how and when public and private land can be acquired; compensation to local communities; and community development obligations.
- *Fiscal Provisions*: license and area fees; taxes; royalties; signing bonuses; exemptions from taxes and levies; and definitions of the nature and calculation methods of taxes, royalties and other payments.
- *Fiscal Considerations*: foreign exchange arrangements; dividend and capital repatriation; provisions for debt repayment and debt-to-equity ratios; revenue distribution requirements; and criteria to regulate intercompany transactions.<sup>14</sup>

(f) *Confidentiality*

Near the end of the contract, there will usually be a confidentiality clause that lays out which information is confidential and for how long, and describes various exceptions to the confidentiality obligation.

(g) *Termination*

Also near the end of a contract will be provisions laying out the term of the contract as well as the triggers for termination prior to the contract's stated end. These provisions describe when a breach is forgivable (e.g., *force majeure*) and whether and how a breaching party may have the opportunity to cure the breach prior to termination. Renewal provisions are generally found near the end of a contract as well.

(h) *Dispute Resolution*

Often adjacent to or combined with the termination clauses, these clauses deal with the consequences of a dispute between the parties. Extractive contracts commonly require resolution through arbitration. Remedies for a breach may be detailed. Frequently associated with dispute resolution provisions is a "choice of law" clause.

*(i) Assignment*

These clauses deal with the possibility that a company may decide to transfer title to the land, how a transfer of title would occur, and what the government's rights are in that situation. Transfer of stock in the corporation may also be addressed.

### C. Information Not in Primary Contracts

While impossible to cover all concerns, the information that is *not* provided in primary contracts, but to which citizens may seek access, generally falls into these categories:

- environmental mitigation costs;
- assumptions used for assessing commercial terms;
- quality and quantity of the reserve;
- operational data;
- cost information;
- manufacturing processes;
- pending litigation;
- identity of shareholders;
- revenue and cash flow data;
- capital expenditures and operating expenditures; and
- employee information.

As stated above, this report focuses on the primary contract and the information within it. But information that will generally come after contract signing, such as revenue payments and geologic information, is referred to as well, particularly in the next chapter on confidentiality clauses. It is important to distinguish between these two categories of information: (1) that which is contained in the contract and (2) that which flows from it. Generally only the latter is covered by the confidentiality clause in the contract, although both may be explicitly covered.





# What Confidentiality Clauses in Extractive Industry Contracts Actually Say

Companies and governments have consistently argued that confidentiality clauses keep them from disclosing information, particularly contracts. This argument is circular, of course, because the companies and governments put the clauses into the agreements themselves. However, in most cases, confidentiality clauses are not the major barriers to disclosure that parties claim. Parties can generally disclose by consent or unilaterally, pursuant to law. As it turns out, there is considerable margin for action if and when contract parties decide to make disclosures.

An important starting point is the confidentiality clause itself. Parties to a contract can choose to keep almost anything confidential. Freedom of contract permits them to keep even mundane information secret. The survey of more than 150 oil and mining contracts between companies and countries or state-owned companies conducted for this report shows that governments and companies are doing just that: using confidentiality clauses to cover a broad range of information, most of which need not remain confidential. Despite their broad reach, there are many exceptions in confidentiality clauses that allow the disclosure of information, including the contracts themselves, in many situations.

## A. Confidentiality Clauses in Extractive Contracts

One of the most important conclusions of the survey of confidentiality clauses is that they are largely generic. Such clauses look very similar across all potential variations: country, contract type (e.g., production sharing agreements, mining conventions, leases), time of contract signing, etc. A sample of the clauses surveyed is available as Appendix B.

Generic contract clauses take a standard form and are put into contracts with little or no individual adaptation. While their language may not be identical, the same elements appear in nearly the same form in all of the contracts surveyed. A typical example, from the renegotiated Liberia-Mittal Steel Mineral Development Agreement (MDA) of 2006, Article VII, includes the following:

---

### Section 1 Confidential Information

All information exchanged between the Parties hereto in the context of this Agreement shall be considered and treated as confidential information, subject to Article VII, Section 2 of the MDA. The Parties hereto hereby agree not to divulge such information to any other Person without the prior written consent of the other party, which consent shall not be unreasonably withheld and/or delayed. However, the foregoing shall not be applicable to CONCESSIONAIRE's or the GOVERNMENT's bankers, advisors and all those who are, in a special way, connected with the Operations.

### Section 2 Public Information

The obligation of confidentiality set forth in Article VII, Section 1 above shall not apply either to information exchanged between the Parties hereto which is in the public domain or to information exchanged by the Parties which the CONCESSIONAIRE is required to reveal to any other Person by law applicable to it.<sup>15</sup>

---

In the sections that follow, the typical features of confidentiality clauses and their implications are explained.

## 1. The Clauses Cover a Broad Range of Information

In the contracts surveyed, very few clauses diverged from the generic model illustrated above, in which confidentiality typically applies to *all* information. One significant deviation is Denmark's Model License of 2005 for Exploration & Production of Hydrocarbons, cited above, which specifically states that disclosures should be allowed if they are in the public interest (see page 12). This clause is particularly striking for its consideration of the public interest in information flowing from the contract, but also in its recognition that not all information legitimately needs to be confidential.

Some contracts cite specific examples of confidential information in addition to declaring that all information is confidential. These claims might be viewed as establishing a higher tier of information that is unquestionably secret. They focused on technical data:

All plans, maps, sections, reports, records, scientific and technical data, and other similar information relating to the operation shall be treated by the contractor as confidential even after the termination of the Contract and not disclosed by the contractor or its affiliates without prior written consent of N.I.O.C. [National Iranian Oil Corporation] except if required to prepare or publish a report by law. Both parties will fully comply with any license restrictions relating to proprietary technology contained in the license until the license restrictions terminate.<sup>16</sup>

The uniformity of confidentiality clauses in extraction agreements appears to be an exception among commercial agreements. In a survey of more than 250 confidentiality clauses in many types of commercial contracts beyond those solely concerning extractive industries, researchers found that “it is noticeable that the confidentiality provisions are often more carefully crafted than other clauses of the contract.”<sup>17</sup> While contracts in some industries contain similarly uncomplicated confidentiality clauses regarding the subject matter of the information to be kept confidential (“The term ‘confidential information’ shall mean all information disclosed under this agreement”),<sup>18</sup> contracts in many other industries are very detailed in their subject matter descriptions, specifically listing over several pages the kind of information that must be kept confidential.

Culture, practice and the absence of any recent contentious disputes on the subject may explain this widespread use of generic confidentiality clauses in the extractive industries; if no problems have arisen, there will be little impetus for change. While it may be easier to provide for blanket confidentiality than to sort through the details, it is clear from the above-mentioned survey of confidentiality clauses in other contracts that some contract parties in other industries do take the time to do this. These factors suggest that governments and extractive companies are simply not devoting much thought or time to the clauses, an implication that is supported by experienced negotiators.

## **2. There is No Standard Time When Confidentiality Ends**

The clauses surveyed for this report demonstrate a wide variation as to when the confidentiality obligation ends, ranging from the termination of the contract to a perpetual obligation to keep all information confidential.<sup>19</sup> Some interviewees indicated that time variations might reflect a difference in the competitiveness of a country’s industry, different philosophies about the disclosure of information, or some other variable. The survey suggests a simpler conclusion: the clauses appear to follow patterns within particular countries, reflecting familiarity with a certain provision.

## **3. Confidentiality Clauses Tend To Be Very Similar Within a Country’s Oil or Mining Sector**

With small variations over time, confidentiality clauses in the extractives sector follow a pronounced pattern at the country level. The clauses appear duplicated from one agreement to the next. Although the genealogy and origin of confidentiality clauses remains obscure, observers have suggested that the pervasive language may have initially been spread by international financial institutions or industry groups. The survey indicates that the basic form was fairly well settled by the 1970s. We did not find a similar transnational pattern based on the companies, which gives some support to the argument that countries, rather than companies, are dictating the terms of confidentiality clauses. On the other hand, the overbroad scope of provisions and limited variation among them makes it hard to draw any conclusion except that neither party is actively negotiating the provision.

It would not be unprecedented for government officials to exploit overbroad confidentiality clauses. In 2000, an audit commission in Victoria, Australia investigated government procurement contracts in response to allegations of inefficient and corrupt contracts signed during previous administrations. In reviewing the contracts, the commission reported evidence that confidentiality clauses inserted at the initiative of the government had been overused.<sup>20</sup> The Commission found that government officials used confidentiality clauses excessively to insulate the government from public inquiries into its decisions and operations, and to shield other government agencies and officials from investigation or disclosure of information.<sup>21</sup>

Industry and government officials interviewed for this report shared similar anecdotes about executive and legislative branches that were unwilling to disclose information, even when the law supposedly required or allowed it. These often included circumstances in which a state’s ministry of petroleum or mines was unwilling to share information with other ministries.

## B. Important Exceptions for Contract Transparency

Despite the broad range of information covered by confidentiality clauses, the clauses allow for the possibility of contract transparency. Section 2 of the Mittal Steel confidentiality clause, cited above, is a good example:

---

### Section 2 Public Information

“The obligation of confidentiality set forth in Article VII, Section 1 above **shall not apply either to information** exchanged between the Parties hereto which is **in the public domain or to information** exchanged by the Parties which the **CONCESSIONAIRE is required to reveal** to any other Person **by law** applicable to it.”<sup>22</sup>

---

These exceptions are explicit in many, if not most, confidentiality clauses. But even if not explicit, the exception for law would most likely be “read into” the agreement by any court or arbitral tribunal; without it, even the judges or arbitrators themselves would not be permitted access.

Other standard exceptions allow disclosure of information: to affiliates, provided they maintain confidentiality; as required by stock exchanges; to banks, insurers or other funders, usually with the provision that these parties sign confidentiality agreements; to government authorities; to arbitrators or other experts in connection with the agreement; or to bona fide prospective transferees of financial interest (merger, consolidation or sale of majority of shares).

## I. Information in the Public Domain is Not Confidential

Confidentiality clauses generally include exceptions for information that is in the public domain. At first blush this may seem rather obvious, but it is significant because the definition of what constitutes the “public domain” can be very broad. Contracts are much more widely available to private industry than to citizens; however, under US jurisprudence, industry knowledge is sufficient for information to be considered “in the public domain.” Thus, contracts in pay-for-access databases, industry publications and on industry forums and electronic mailing lists are all “in the public domain,” from a legal perspective.

## 2. Information That Must Be Disclosed by Law

Disclosures required by law are a very common exception to confidentiality clauses. Sometimes more specific legal requirements are cited as exceptions, such as disclosures required by stock exchanges, arbitration or other legal proceedings. Many provisions do not just require compliance with the law of the host state; they also usually state that the parties may make disclosures under any law to which the party is subject. Therefore, a state can require contract transparency of the companies that operate within its jurisdiction and are thus subject to its laws. Similarly, home states could also require the disclosure of contracts for their companies, though a host state may argue that this would run afoul of its sovereign right to selectively disclose information as it sees fit and regulate activity occurring within its territory.

## C. When Do Confidentiality Clauses Bar Contract Disclosure to the Public?

Based on the general confidentiality clause used in most contracts, contracts can generally be disclosed in most cases. However, if both parties are unwilling to disclose a contract, they can rely on the confidentiality clause to avoid disclosure (see chart below). As long as confidentiality clauses take the same standard form, this analysis will also apply to contracts concluded in the future.

### a) If the government and the company want to disclose a contract, they can mutually agree to do so.

If the government and the company, or consortium of companies, agree to disclose the contract, the confidentiality clause poses no impediment, except possibly a procedural one—written consent of the parties. Some clauses, such as the Mittal Steel clauses cited above, even prohibit a party from unreasonably rejecting a request for disclosure.

On the other hand, procedural requirements may serve as a pretext to mask the unwillingness of one or both parties to disclose. Governments and corporations may claim that the other is responsible for blocking disclosure. In these cases, a “blame game” may be occurring to avoid disclosure; but it is also possible that the parties may not be looking closely at the terms of the clause, or are mistaken about its meaning.

One recent example shows how suspicion, confusion and wrangling can get in the way of disclosure. In 2006, the government of the Democratic Republic of Congo (DRC) was determined to publish all mining contracts.<sup>23</sup> Prior to publishing the contracts, the Ministry of Mines had discussions with other ministries, donor countries, and outside consultants. One company in particular, Tenke Fungurume Mining (TFM), controlled by Freeport McMoRan in the United

States, actively resisted and pressured the government not to release its contract. When the contracts were published by the government, the exploitation agreement for TFM was the only noticeable absence. Over the next two years, The Carter Center, supported by Columbia’s Human Rights Institute, continually brought the absence to the attention of government and company officials. However, other members of TFM’s management expressed surprise that disclosure would create any problems, and subsequently initiated an internal process to seek release. When TFM decided in favor of release, management sought the agreement of the Congolese government under the terms of the agreement, but it was never given. High sources in the government explained that the request, coming after active efforts to prevent release of the agreement, had left them suspicious, and thus they avoided any response.<sup>24</sup> Eventually, Freeport McMoRan determined that it could release the contract unilaterally as a disclosure under securities regulations, demonstrating that companies do have options, even when a government is resistant.<sup>25</sup>

**b) If the government wants to disclose, but the company does not want to, there are options.**

Governments can require contract disclosure by law without violating the confidentiality clause of an existing agreement. However, other clauses of the agreement might interfere with disclosure. Contracts almost always permit disclosure in compliance with the law, whether explicitly stated or not. If a country were to pass a law requiring disclosure of all contracts (for example, an EITI law), it would certainly affect all future agreements. With regard to agreements in force, it is necessary to scrutinize other provisions of the agreement. A problem may arise if the contract also includes a stabilization clause that freezes the law at the time the contract is executed. In such a case, a new law mandating the disclosure of contracts may not overcome the confidentiality clause.

**c) If the company wants to disclose but the government does not want to, disclosure may be possible but is unlikely.**

If a company would like to disclose its contract but the government is opposed, there are fewer options. BP and its partner companies decided to disclose the BTC pipeline and upstream contracts at a time when they were not publicly available in Turkey, Azerbaijan, and Georgia, although by law they were supposed to be public. However, discussions with company representatives and lawyers indicate that companies are generally reluctant to take the initiative in disclosing contracts, even in such circumstances. Those interviewed felt strongly that it was not a corporation’s duty to fulfill the sovereign obligations of states, particularly since it could jeopardize their relationship with the government. In the case of the BTC consortium’s contract disclosure, some interviewees reported the strong belief that high level politicians were consulted before the contracts were released.<sup>26</sup>

**d) If the government and the company do not want to disclose, then recourse to other legal mechanisms, such as FOI law, is necessary.**

If the government and the company (or companies) are opposed to disclosing the contract, then recourse to other legal mechanisms will be necessary to gain access to the contract before the confidentiality period in the contract clause ends (if it has an ending—some clauses call for indefinite confidentiality). In countries with freedom of information laws, this may be the best option for the public disclosure of contracts.<sup>27</sup>

	Government	Company/ies	Result
Willing to Disclose the Contract?	Yes	Yes	No barrier. Contract can be publicly disclosed.
	Yes	No	Government can most likely disclose if it creates a law to do so, though some complications may arise.
	No	Yes	Company will likely not be able to disclose, unless it can find a reason why the contract should already be in the public domain.
	No	No	Contract will not be disclosed until confidentiality period ends, but FOI laws may be an option (see Chapter Three).

## D. What Are the Consequences of Breach?

It is quite difficult to determine the consequences of a breach of confidentiality. The survey of confidentiality clauses found very few contracts that included penalties for breach of such clauses. According to the survey of contracts in many industries cited above, including penalty provisions for confidentiality violations is not the usual practice in most industries.<sup>28</sup> Thus, extractive contracts are not particularly unique in this regard.

As a practical matter, disclosure of a primary contract is unlikely to motivate either party to resort to litigation or other dispute resolution mechanisms. The damage of disclosure is typically difficult to measure. In addition, most major agreements require expensive arbitration, which parties seek to avoid, except where a project has “failed.” Where states have breached the confidentiality clause, as in the massive publication of agreements by the Congolese government, no legal action was threatened or pursued.

Aside from the usual monetary damages, some industries have developed tools for obtaining other relief; these include mechanisms for injunctive relief, such as court orders to halt or retract the offending disclosures.<sup>29</sup> However, this report’s survey found no provisions referring to monetary compensation, injunctive relief, or any other specific relief for a breach of confidentiality.

Another possibility for relief is that a breach of confidentiality could entitle a party to terminate a contract altogether, or receive some other compensation. The termination clauses surveyed for this report tend to provide grounds for termination based on material default, failure to comply with performance or work obligations, or failure to make payments. There is little indication from case law or anecdotal evidence as to whether a confidentiality breach would constitute a failure to comply with contractual obligations such that it would qualify as grounds for termination. Since the contracts are generally silent on the issue of penalties for breach of confidentiality, and it is unclear whether such a breach would rise to the level of a “material breach” under the contract, it would be up to an arbitration panel or court to determine the consequences of this type of breach. However, we were unable to find any arbitration cases where breach of confidentiality was an issue. This may be because most arbitration decisions are confidential, and a party seeking redress for a confidentiality breach is likely to choose an arbitration forum with strict confidentiality, if such a choice is allowed by the contract. Alternatively, parties may try to settle such a matter internally to avoid further dissemination of the confidential information.



The only contract in our survey that specifically provided for termination in case of a breach of confidentiality is the Angolan PSA.

### ANGOLA'S CONFIDENTIALITY & TERMINATION CLAUSES

Angolan PSAs, beginning in the 1980s, are the notable exception to the confidentiality clause form. While most clauses do not include penalties for breach, a violation of the Angolan confidentiality clause is grounds for termination under these contracts.

#### *Confidentiality of the Agreement (Article 40):*

Sonangol and Contractor Group agree to maintain the confidentiality of this Agreement, provided, however, either Party may, without the approval of the other Party, disclose this Agreement:

- a) to any Affiliate or potential assignee of such Party upon such Affiliate or potential assignee giving a similar undertaking of confidentiality;
- b) in connection with the arranging of financing or of a corporate reorganization upon obtaining a similar undertaking of confidentiality;
- c) to the extent required by any applicable Law, Decree or regulation (including, without limitation, any requirement or rule of any regulatory agency, securities commission or securities exchange on which the securities of such Party may be listed);
- d) to consultants as necessary in connection with the execution of Petroleum Operations upon obtaining a similar undertaking of confidentiality.

#### *Termination of the Agreement (Article 39)*

1. Subject to the provisions of the general law and of any contractual clause, Sonangol may terminate this Agreement if Contractor Group:

[...]

- d. discloses confidential information related to the Petroleum Operations without having previously obtained the necessary authorization thereto if such disclosure causes prejudice to Sonangol or the State.

Article 33, *Confidentiality of Other Information*, is very similar to the typical confidentiality clause, stating that all information of a technical nature is considered confidential. It then lists the usual exceptions in which confidential information may be disclosed, namely: if disclosed to various people associated with the operations; as required for financing; and as mandated by applicable laws and regulations.<sup>30</sup>

While industry often cites Angola's negative reaction to BP's disclosure of the signature bonus it paid the country,<sup>31</sup> and despite the rather extreme consequences of confidentiality breaches included in Angolan PSAs, it is important to note that companies have succeeded in operating transparently in Angola. Statoil, for instance, regularly reports payments made to the Angolan government, as required under Norwegian law.<sup>32</sup> Since disclosures pursuant to law are specifically allowed by the Angolan confidentiality clauses, this type of disclosure does not trigger the termination clause.



Industry—as well as the media covering the industry—have often misconstrued confidentiality clauses, treating them as a bar to legal enforcement and a constraint on mutual release. One flagrant example of such mischaracterization arose in connection with proposed legislation in the US House of Representatives to require disclosure of revenues by companies subject to the US securities regulations. The proposed law, the Extractive Industries Transparency Disclosure Act (EITD),<sup>33</sup> would require extractive companies that are listed on a US stock exchange to disclose payments made to foreign governments. One news account conveyed this information thus: “[Representative] Frank’s proposed law [the EITD] could place the oil companies in an awkward position, **with American law forcing them to violate confidentiality provisions in their contracts.**”<sup>34</sup> On the same subject, Frank Verrastro, Director and Senior Fellow at the Center for Strategic and International Studies’ Energy Program, was quoted as saying: “If the company took the position that SEC rules trumped contract language [...] contracts could be canceled and their investment jeopardized.”<sup>35</sup>

**Such statements dramatically misstate the terms of confidentiality clauses.** Even under clauses as strict as Angola’s, securities disclosures are permissible, as are other legally mandated releases. Laws such as the proposed EITD would not “trump” existing contracts; rather they would be consistent with them.

## **E. What If a Contract Is Leaked? Is the Confidentiality Clause Still a Bar? What Are the Consequences of Going Public with a Contract?**

Contracts, as a general matter, only bind the parties to the contract. A third, unrelated party may have confidentiality obligations to one or both of the contract parties if such a third party signs a confidentiality agreement or has another professional responsibility requiring confidentiality, such as a lawyer-client relationship. In general though, third parties that gain access to the contracts are not bound by the confidentiality clause.

Nevertheless, there are potential risks for unrelated third parties, including NGOs and journalists, who gain access to confidential agreements and then publish them, or publish documents based on them. Companies have threatened lawsuits, typically alleging some form of defamation or inappropriate interference in business activities. The threatened suits have likely had a “chilling effect” on the press and civil society organizations, even though their underlying legal claims are often quite weak.

### **SLAPP SUITS**

Several companies have threatened legal action against journalists and NGOs seeking to expose confidential contract language. The actions resemble what are known in the United States as strategic lawsuits against public participation, or “SLAPP” suits. SLAPP suits are “litigation (or threats of litigation) which have, or could be assumed to have, a chilling effect on the rights and ability of people to participate in public debate and political protest.”<sup>36</sup> The goal of the party bringing the suit is not necessarily to win; it is rather to use the threat of litigation to intimidate and silence critics as well as intimidate others from participating in the debate.

### Kinross-Forrest Limited

It is unclear how the consortium of NGOs acquired the contracts, but in December 2005, three NGOs, 11.11.11, Broederlijk Delen, and Rights & Accountability in Development (RAID), and a Belgian newspaper, *Mo\**, hired law firm Fasken Martineau DuMoulin (Pty) Ltd. to analyze three joint venture (“JV”) agreements between the Democratic Republic of Congo’s state-owned mining company, Gecamines, and its joint venture partners. The law firm was asked to compare the provisions in the JV agreements to those generally found in similar JVs. One of the agreements analyzed was the February 2004 JV between Gecamines and Kinross-Forrest Limited (KFL) concerning the Kamoto copper mine.

When the consortium of NGOs received the law firm’s analysis in February 2006, they sent copies to the transitional Congolese government and the president of the World Bank, among others. RAID also posted the Fasken analysis on its website. Fasken quickly disclaimed the analysis—which was sent out from the firm on official stationery and had the form of a final opinion—stating that the analysis was sent out without partner approval and did not represent the firm’s views. Fasken ended its lawyer-client relationship with RAID and requested that the analysis be removed from RAID’s website.

Around this time, lawyers for Kinross-Forrest contacted Fasken, threatening a potential law suit: “We wish to advise you that in our view, your said letter was reckless for a number of reasons, could damage our client’s reputation and could cause our client irreparable harm . . . KFL has asked us to advise you that they are adamant that these matters be dealt with immediately, failing which KFL will consider any and all options that are available to them under the circumstances.”<sup>37</sup>

George Forrest, the major financier behind the KFL company, later brought a libel suit on behalf of KFL against the consortium of NGOs that published Fasken’s analysis. The proceedings are still ongoing in Belgium.

### Mittal Steel

The day before the *Financial Times* was scheduled to publish a story about Mittal Steel’s contract and activities in Liberia, the paper received a letter from lawyers representing Mittal Steel essentially threatening the newspaper with a suit for defamation if it published the story: “Should you choose to publish regardless, you should be aware that our client will hold the *Financial Times* and yourself responsible for any aggravated and special damage caused by these defamatory allegations.”<sup>38</sup> The reporting of the *Financial Times* was significantly reduced as a result.<sup>39</sup>

In parts of the US, SLAPP suits are becoming less feasible as law reforms take place. In the United States, twenty-six states have adopted anti-SLAPP statutes to prevent the misuse of litigation. Such laws should limit the potential negative effects of leaking a contract or making statements about a leaked contract, as far as legal action in the United States is concerned. This is not to say that non-legal harassment of citizens by companies and governments could not take place. In particularly repressive states, citizens may fear retaliation that is far worse than litigation, such as violence and imprisonment.<sup>40</sup>

# Commercially Sensitive Information and the Public Interest

Perhaps the most widely made—and unchallenged—claim for confidentiality is that it protects *commercially sensitive information*. But this claim is only the beginning of an analysis, not the end. There is no technical definition of commercially sensitive information. Everything, from the existence of a contract, to illegal bribes, to most of what is disclosed under securities regulations, can be classified as “commercially sensitive” in the broadest sense of the term. However, disclosure of such information may still be required, in order to serve a greater public interest. In some cases it may be obvious; but in others, it may require tools to measure and balance the public interest in transparency against the private interest in confidentiality.

The most important public interest at stake is the right to information, which enables democratic accountability. The public’s right to government-held information has been recognized by international human rights courts and implemented in national “sunshine” and freedom of information (FOI) laws. Additionally, the European and Inter-American Human Rights Courts have both recognized the right to information. In a case involving the disclosure of documents in a Chilean forestry investment, the Inter-American Court specifically recognized the “principle of maximum disclosure,” linking democratic accountability to expansive access to information, including the documents sought on the project.<sup>41</sup>

## A. What Is Commercially Sensitive Information?

There is no consensus definition of “commercially sensitive information.” The term is not in the authoritative legal dictionary, Black’s Law Dictionary, nor were we able to find a settled definition in other legal documents. It is generally understood to be any information that has economic value or could cause economic harm if known.<sup>42</sup>

What constitutes “commercially sensitive information” varies in different industries and in markets within those industries. It is often defined in reference to trade secrets, which do have a set definition:

“A trade secret may consist of any formula, pattern, device, or compilation of information which is used in one’s business, and which gives [the holder] an opportunity to obtain an advantage over competitors who do not know or use it.”<sup>43</sup>

Specific examples of trade secrets include customer lists, marketing strategies, and formulas for a specific product.

Trade secrets are different from other forms of “intellectual property” because they are, by definition, a secret. Other forms of legally protected information, such as patents, trademarks and copyrighted material, are generally protected upon becoming public. The underlying philosophy is that competitive markets need some amount of protection of information, even after that information becomes known, in order to promote innovation.

Consider the “Coca-Cola formula,” which is a *trade secret* and is not protected by other legal mechanisms like a patent. Coca-Cola has never disclosed the secret formula for its product; it therefore remains a trade secret. If Coca-Cola were to seek patent protection for the secret formula, it would have to disclose its trade secret in order to receive a patent license for the formula. The formula would eventually become public information upon expiration of the license, thus losing its economic value to Coca-Cola.<sup>44</sup>

Conversely, consider the pending merger of two companies: news of the potential merger is highly commercially sensitive information, since the stock prices of one or both companies could change if this information becomes public, causing great economic harm. However, a potential merger is not a “trade secret”—it is not a formula, pattern, device or compilation of information that could give a competitor an advantage if known.

## **I. What is commercially sensitive information in the extractive industries?**

Given how open the definition of “commercially sensitive information” can be, a potentially limitless amount of information could fall within it. Some of the information that business officials often cite as commercially sensitive in the extractive industries includes:

- financial terms of the deal;<sup>45</sup>
- assumptions used for assessing commercial terms;
- work obligations;
- environmental mitigation costs;
- quality and quantity of the reserve;
- operational data;
- cost information;
- manufacturing processes;
- pending litigation;
- pending mergers & acquisitions;

- identity of shareholders;
- revenue and cash flow data;
- capital expenditures and operating expenditures; and
- employee information.

Some of this information may be covered under the definition of “trade secret” so long as it is not in the public domain (e.g., manufacturing processes, cost information, operational data). However, some of this information is in the public domain, through securities filings that companies must make (quality and quantity of reserves, information about shareholders, some amount of revenue information).<sup>46</sup> Moreover, under some securities regulations, companies have the right to withhold commercially sensitive information through redactions; but from a limited review of contracts disclosed pursuant to such regulations, there were no such redactions made.

## 2. Most information cited as commercially sensitive is not in primary contracts

The reader will note that the list of “commercially sensitive information” discussed in the above section is very similar to the list in Chapter One, Section C: “Information Not in Primary Contracts.” Indeed, much of the specific information said to be commercially sensitive is not in the primary contract between a company and the government (see chart below).

But some information is necessarily contained in a primary contract, such as the financial terms of the deal. Work obligations, while not always detailed (they may be dependent on further feasibility studies, for example), are enumerated in some production sharing agreements and exploration agreements, and may also be included in the primary contract.

The exact costs of environmental mitigation processes connected with an extractive project are not generally detailed in the primary contracts associated with the project, though they may contain terms requiring the posting of bonds or other sureties<sup>47</sup> so that the costs of environmental damage are not borne by the country. Some primary contracts may require other environmental protection measures (such as the use of best international mining practice or internationally observed industry standards in the building, operating and closure of projects), but the specific *costs* of these measures are not included.

In fact, *costs* will rarely be found in contracts as a general matter, since they are incurred *after* the conclusion of a contract, in most situations. The same is true of *operational information* generally (e.g., manufacturing processes, construction costs or operating costs). None of the operations that generate such information and costs would go into effect until after the contract is concluded; thus, these details are necessarily *not* included in the contract.

The same is true of *payments* throughout the life of the contract. While *rates* of payment may be determined by a contract if not established by law, the actual *amounts* of these payments are not in the contract, with the exception of any set payments, such as signature bonuses or payments to community development funds.

There may also be references to trade secrets in contracts, if in exploring or developing the resource the contractor plans to employ a specific technology that is not broadly used or known in the industry; however, we have not seen such references. The same is true of references to future transactions or pending litigation: one could imagine a situation where Company A is in contract negotiations with Country X, and Company A knows it is about to be acquired by Company B. Company B may view the asset that Company A is acquiring as part of the reason that it wants to buy Company A. Thus, Company A and Company B would want to ensure that Country X will accept Company B as the main contractor once the acquisition is complete. A contractual provision stating as much might be included in the contract. This is possible, but unlikely.

Likely Presence of Commercially Sensitive Information in Contracts			
Not Generally	Possible, but Unlikely	More Likely	Almost Always
<ul style="list-style-type: none"> <li>▪ Employee information</li> <li>▪ Assumptions used for assessing commercial terms</li> <li>▪ Costs and expenditures (operational, environmental, capital)</li> <li>▪ Most payments</li> <li>▪ Quality and quantity of the reserve</li> <li>▪ Operation information and data (construction and development plans, manufacturing processes)</li> </ul>	<ul style="list-style-type: none"> <li>▪ References to future transactions</li> <li>▪ Trade secrets</li> </ul>	<ul style="list-style-type: none"> <li>▪ Some payments (generally one-time or set payments, e.g., annual contributions to a social development fund)</li> <li>▪ Work obligations</li> <li>▪ Local content</li> <li>▪ Employment and training</li> </ul>	<ul style="list-style-type: none"> <li>▪ Financial terms of the deal (or “contract terms” or “payment rates”)</li> <li>▪ Parties to the contract</li> </ul>

## B. What If There Is “Commercially Sensitive” Information in Primary Contracts? Should the Contracts Remain Confidential?

The mere presence of commercially sensitive information is not enough to prevent disclosure when it is in the public interest. For example, much commercially sensitive information is routinely required to be disclosed under securities regulations. Thus, the fact that information is “commercially sensitive” is only one consideration among many when determining whether information should be made publicly available.

FOI legislation provides a framework for considering the interests involved in disclosing state information. When a state is a party to a contract, issues of democratic accountability and governance are directly implicated, in addition to commercial interests. A presumption in favor of government transparency has been incorporated into FOI legislation in over 70 countries from all regions of the world.<sup>48</sup> As of June 2008, at least 78 countries had nationwide laws establishing mechanisms for the public to request and receive government-held information.<sup>49</sup> Many sub-national government bodies have public records laws, sunshine acts, and other variants of FOI laws.

While their effectiveness varies, FOI laws not only provide a promising tool for obtaining state-investor agreements, they also provide a basis for evaluating the role that public interest should play in judging arguments asserting the commercial sensitivity of state-investor agreements.

## I. FOI principles

Unlike contract and commercial law, which assumes and allows for a high degree of secrecy among parties to a business venture, FOI laws assume the opposite: that government information should be public. While there is not an international standard governing the right of access to information held by public bodies, the principles are common:<sup>50</sup>

- 1) FOI laws presume that information should be disclosed, unless the public body provides a reason against it.<sup>51</sup>
- 2) The burden is on the government to explain why information must remain confidential. The requester does not need to demonstrate a reason for seeking the information.
- 3) Governments should actively publish key information even in the absence of requests.<sup>53</sup>
- 4) Some common exemptions include information pertaining to:
  - a. national security and defense;
  - b. internal working documents of agencies;
  - c. law enforcement and public safety;
  - d. fair and effective administration of justice;
  - e. personal privacy; and
  - f. trade and commercial secrets.<sup>53</sup>
- 5) Where categories of information that can be withheld from the public are delineated, these should be interpreted as narrowly as possible.
- 6) If there are portions of a document that cannot be disclosed due to one of the above exemptions, disclosure is still favored, with redactions that are as limited as possible.<sup>54</sup>
- 7) Non-disclosure should be limited to circumstances where disclosure would cause extreme harm or is not in the public interest.<sup>55</sup>
- 8) When considering whether a document or portions thereof can be disclosed, the public agency should not take into account any potential embarrassment, loss of confidence or misunderstanding that may result from such disclosure.<sup>56</sup>

The analysis of whether contracts or portions thereof could be kept confidential under the FOI framework would thus be:

- 1) Is there a relevant FOI exception that could keep this information from the public? For extractive industry contracts, the relevant exception would be “**Trade and Commercial Secrets**.”<sup>57</sup>
- 2) To warrant redaction under the trade and commercial secrets exception, the information must:
  - A) **not** previously have been **disclosed or in the public domain**; and
  - B) must be shown to be likely to **cause substantial harm to the competitive position**<sup>58</sup> of the person from whom the information was obtained if disclosed.

### a) Trade and Commercial Secrets Exception

The trade and commercial secrets exception is the FOI exception most relevant to contract transparency. Under FOI statutes in most countries, any information determined to be a “trade secret” is protected from disclosure, in addition to a somewhat broader category of commercial



or financial information that is deemed “confidential.” In the United States, courts have tended to say that, for the purposes of FOI, “commercial or financial information” is essentially co-extensive with trade secrets, thus narrowing the type and amount of information that cannot be disclosed under US FOIA (see box on US FOIA and the Public Domain, below).

There are few circumstances in which the entire agreement would meet the standard of a trade secret or commercial information. The contract forms used in the extractive industries are widely known and often disclosed, and model contracts are available through industry websites and on government websites and databases. Thus, the issue would be whether to redact parts of the agreement.

**b) “Not Previously Disclosed or in the Public Domain”**

Even where contracts include protected information, the FOI principles establish a further test: whether the information has been previously released or exists in the public domain. As the IMF points out, “contract terms are likely to be widely known within the industry soon after signing.”<sup>59</sup> In addition, US jurisprudence suggests that the “public domain” is co-extensive with “industry knowledge” (see box, below); however, this position may not have been tested in many jurisdictions.

**US FOIA AND PUBLIC DOMAIN**

The most relevant case under the US FOIA<sup>60</sup> is *Freeman v. Bureau of Land Management*.<sup>61</sup> The logic of the case would compel disclosure of oil and mining contracts under US FOIA; for purposes of US law, such “contracts” would be mining claims, patents and leases where the US government grants title to a company for a particular land parcel. Critical to the court’s reasoning in *Freeman* was the fact that much of the information that companies generally seek to classify as confidential is actually known in the industry, and is therefore in the public domain.

The *Freeman* case involved an application for a mining permit and private title to formerly public land under the US General Mining Law of 1872.<sup>62</sup> In evaluating Freeman’s proposal to mine iron ore, the Bureau of Land Management (BLM) commissioned a study of the proposed project and produced a detailed report outlining Freeman’s business plan. When concerned environmental groups requested the BLM report through FOIA, Freeman argued that the exemptions for trade secrets and commercial and financial information applied to all substantive terms of his proposed mining operation, including the proposed process for extracting and refining iron ore, estimated capital and operating costs, the quality of ore deposits, and the estimated lifespan of mines. The court rejected his argument and ordered disclosure, holding that only information not generally known to others in the relevant industry, such as novel and previously undisclosed production processes, qualifies for exemption under FOIA. Furthermore, the court held that Freeman had failed to show how disclosure of this information, even if it were not available publicly, would be disadvantageous to him.



**c) “Likely to Cause Substantial Harm” to Competitive Position**

*Financial terms of the deal & work obligations*

Since the financial terms of many deals are known within the industry, the argument that contract transparency would cause competitive harm seems weak. Rates for significant repeating payments (such as taxes and royalties, profit oil, etc.) constitute the main terms of the deal. Most one-time or set payments (such as annual contributions to community development funds or per acre fees for land) should be treated as basic contract terms, subject to disclosure. Other less significant payments that are not generally known to the industry would likely not be so significant as to cause competitive harm if disclosed.

Work obligations are more difficult to assess. We have seen no literature evaluating the degree to which work obligations are a secret within the industry or whether there could be substantial harm to companies if they were disclosed. Based on interviews, it appears that there may be circumstances in which disclosure could cause competitive damage; for example, in frontier regions, the exploration risk is great and the terms of the market completely unknown. Even so, this particular information could be redacted in a potential disclosure.

*References to future transactions & trade secrets*

Two categories of information present strong arguments for redaction. Knowledge of future transactions is widely regarded as commercially sensitive information. Parties to a potential merger or acquisition use many measures to ensure that such information does not enter into the public domain, and the potential harm caused by disclosure would likely be discrete enough to meet the “actual harm” test of FOI legislation. The same is true of a trade secret, which by its very nature will not be in the public domain, since its economic value is derived from the fact that it is not widely known in the industry. Other information said to be commercially sensitive is analyzed in the box below.

Summary of FOI Analysis and Examination of Specific Terms		
Possibly in Contracts, but Unlikely	Public Domain?	Substantial Harm?
<ul style="list-style-type: none"> <li>References to future transactions</li> <li>Trade secrets</li> </ul>	<ul style="list-style-type: none"> <li>No</li> <li>No</li> </ul>	<ul style="list-style-type: none"> <li>Yes</li> <li>Yes</li> </ul>
More Likely to be in Contracts		
<ul style="list-style-type: none"> <li>Some payments (generally one-time or set payments, e.g., annual contributions to a social development fund)</li> <li>Work obligations</li> <li>Local content</li> <li>Employment and training</li> </ul>	<ul style="list-style-type: none"> <li>Possible</li> <li>Possible</li> <li>Possible, but unlikely</li> <li>Possible, but unlikely</li> </ul>	<ul style="list-style-type: none"> <li>Unlikely</li> <li>Unlikely</li> <li>Unlikely</li> <li>Unlikely</li> </ul>
Almost Always in Contracts		
<ul style="list-style-type: none"> <li>Financial terms of the deal (or “contract terms” or “payment rates”)</li> <li>Parties to the contract</li> </ul>	<ul style="list-style-type: none"> <li>Likely</li> <li>Likely</li> </ul>	<ul style="list-style-type: none"> <li>Unlikely</li> <li>Unlikely</li> </ul>

## 2. Contracts should be disclosed under FOI principles

Under FOI, contracts should be made public, with very limited redactions for trade secrets and references to future transactions. FOI laws are not perfect, however, and are enforced with varying efficacy in different countries (see box below). Governments often continue to resist disclosure and do not create databases of information as FOI principles require.

### ECUADOR Example

Ecuador’s Constitution provides a right of access to information and expressly states that “[i]nformation held in public archives shall not be classified as secret, with the exception of documents requiring such classification for the purposes of national defense or other reasons specified by law.”<sup>63</sup> Putting this constitutional law into operation is the Organic Law on Transparency and Access to Public Information (LOTAIP), which was adopted on 18 May 2004.<sup>64</sup> Pursuant to LOTAIP, Ecuador has made hydrocarbon contracts publicly available via the Internet.<sup>65</sup>

### UGANDA Example

Oil has recently been discovered in Uganda, and citizen groups have used the country’s FOI law to seek access to the contracts that Uganda signed.<sup>66</sup> A case seeking disclosure of the contracts has been filed, but no decision has been made. In March of 2009, the Minister of Energy agreed to give parliamentarians access to the contract, but did not grant wider public access.<sup>67</sup> An independent expert has assessed one contract, with Tullow Oil, as a being a good deal for the country; and the company, in public statements, says it will support whatever decision the government makes.<sup>68</sup> Despite this, it remains unclear whether the contracts will be disclosed to the public.<sup>69</sup>

# Policy Arguments and Counter Claims

Having now addressed the value of contract transparency, the contractual constraints to it, and the balance between commercially sensitive information and the public interest, we wish to address a number of questions about whether the battle is worth the effort. Specifically:

- a) *Will contract transparency really help fight corruption?*
- b) *Aren't these contracts too complex for the public to understand?*
- c) *Won't contract transparency result in renegotiations?*
- d) *Will contract transparency lead to a race to the bottom...or the top?*
- e) *Will companies ever agree to contract transparency?*

## **A. Will Contract Transparency Really Help Fight Corruption?**

Inexplicable giveaways and major asymmetries in contracts, while they may simply be due to a lack of capacity of the negotiators, could also point to official misconduct resulting from corruption. Contract transparency provides a strong incentive for government officials and company representatives to operate within the bounds of the law and not to deviate from general contract forms and terms, as any discrepancies would be publicly disclosed. While it may not prevent lower-level corrupt acts that are beyond contractual terms, it is a deterrent to the manipulation of contract terms due to corruption.

## **B. Aren't These Contracts Too Complex for the Public to Understand?**

Extractive contracts are complex. Experts will disagree on how to value them and untrained readers may be misled or offended by their language. As a result, they may be exploited by demagogues or political opponents. But it is not clear that contract secrecy prevents such an outcome; furthermore, much government information is complex, but that is not a sufficient reason to keep it from the public. While the public may not have a full understanding of the complexities of the extractive sector, citizens and civil society organizations are developing the skills to analyze these documents and pose the right questions about them.

Citizens understand that national resources, and the benefits resulting from their extraction, belong to them. However, they may be skeptical about whether governments and companies have their best interests at heart; keeping contracts secret will only increase this skepticism. Contract transparency signals to the public that companies and governments have nothing to hide, that they honor citizens' rights of access to these contracts, and that they respect citizens' rights to have a say in how resources are used.

Rather than fighting against disclosure, a long-term and ultimately more sustainable response is to educate the public about the agreements.<sup>70</sup> In countries where one agency has often monopolized the process, contract transparency will enable better understanding and more effective management of the extractive industries. Easily accessible public databases of a country's contracts will make the administration and monitoring of these agreements easier for governments and citizens alike.

Finally, contract transparency, over time, will help governments overcome the information asymmetry that currently exists when governments are negotiating contracts with companies. While companies have access to their own contracts around the world, and can easily pay for access to contract databases and consultancies that survey and rank contracts, governments will generally have only their own contracts as a guide in negotiation. The gap in understanding and leverage between companies and governments does not end there; often the consultants, bankers, economists, and lawyers that a company will bring to negotiations will likely far outnumber a government's negotiating team. Contract transparency will not completely correct this imbalance, but is a critical step towards gaining better terms, better enforcement, and thus greater benefits for resource-rich countries in their dealings with extractive companies. These benefits make contract transparency worth the time and effort.

### C. Won't Contract Transparency Result in Renegotiations?

Governments and companies are apprehensive about opening themselves up to the criticism or embarrassment that could result from the public disclosure of contracts. A contract will rarely satisfy all interested constituencies in a country. Even when the terms may have been reasonable when negotiated, circumstances may have changed, making a deal that looked good when signed seem like a windfall to a company. In short, it is not hard to envision contract transparency resulting in calls for the renegotiation of contracts.

Based on recent experience, publication has been an important element in some—though certainly not all—calls for contract renegotiation. Moreover, for myriad economic reasons, natural resource contracts are already among the most likely to be renegotiated: “Across all types of FDI (foreign direct investment), contracts and concessions to foreigners in natural resources and infrastructure have proven to be the most unstable.”<sup>71</sup>

While contract renegotiation may be costly and provoke negative market reactions in the short term, an open process of renegotiation, with buy-in from citizens, will result in more durable contracts in the long run. Contract transparency should create an incentive for the parties to ensure that they “get the deal right” and communicate this to citizens. Secrecy only prevents the court of public approval from serving its purpose, thus creating instability.

## D. Will Contract Transparency Lead to a Race to the Bottom...or the Top?

Contract transparency will affect the negotiating posture of countries and companies by adding to the information at their disposal. The benefits and burdens will vary; but inconsistent application of transparency may place unequal burdens on some companies.

Some companies argue that contract disclosure will force them to offer the same or better terms in the future. From the point of view of citizens, government and investors that intend to remain in a country over the long term, contracts that provide a good deal for all parties is desirable, and the goal of contract transparency.

Others argue that when items such as tax and royalty rates are disclosed in combination with project-level production and payment data, this information could reveal the cost structure and pricing strategy of a company, giving competitors crucial information that they could either mimic or use against the disclosing company. If transparency is piecemeal, some argue, it will disadvantage transparent companies over non-transparent ones, since non-transparent companies may gain information and use it against their transparent competitors, and governments with no interest in transparency may choose non-transparent companies over their competitors.

Governments may fear pressures to lower their standards to match other competitors, in the same way that some governments were perceived to lower human rights standards to attract low-cost manufacturing. Another version of the “race to the bottom” concern is fear that governments will be pressured to give concessionary terms in later contracts (e.g., tax holidays, lower tax rates, etc.) or renegotiate contracts to give better terms to currently operating investors. As the IMF states: “The reason usually advanced by governments (and to some extent by companies) is that disclosure would erode their bargaining power for future contracts.”<sup>72</sup>

*It seems unlikely that contract transparency would cause a race either to the top or to the bottom.* Contracts are already available through pay-for-access sites, existing government disclosures, and industry publications. Companies currently operate and continue to seek opportunities in countries where contracts are publicly disclosed, including Congo-Brazzaville, Ecuador, Liberia, Peru and Timor Leste. While companies do have significant bargaining power over many governments, the resources on which their industry depends are finite and location-specific, giving governments some measure of bargaining power. Contract transparency, in countries where it has occurred, does not appear to have been a deterrent to investment (see Chapter Five: International Policy and Practice on Contact Transparency).

The arguments warning of disparities between transparent and non-transparent companies only further support consistent application of transparency rules. However, the wide availability of contracts for purchase within the industry indicates that most competitors, transparent or not, are already the best informed. It is unlikely that contract transparency will result in a race to the bottom; nor will it provide a windfall to governments. The most likely long-term outcome is contracts that fall within a flexible and reasonable rate of return for both parties being less susceptible to renegotiation, an outcome that is desirable for serious investors, governments, and citizens.

## E. Will Companies Ever Agree to Contract Transparency?

To answer the question of whether private enterprise will ever fully embrace transparency in the extractive industries, we need to know who is really driving contract secrecy: companies or governments? Interviews, experience and research indicate that the answer depends on individual governments and companies and the power dynamics of particular situations.

Some believe that governments are driving secrecy, and there is some anecdotal evidence to support this belief. In Uganda, activists and parliamentarians are currently seeking access to contracts signed with Tullow Oil Plc. The company has publicly stated that it will disclose contracts, but only if the government allows it.<sup>73</sup> On the other hand, individuals involved in the negotiation of Ghana's recent oil contracts report that the government was afraid of company reaction if it committed to contract transparency. It seems that governments and companies will rarely make contracts public unilaterally, even if the law allows it.

This was the case with BP and its partners when they faced an international campaign against the proposed Baku-Tblisi-Ceyhan (BTC) pipeline, the most notable example of a company taking the lead in disclosing contracts. BP lawyers and other industry members involved in the pipeline project noted that the consortium would not have disclosed the contracts if the contracting countries had not had existing laws that should have made them public in any event. Some even said they felt sure that government officials at the highest level, in particular President Aliyev of Azerbaijan, would have been consulted before any disclosure was made, the laws notwithstanding.

### BTC Contracts

A consortium<sup>74</sup> led by British Petroleum (BP) publicly disclosed the BTC pipeline and upstream contracts in 2003. This is the most prominent example of a company taking the lead in making contracts easily accessible to the public by putting the contracts on the company-led website devoted to Caspian oil development.<sup>75</sup> While there has been much analysis of the pipeline contracts on the part of activists and industry, there is little explanation of why BP and its partners took the dramatic step of disclosing its contracts. The IFC and the BTC consortium believed there were misconceptions about its contracts and how it planned to implement the pipeline project. This concern had two forms: (1) the citizens of the countries through which the pipeline was to pass had unrealistic expectations about the benefits that the project would bring, and (2) there was a large-scale international campaign to stop the project due to fears that it would cause environmental and social harm.<sup>76</sup> Thus, the BTC consortium, along with its public funders, the IFC and the European Board of Reconstruction and Development (EBRD), engaged in a counter-campaign to dispel these perceptions through public consultations and unprecedented transparency.

*Initial Civil Society Concerns.* From the outset, this major project was viewed warily by local and international civil society institutions. After conducting several fact-finding missions to the three countries involved in 2002 and 2003, Friends of the Earth and other civil society organizations began mobilizing protests over the pipeline's construction. Over 60 regional and international NGOs wrote to the IFC, the EBRD and other financial institutions, raising a number of concerns

about the project's social, environmental, economic and human rights impacts. The organizations urged the IFC to make loan approval subject to a number of conditions.

Despite protests, the countries (host and home), companies, and financial backers of the project wanted to see the successful implementation of the project.<sup>77</sup> Most of the interviews conducted, as well as the literature about the pipeline, indicate that some companies in the consortium did not view the pipeline as particularly lucrative. With oil at around \$15 a barrel, a technically, diplomatically and legally complex pipeline was not financially appealing. However, western governments exerted significant political pressure to build the pipeline.<sup>78</sup> The US and the EU saw the region and the pipeline as particularly critical for energy security: the pipeline would supply oil without running through Russia or Iran.<sup>79</sup> There was also a viable economic case to be made: the Azeri-Chirag-Gunashli oil field has an estimated 5.4 billion barrels of recoverable resources.<sup>80</sup> In terms of using modern oil technology, the Caspian region was a major resource that was largely untapped.

*Why did the consortium disclose?* Civil society pressure was the major factor resulting in the decision to disclose the contracts, based on IFC documents and interviews with individuals within the companies that were involved in the decision-making process.<sup>81</sup> Similar international activism for the release of contracts in another country had recently resulted in a major project being stalled and halted.<sup>82</sup> The IFC and the consortium companies sought to avoid the same outcome with the BTC pipeline project.

When BP, as the leading company in the consortium, consulted legal counsel for advice on whether the BTC agreements could be made public, counsel found no compelling reason not to disclose. It was determined that contract disclosure was not problematic from a legal standpoint.<sup>83</sup> The contracts were not considered very commercially sensitive, and they should have been in the public domain in any event since they had the force of law in the three countries. Counsel also noted the political benefits of disclosing the contracts, namely showing support for the EITI process that was just beginning at the time. In fact, the primary concern was not legal, it was offending the government counterparties of Georgia, Azerbaijan, and Turkey.<sup>84</sup>

Even when companies want to disclose, they will be very sensitive to the views of government, likely seeking their express approval before making any major public disclosures of contracts. It seems highly unlikely that a company would disclose without a significantly grounded legal argument or the express consent of the government. However, when it serves their purposes, companies will disclose contracts, as the BTC example demonstrates, and the aforementioned Freeport McMoRan disclosure of its Tenke Fungurume contract via securities regulations, on page 27.

Where governments are more experienced in dealing with companies and their resources are well known, they may be able to exert more pressure to keep contracts secret. This is especially true of governments that are particularly secretive and concentrate power in the executive branch or a small circle of political elite. Transparency may run directly against the interest in maintaining such centralized power.

But even governments that are not particularly secretive may resist transparency. Governments are directly concerned with the interests of a diverse set of players whose interests are less directly aligned to profit maximization than those of companies and their stakeholders. Governments are answerable to several different pressure groups, including local communities, foreign governments and international aid organizations, and various ideological constituencies (pro-business, environmentalists, directly affected communities versus the population more broadly).

This is not to say that companies do not have an interest in contract secrecy. Companies currently have a strategic advantage over governments, with greater access to information, and to contracts in particular. Contract transparency would erode this advantage.



# International Policy and Practice on Contract Transparency

## A. Host Country

### I. Law and Policy

To date, many countries have not yet committed to full contract transparency. Full contract transparency, as defined in this report, would require a government to make all of its contracts, past and present, in all of its extractive industries, easily accessible to the public. Ideally, access to the contracts would be free of charge and anonymous. Citizens should be able to access contracts without fear of harassment or scorn.

The chart below provides a few examples of countries that have committed to contract transparency as a policy and countries that have engaged in *ad hoc* disclosures of contracts in one of their extractive sectors.

Contract Transparency Policy	Hydrocarbon Contract Disclosures	Mining Contract Disclosures
<p><b>Ghana:</b> Committed to transparency of oil contracts</p> <p><b>Liberia:</b> Contract transparency in recently passed Liberia EITI act</p> <p><b>Timor Leste:</b> PSCs signed in the Timor Sea zone</p>	<p><b>Congo Brazzaville</b></p> <p><b>Ecuador</b></p> <p><b>Peru</b></p>	<p><b>Democratic Republic of Congo</b></p> <p><b>Liberia</b></p> <p><b>Peru</b></p>

In some countries, an individual can apply to the relevant ministry or parliamentary library to gain access to contracts.<sup>85</sup> We have not generally included such countries as “disclosing countries” for two main reasons: one, we have only been able to determine whether this type of disclosure exists in countries where we have done field work; two, even in countries where this is nominally the case, activists and researchers cite poor record-keeping, high costs to receive contracts, and rejections of requests as being particularly common.

## 2. Parliamentary Approval of Contracts

Some countries have laws requiring parliamentary ratification of foreign investment contracts or the ratification of oil and mining contracts, specifically. As a matter of law, these contracts should be public documents. In most countries, the drafting and negotiation of contracts is the responsibility of executive branch ministries or state-owned enterprises. After this process, some countries require the final, negotiated contract or selected bid in an auction to be ratified by parliament for it to come into effect.

Parliamentary ratification of contracts is not grounded, as a general matter, in a government policy of contract transparency. In some instances, it is one among many tools that companies use to secure their investment and safeguard it from change and expropriation.<sup>86</sup> Constitutional language in some countries provides a check on executive power by giving parliament a vote on natural resources contracts in particular. In other countries, contracts with foreign countries are treated essentially as treaties, or “foreign agreements,” and must be ratified by parliament as such. Even if not a part of a contract transparency policy, parliamentary ratification of contracts is yet another example of the regularity with which contracts come into the public domain with no discernable harm to the country or company.

The following countries differ in geographic area, political system, and resources produced; however, they are all states that require parliamentary vetting of contracts.

- *Azerbaijan*. The Azeri Constitution gives the Azeri Parliament the power to ratify or veto international agreements. Such international agreements include extractive industry contracts such as PSAs. All international agreements must be approved by the parliament, at which point they become Azeri law.<sup>87</sup>
- *Egypt*. PSCs must have legislative approval to become operational.<sup>88</sup>
- *Georgia*. Foreign investment contracts are international treaties and must therefore be approved by parliament.<sup>89</sup>
- *Kyrgyzstan*. If a foreign legal entity or individual is a party to a PSA, it should be ratified by the parliament.<sup>90</sup>
- *Liberia*. Parliament must ratify investment contracts after negotiation and signature by executive ministries.<sup>91</sup>
- *Sierra Leone*. Parliament should have access to mining contracts before they are signed, though its powers are limited to an advisory capacity, i.e., it can suggest changes.<sup>92</sup>
- *Yemen*. Contracts are made Acts of Parliament and become part of Yemeni law; this is required by its Constitution and the policy was recently upheld in an international arbitration proceeding against the country, after executive ministries signed and negotiated an extension to a PSA but the parliament vetoed it.<sup>93</sup>

Of course, while a country may have such laws “on the books,” they may not be consistently followed in practice.

## AZERBAIJAN

According to the Azeri Constitution, the Milli Majlis (the Azeri Parliament) has the power to ratify or denounce international agreements. Such international agreements include extractive industry contracts such as production sharing agreements.<sup>94</sup> All international agreements must be approved by the Milli Majlis, at which point they become Azeri law. The contracts are supposed to be available for view by Azeri citizens, though in practice such contracts do not necessarily become accessible, according to researchers in Azerbaijan.<sup>95</sup> We confirmed this through our own research mission as well.<sup>96</sup>

It is not clear how much time is given to Azeri parliamentarians to review a contract, if they do in fact receive it in its entirety. Public hearings or other access does not seem to be available to Azeri citizens during this process, either by law or in practice. The activities of government-run oil-related organizations, such as the State Oil Company of the Azerbaijani Republic (SOCAR) and the State Oil Fund of Azerbaijan (SOFAZ), are reportedly regulated largely through Presidential decree rather than by Parliament. Government power has been described in some reports as “feudal” rather than democratic.<sup>97</sup> While strides have been made in extractive industry transparency in Azerbaijan, contract secrecy remains an issue.<sup>98</sup>

## LIBERIA

Parliament must ratify investment contracts, which are negotiated and signed by executive branch officials.<sup>99</sup> By law, parliamentarians should always have access to the full contract, though under the transitional government that preceded President Ellen Johnson-Sirleaf’s administration, this was not always the case. Reports indicate that, for example, only a brief one-page summary (that was said to be inaccurate) of the major mining contract signed by the transitional government with Mittal Steel was given to parliamentarians prior to the ratification vote.<sup>100</sup>

Presently, Liberian parliamentarians are given full contracts for review—though parliamentarians have had some difficulty gaining access to all necessary documents relating to major mining contracts, particularly contract annexes, even under the Johnson-Sirleaf administration.<sup>101</sup> Contracts are to be printed into handbills, and they become public documents. Due to lack of state resources, however, the contracts are not easily available via an online database or in a single, immediately accessible location with either parliament or an executive branch ministry in Liberia. If a person would like a copy of a contract, they may make a request with the various ministries that have the contract. Those wishing to receive the contract must divulge who they are, and the company with whom the contract has been concluded will be notified of the request and the contract’s subsequent disclosure. From the perspective of individuals wishing to monitor a company’s activities, the notification to the company of the requester’s identity is not ideal. Governments and companies have harassed or antagonized members of civil society organizations who have sought information; the potential for negative reaction to information requests is greater for activists known to be critical of government and company actions, particularly in countries where the government is not as open to criticism and debate as the present Johnson-Sirleaf administration in Liberia.<sup>102</sup>

Even with the parliamentary ratification of contracts, Liberia has adopted a contract transparency policy in its EITI bill and the present government appears committed to making real access to contracts a priority. Government officials say they are hoping to have a consolidated library of contracts at the National Investment Commission. The library would be accessible to the general public, not just investors.<sup>103</sup>

### 3. Contract Transparency Case Studies: DRC, Liberia, and Peru

Governments are increasingly making contracts public, though disclosures have been *ad hoc*.<sup>104</sup> They are characterized as “*ad hoc*” because the number of contracts disclosed has been limited. Disclosures have been made in either the minerals or hydrocarbons sectors, but not both; and not all contracts signed have been made publicly and easily accessible. While not exhaustive, the case studies in this section indicate when, why, and how various countries have made contracts transparent.

#### i. The Democratic Republic of Congo’s Mining Contract Review

On June 11, 2007, the DRC’s Ministry of Mines officially launched a review of 61 mining contracts signed during the wars of plunder (1996–2002) and the transition process (2003–2006).<sup>105</sup> Political demand within the country to make these contracts public and renegotiate them was high. A leaked World Bank report confirmed that the country’s greatest sources of revenue, its legendary mines, had been hastily sold without knowledge of their value and to companies without the experience and financing to actually run, manage and operate industrial mines.<sup>106</sup> Some government officials in the DRC hoped to attract more reputable companies by canceling contracts with companies that had no intention or capacity to conduct mining operations.<sup>107</sup>

At the outset of the review, the Ministry of Mines committed to making the contracts under review publicly available. The Carter Center was asked to “accompany” the contract review process, and one of the Center’s conditions for involvement was a commitment by the government to make the contracts public.<sup>108</sup> Although the government may have made the contracts public in any event, the publication of the contracts under review was the high watermark of transparency measures taken by the government.<sup>109</sup> The burst of transparency at the outset did not continue. Civil society involvement in the review was limited, public announcements about how the process of review was to proceed were incomplete and *ad hoc*, and updates on the renegotiation process have been even more rare.<sup>110</sup>

The renegotiations have occurred in secret and the amended agreements have not been made public. There has been no indication by the government that it intends to make them public. Whether or not the renegotiations are ongoing at the time of publication of this report remains uncertain; if the process is any indication of the substance, there is not much reason to be optimistic. However, while companies were unhappy with the review and renegotiation of the contracts, the negative individual reaction to the unilateral publication of the contracts never resulted in serious operational disruptions, or even threatened legal action.

#### ii. Peru’s Hydrocarbon Contracts

Peru is a minor hydrocarbons producer, but since the discovery of the Camisea reserve, Peru has become a larger gas producer. In 2005, exports of oil derivatives were 9% of total exports.<sup>111</sup> Seeking to attract foreign investment, Peru has sought to create an open investment environment with a predictable, transparent and stable legal system. The oil sector has attracted more investors in successive bidding rounds, and royalties have gone up as well.<sup>112</sup> The public disclosure of the primary exploration and exploitation contracts does not seem to have affected companies’ interests.

Peru’s decision to publish its hydrocarbons contracts goes against the general perception that governments are afraid to publish contracts for fear of inhibiting their ability to attract investment.<sup>113</sup> According to stakeholders interviewed, one motivation was to increase foreign

investment in the sector after a period of low interest by investors. Making as much information available as possible, including contracts, was part of the strategy to increase interest.<sup>114</sup> Those interviewed explained that since there was a set model contract with very few bidding variables, there was little left unknown. The bidding rounds were public, and announcing the winning bids and disclosing them would not only result in companies feeling more secure in their investment, but it would indicate that the process was transparent and competitive.

Peru has also been moving towards a more transparent and open government in the post-Fujimori era. The government created a free online legal search engine, Poder Judicial de Peru,<sup>115</sup> making many legal documents accessible. Peruvian legislation regarding access to information for citizens to monitor public officials is considered quite robust.<sup>116</sup> However, the much more significant mining sector contracts are not available online. They are available to the public, but one must go to the relevant government agency to get a contract.

Despite the relatively high levels of transparency, a scandal in the oil sector came to light in late 2008, and is sometimes referred to as “Petrogate” or “PetroAudio.” Fourteen officials were alleged to be involved in bribery concerning a recent oil contract bidding process. On October 22, 2008, charges were brought against one current and three former high-level officials and ten others based on allegations of bribery in the awarding of oil contracts to Discover Petroleum, a small Norwegian company.<sup>117</sup> These allegations of meddling and kickbacks led to the entire 17-member government cabinet stepping down. Although ten were reinstated, the Prime Minister was not. Among those charged were Petroperu’s former president César Gutiérrez Pena, former general manager Miguel Celi, former director Alberto Químper, and current PeruPetro president, Daniel Saba.<sup>118</sup> Others associated with the scandal include five Petroperu officials who conducted the technical assessment that resulted in the decision to grant multiple oil contracts to Discover Petroleum.

More recently, Peru has faced internal strife related to its foreign investment regime, including its hydrocarbons sector. 2009 has seen nationwide strikes, the blockage of key transit routes, and violent confrontation between protestors and police in Peru.<sup>119</sup> The future of the hydrocarbons sector remains uncertain, though government officials remain optimistic in the press, and are pressing for continued development in the face of protests.<sup>120</sup>

Despite the fact that the future of the industry remains uncertain after these events, some conclusions can be drawn about contract transparency in Peru. First, companies are bidding on the contracts knowing they will be publicly available. While it is impossible to know if more companies would have bid if they were not made available, Peru has attracted more companies in successive bidding rounds, and higher royalty rates as well. Thus, contract transparency has not been a deterrent, and it may have attracted more investment. Companies operating in Peru report that the disclosure of the contracts was simply one aspect of doing business in Peru.<sup>121</sup>

Second, contract transparency will not prevent all forms of corruption, as the Petrogate scandal attests; but this has never been a claim by those advocating for contract transparency. Transparency is one means among many to deter corruption; it is not a panacea.

Finally, citizens, activist groups and parliamentarians are very eager to learn about the contracts in order to act as monitors and influence policy. Activist groups have written reports on various contracts, and issues surrounding the contracts receive nationwide attention in the press.<sup>122</sup> Contract transparency is allowing civil society to play a greater role in the nationwide debate over how to use its non-renewable resources. Again, while contract transparency will not diffuse all differences, it is providing an avenue for constructive dialogue.

### iii. The Mittal Steel Iron Ore Contract with Liberia

Many contracts come into the public domain not through government policy or practice, but through the efforts of concerned citizens in host countries who use their connections to gain access to contracts.

Local concerned citizens were able to gain access to Mittal Steel's multi-million dollar iron ore contract through contacts in the government.<sup>123</sup> The Sustainable Development Institute (SDI), a local Liberian NGO working on natural resource issues, asked the Columbia Human Rights Clinic to analyze the contract. SDI published the memorandum that the Clinic authored in a national newspaper.<sup>124</sup> Mittal responded with its own newspaper ads, stating that the conclusions in the memorandum were false or that the contract had been misconstrued.<sup>125</sup> Mittal maintained that its agreement with Liberia "mirrored essentially like it's done anywhere else."<sup>126</sup> Global Witness, an NGO dedicated to exposing the corrupt exploitation of natural resources and international trade systems, authored a much more detailed analysis of the Mittal contract, adding further pressure for renegotiation.<sup>127</sup>

On January 16, 2006, shortly after coming into office and preceding the newspaper battle about the contract, President Ellen Johnson-Sirleaf instituted a policy to review all contracts and concessions entered into by the transitional government that preceded her.<sup>128</sup> The review policy was part of a national strategy to facilitate the rebuilding of Liberia after fourteen years of civil war, and it was not limited to natural resource contracts. The transitional government that preceded Sirleaf was known to be exceedingly corrupt, to the point that the international community developed a program specific to Liberia, called the Governance and Economic Management Assistance Program or "GEMAP."<sup>129</sup> GEMAP was designed to rebuild Liberia's institutions and oversee the process with technical expertise and oversight within government ministries. Contract review and renegotiations were already a part of this program, and Johnson-Sirleaf put this particular aspect of the program at the top of her agenda. More specifically, Johnson-Sirleaf fast-tracked the Mittal Steel contract, creating a process that was parallel but complementary to the international community's process under GEMAP.

The administration used international support for the larger contract review process and the media and NGO coverage of the Mittal contract to strengthen Liberia's bargaining position.<sup>130</sup> The changes in the renegotiated contract vary from increased fiscal benefits to Liberia to increased government rights and protections, particularly with regard to critical infrastructure, such as rail and ports. Although the agreement still falls short of what some civil society advocates called for in key respects, namely the confidentiality clause and Mittal's unfettered right to timber, the agreement is far better than it was previously.<sup>131</sup> Particularly relevant to this report, the confidentiality clause will continue to keep all information confidential between the parties, unless they mutually agree to disclose it.

The renegotiated contract is a public document, despite the restrictive confidentiality clause. Gaining access to it is not easy, though: there is no contract database housed in one government agency, nor are contracts available via Internet. However, they can be requested, and the government plans to create a single database in the future.<sup>132</sup>

## B. Companies

Very few companies, if any, have adopted a contract transparency policy. The BTC consortium's disclosure of the BTC contracts is the most prominent example of a company taking the initiative to disclose contracts. And while that disclosure was a major step, it has not led to a permanent contract disclosure policy by BP or by any other BTC consortium company.<sup>133</sup>

## C. Home Countries

### I. Law

Home country policy on contract transparency is relatively obscure and appears unenforced. One example is the United States 2006 Foreign Operations Appropriations Bill H.R. 3057. The law restricts the allocation of funds to IFI extractive industry projects that do not require the disclosure of host country agreements and other project bidding documents. But despite the strength of the language, there is no indication that funds have been withdrawn due to a failure by IFIs to require contract transparency.<sup>134</sup>

### 2. Securities Regulations

The most significant “home country” laws that bear on contract disclosure are securities laws and regulations. Stock exchanges may require disclosure, in various forms, of “material contracts” or “material transactions.” As securities regulations, the motivation behind such disclosures is to provide information to investors to value securities. These regulations are not currently related to a policy for better management of extractives through contract transparency. Nonetheless, securities regulations are important because they provide a potential source of information for the general public and they demonstrate that contracts are already routinely disclosed and publicly accessible, without significant harm to the industry, individual companies, or government counterparties.

It is difficult to track exactly which contracts become public, but a small survey conducted for this report suggests that disclosure is inconsistent and typically does not occur in the case of major mining and oil companies. Several factors contribute to this. First, securities disclosures (or “filings”) are made by companies (or their agents, usually lawyers), not an independent body. The filings are overseen and audited by government regulators, but the burden is on the company to self-report. This means that companies may interpret the rules slightly differently, leading to some variation.

Second, “material contracts,” when defined in these regulations, tend to mean contracts “out of the ordinary course of business.” What constitutes “the ordinary course of business” is different from company to company as well. For example, a small oil company that has only one or two major contracts with governments will likely need to disclose those contracts and any changes to them, as its business is largely dependent on those contracts. Conversely, a large multinational that is listed and has many contracts around the world would not need to make similar disclosures, as they would not be “material” to its business by securities regulation definitions. Further, the contract itself is not always required to be publicly available pursuant to securities regulations on all exchanges; rather, only the major terms must be disclosed on some exchanges.<sup>135</sup>



### EXAMPLES OF CONTRACTS ON SECURITIES DISCLOSURE DATABASES

*Kazakhstan and Chaparral Resources Inc.* Material contracts, if required to be disclosed, are generally found as “EX-10 Exhibits” as a part of filings required by Regulation S-K. Chaparral Resources Inc. was an American company<sup>136</sup> whose only operational contract was for the Karakuduk field in Kazakhstan.<sup>137</sup> The company’s Exploration, Development, and Production Agreement with Kazakhstan is available as an EX-10 Exhibit on the US Securities Exchange Commission’s database, EDGAR.<sup>138</sup> A review of the contract indicates no discernable redactions.

## D. IFIs

The major international financial institutions—the World Bank (IBRD and IDA), the IFC and the IMF—are moving towards contract transparency policies and programs. However, despite the policies on contract transparency articulated by the major IFIs, there are still major gaps and lags.

IFI Policies on Contract Transparency		
IMF: Robust Contract Transparency Policy	IFC: Limited Contract Transparency Policy	World Bank: Moving Towards a Contract Transparency Policy
<p>The IMF’s Guide to Resource Revenue Transparency has, since 2005, recommended that oil, gas and mineral producing countries disclose their contracts (i.e., PSAs, Mining Conventions, etc.) as a part of sound fiscal policy. The second version of the Guide, published in 2007, reiterated the need for the disclosure of contracts (i.e., bids, license agreements, PSAs, etc.):</p> <p>“Best practices [...] in this respect are: (i) standard agreements and terms for exploration, development, and production, with minimum discretion for officials, though these terms may vary over time; (ii) clear and open licensing procedures; (iii) disputes open to (international) arbitration; and (iv) disclosure of individual agreements and contracts regarding production from a license or contract area.”<sup>139</sup></p>	<p>The IFC requires the transparency of major contract terms, though not disclosure of full contracts. The “Policy on Social and Environmental Sustainability, 2006” states:</p> <p>“The IFC promotes transparency of revenue payments from extractive industry projects to host governments. Accordingly, IFC requires that: (i) for significant new extractive industries projects, clients publicly disclose their material project payments to the host government (such as royalties, taxes, and profit sharing), and the relevant terms of key agreements that are of public concern, such as host government agreements (HGAs) and intergovernmental agreements (IGAs); and (ii) in addition, from January 1, 2007, clients of all IFC-financed extractive industry projects publicly disclose their material payments from those projects to the host government(s).”</p> <p>The IFC’s commitment to contract transparency only applies to “significant” and “new” projects, i.e., those expected to account for 10% or more of government revenue.<sup>140</sup></p>	<p>The World Bank has not announced a policy on contract transparency. In April 2008, it launched the “EITI ++” initiative that aims to apply the principles of transparency and good governance across the “value chain,” i.e., contracts, revenues, budgeting, expenditures, when it becomes operational. The exact contours of the initiative are still developing, though contract transparency could be included in the program. No new announcements are on the Bank’s website concerning the initiative, but reports from those working with the Bank on EITI++ say that it will likely take a country-by-country focus, and not become Bank policy.<sup>141</sup></p>



The IMF Guide on Resource Revenue Transparency (“IMF Guide”) provides analysis according to the *type* of contracting procedure used, indicating how transparency of agreements should be implemented in each procedure:

- *Open bid—fixed terms.* The IMF recommends that systems using fixed term bids should make public all bids received and the final contract awarded. Furthermore, all seismic data and drilling data from the successful bidder should also become public, though no time frame is fixed. The report notes a range from eight years (Australia) to thirty-five years (US operations in the Gulf of Mexico).
- *Open bid—variable terms.* The IMF recommends disclosure of winning bids, and that bid rounds should be open to scrutiny by international observers.
- *Negotiated deals.* For these deals, which are generally characterized by a number of variable terms being up for negotiation, the IMF notes that disclosure is especially rare. While the approach can be fairly efficient, it “carries a greater risk of corruption. Good practice as far as disclosure is concerned would at least include ex post publication of contract awards and terms.”<sup>142</sup>

The IMF Guide notes that, for the petroleum industry, open bidding is generally not possible in particularly exploratory areas. “International companies, particularly smaller ones, are not in a position to invest in exploration or release ideas about prospects to either licensing authorities or competitors. An ordinary tender for bids in the early stages or exploration of frontier or gas-prone regions, for instance, is thus likely to fail because of the high risks and up-front costs. Negotiated deals are common in these situations. **Good practice for transparency, however, would require the publication of all signed contracts.**”<sup>143</sup>

The IMF Guide presents some explanation for the reluctance of governments and companies to follow its recommendations:

“An often expressed concern with regard to open tendering processes is that both government and companies may lose their competitive advantage by public disclosure of winning contracts. For reasons of commercial confidentiality, therefore, negotiated contracts with non-disclosure clauses [another term for confidentiality clauses] are the practice in a number of countries. **The reason usually advanced by governments (and to some extent by companies) is that disclosure would erode their bargaining power for future contracts.** In practice, however, the **contract terms are likely to be widely known within the industry soon after signing.** Little by way of strategic advantage thus seems to be lost through **publication of contracts.** Indeed, it could be argued that the obligation to publish contracts should in fact strengthen the hand of the government in negotiations, because the obligation to disclose the outcome to the legislature and the general public increases pressure on the government to negotiate a good deal.”<sup>144</sup>

This observation underscores a major conclusion of this report: that industry is far more knowledgeable about contracts and contract terms than their government counterparties. While governments may fear contract transparency for exposing corruption, incompetence, or lack of resources, they may, in fact, be missing the opportunity to get a better deal. This may also be why companies are not racing to adopt contract transparency.

Despite the movement towards contract transparency policies, implementation is lagging. According to a joint Global Witness/Bank Information Center Report, contract disclosure is largely not promoted in the IFIs' operations:

“The disclosure of contracts is not addressed by nearly 80% of IMF operations and 90% of World Bank operations in resource-rich countries. The IMF does make contract disclosure a program benchmark or progress indicator in 12% of countries with IMF lending programs. The Bank never designates it as a program benchmark, and only one IFC EI project investment has required contract disclosure since June 2003.”<sup>145</sup>

## E. Industry

Industry groups and individual companies have yet to adopt full contract transparency policies. While contracts are bought and sold and traded among friends and colleagues, industry is reluctant to make contracts available to the public.

The most promising statement on contract transparency has come from the International Council on Mining and Metals (ICMM), an industry association. As part of its “Position Statement on Mineral Revenue Transparency,” ICMM members commit themselves to “[e]ngage constructively in appropriate forums to improve the transparency of mineral revenues – including their management, distribution or spending—or of contractual provisions on a level-playing field basis, either individually or collectively through the ICMM Secretariat.”<sup>146</sup>

While contract transparency policy endorsements are exceedingly limited—even the ICMM’s endorsement is only for contractual provisions, not full contracts—contract disclosures among industry members are not. Various oil, gas and mining contracts can be bought on industry-specific websites and general contract websites. Alexander’s has a Contracts & Tenders section on its website,<sup>147</sup> which includes a database of oil and gas contracts. The Barrows Company also has oil, gas and mining contracts in its database.<sup>148</sup> Neither of these databases appears to be comprehensive. Columbia Law School houses some paper copies of the Barrows “Basic Oil Laws and Concession Contracts” collection, but a review of its contents reveals no discernable pattern as to how these contracts and laws are acquired. Despite having oil, gas and minerals, some countries are not listed as having contracts in the collection, while others have many. Markings on model contracts indicate that some may have been accessed through government publications, such as federal registers or gazettes.

In addition to looking to gazettes, it is likely that these databases gain access to contracts through connections in the industry and in government. It is not unusual for participants in various industry electronic mailing lists to also ask for contracts from other participants, such as on the Oil, Gas and Energy Law forum.<sup>149</sup>



# 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.



# “Best Practice” Confidentiality Clauses

## Example One

This Agreement will be published in [government gazette/federal register] or publicly available at [ministry website/ ministry library/ parliamentary records]. Information in relation to activities under these agreements shall be kept confidential if requested by a Party, to the extent that such Party establishes that confidentiality is necessary to protect business secrets or proprietary information. Such confidentiality is subject to [relevant disclosure laws], as well as to applicable laws and regulations, including stock exchange and securities rules, and requirements for the implementation of the Extractive Industries Transparency Initiative.

## Example Two

- a) Subject to the limitations below and subject to applicable Law, for a period of [three] years from disclosure, each party agrees not to divulge information designated in writing at the time of delivery as confidential information (“Confidential Information”) by the other party to any other Person without the prior written consent of the designating party. By designation of information as Confidential Information a party will be deemed to have represented that after review of such information it has reasonably determined that the release of such information to third parties would materially adversely affect the party or its economic well-being. In any event Confidential Information does not include information that was publicly available or otherwise known to a party prior to the time of disclosure to it and not subject to a confidentiality obligation, subsequently becomes publicly known through no act or omission by a party, otherwise becomes known to a party other than through disclosure to such party by the other party, constitutes financial statements delivered to the Government that are otherwise publicly available, is mainly of scientific rather than commercial value such as geological or geophysical data relating to areas in which the Company no longer holds a valid exploration license and has not designated as a Proposed Production Area, or has been disclosed pursuant to generally applicable Law or a final order or any court having jurisdiction that is not subject to appeal.

- b) Each party will maintain the confidentiality of Confidential Information disclosed to it in a manner consistent with procedures adopted by such party to protect its own confidential information, provided that such party may deliver or disclose Confidential Information to its financial, legal and other professional advisors (to the extent such disclosure reasonably relates to the administration of this Agreement) or any other Person to which such delivery or disclosure may be necessary or appropriate to effect compliance with any law, rule, regulation or order applicable to such party, in response to any subpoena or other legal process, in connection with any litigation to which such party is a party if reasonably delivered necessary to protect such party's position in such litigation or if an Event of Default has occurred and is continuing but only to the extent such party reasonably determines such delivery and disclosure to be necessary or appropriate in the enforcement or for the protection of the rights and remedies under this Agreement.
- c) This Agreement and any annexes or amendments are not confidential, and the Company is not entitled to confidential treatment of information relating to the timing and amount of royalties and other payments specifically due under the terms of this Agreement or of Taxes and Duties payable by the Company or the rates at which such royalties, other payments or Taxes and Duties become due or are assessed, or information that is necessary to compute the amount of such royalties or other payments becoming due.

## ■■■ APPENDIX B

# Global Survey of Confidentiality Clauses

Country	Date	Contract Type	Confidentiality Clause or Clause Summary
Abu Dhabi	1980	Petroleum	The Government must treat all information, maps, records, and reports provided by the Company under this Section as confidential, except as required for settlement by arbitration of a dispute between the parties.
Abu Dhabi	1980	Petroleum	Same as above.
Albania	1998	Petroleum	All information acquired or received under the Contract shall be treated by Parties as confidential and not divulged to other parties without the prior written consent of the other Party during the term of this Contract, except: 1) to comply with laws, rules, or regulations of the NPA or any stock exchange; 2) if the information becomes part of the public domain; 3) if disclosed to employees, Affiliates, consultants, etc. to the extent necessary for the efficient conduct of Petroleum Operations, provided that the other party has entered into a confidentiality undertaking; 4) if the Contractor shows the information to bona fide potential assignees, as long as that party has entered into a confidentiality undertaking; 5) if the NPA seeks to obtain new offers on relinquished portions of the Contract Area or adjacent areas, it may show data on relinquished portions in uninterpreted and basic form during the term of the Contract; or 6) as required by financing institutions for purposes of obtaining finances to carry out obligations under the Contract. The Contractor is bound by confidentiality for a period of five years following the Contract's termination.
Albania	1994	Petroleum	All information acquired or received under the Contract is confidential and parties may not divulge the information without prior written consent of the other party while the Contract is in force, except: 1) to the extent required to comply with laws, rules, or regulations or the rules of a stock exchange; 2) to the extent the information becomes part of the public domain; 3) to provide information to employees, Affiliates, contractors or subcontractors required for the efficient conduct of Petroleum Operations, as long as those parties protect the information's confidentiality; 4) for the Agency's purpose of obtaining new offers on relinquished portions of the Contract Area (but data must be in uninterpreted and basic form); 5) if required by financing institutions to obtain finance for the purpose or carrying out Contract obligations; or 6) for the Contractor's purpose of seeking a bona fide potential assignee. Contractor must keep information confidential for four years after the Contract's termination, except if approved by the Agency.
Angola	2006	Petroleum – Model	Information of a technical nature developed through the Operations is property of Sonangol, and Contractor Group may use and copy such information for internal purposes. While the Agreement remains in force and for ten years following its termination, all technical, economic, accounting or any other information and data developed through the conduct of the Petroleum Operations shall be held as confidential and not disclosed to others without the prior written consent of the other Party, except [standard exceptions except for arbitrators]. A similar confidentiality requirement exists for the Agreement itself, but without any cutoff date. Sonangol may disclose to third parties geophysical and geological data and information and other technical data (more than one year of age) and interpretations (more than five years of age) to obtain offers for new Petroleum Exploration and Production agreements upon informing Contractor Group.
Angola	2005	Petroleum – Model	Same as above.
Angola	1998	Petroleum	Same as above.

Country	Date	Contract Type	Confidentiality Clause or Clause Summary
Angola	1982	Petroleum	Unless otherwise agreed, all data, information and interpretation of such data provided to SONANGOL by the Contractor shall be strictly confidential and may not be divulged to any Party except to Affiliates without the prior consent of the other Party. However, SONANGOL may show other parties geophysical and geological data (more than one year of age) or Contractor's interpretation (more than five years of age) to obtain new offers.
Angola	1981	Petroleum	This provision has the same exact language as the above provision, except it provides that the Contractor may also furnish data and information as required by competent governmental authorities, to lending institutions for financing the Agreement's operations, as required by any stock exchange or to independent auditors, or to contractors and subcontractors when required by the operations. There is also a clause in the provision related to SONANGOL's access to books, registers and records, as well as the Contract Area and activities, which states that all the information obtained by the Government under this provision is confidential for the term of the Contract without prior written consent of the other Party.
Angola	1979	Petroleum -Model	All data, information and interpretation of such data provided to SONANGOL by the Contractor shall be strictly confidential and may not be divulged by SONANGOL to any Party except to Affiliates, or by the Government, without the prior consent of the other Party while this Agreement remains in force. However, the Government may show other parties geophysical and geological data (more than one year of age) or Contractor's interpretation (more than five years of age) to obtain new offers. There is also a clause in the provision related to SONANGOL's access to books, registers and records, as well as the Contract Area and activities, which states that all the information obtained by the Government under this provision is confidential for the term of the Contract without prior written consent of the other Party.
Angola	1999	Petroleum – Model	Same as above.
Angola	1986	Petroleum Model	This confidentiality provision is the same as above EXCEPT that there is no specific provision relating to confidentiality of the Agreement itself.
Antigua	1981	Petroleum	State has the right to copy all original data resulting from the Petroleum Operations and any other data Contractor may compile during the contract term, but prior to disclosing the data to third parties, must inform and give Contractor the opportunity to discuss the disclosure and allow Contractor to retain copies of data.
Argentina	1991	Petroleum	No confidentiality clause.
Argentina	2006	Petroleum – Model	During the term of the Contract and for two years after termination of the contract, any data or information related to development shall be treated by Contractor as strictly confidential and shall not be disclosed to third parties without prior written consent of the Applicable Authority. Employees, agents, representatives, attorneys-in-fact and subcontractors must also be subject to the same confidentiality conditions. Any information related to the Contract area shall become the exclusive property of the Province, which may freely dispose of it under the same conditions as the relinquishments in Art. 3.2.
Argentina	1991	Petroleum	During the period the Contract is in force, any information, regardless of its nature, regarding the development of the Contract shall be confidential and not revealed to third parties without the prior written consent of the other parties EXCEPT: to an Affiliate or assignee, provided that party has engaged in a written confidentiality undertaking; to any banking or financial institution where a party has applied for or obtained financial support, provided that institution has a written confidentiality undertaking; if information is publicly known; or if required by applicable legislation or regulations of a well-known stock exchange. Parties must take necessary steps to ensure employees, representatives, agents, and subcontractors comply with this confidentiality undertaking. Upon termination of the Contract, information related to the area is Yacimientos Petroliferos Fiscales (YPF)'s exclusive property, except that which the operator should keep, in compliance with legal and supervisory provisions.
Argentina	1991	Petroleum	No confidentiality clause.

Country	Date	Contract Type	Confidentiality Clause or Clause Summary
Argentina	1986	Petroleum	During the period the Contract is in force, any information, regardless of its nature, regarding the development of the contract shall be confidential and shall UNDER NO CIRCUMSTANCES be revealed to third parties without the prior written consent of the other parties. If one of the parties, in executing the contract, should use proprietary technology, the other party shall not be entitled to use or disclose such technology without prior written consent. Neither of these restrictions applies if the information is required by government authorities or financial entities, or if given to associates in situations under Art. 33 of Law 19550. Parties must take necessary steps to ensure employees, representatives, agents, attorneys and subcontractors comply with this confidentiality undertaking. All information concerning areas relinquished to Yacimientos Petroliferos Fiscales (YPF) shall become its exclusive property and YPF is entitled to freely dispose of such information, but the contractor and operator must maintain their confidentiality obligations for a period of two years after relinquishment.
Argentina	1985	Petroleum – Model	During the period the Contract is in force, any information, regardless of its nature, regarding the development of the contract shall be confidential and shall UNDER NO CIRCUMSTANCES be revealed to third parties without the prior written consent of the other parties, EXCEPT if required by government authorities or financial entities, or if it falls under Art. 33 of Law 19.550. Parties shall take necessary steps to ensure employees, representatives, agents, proxies and subcontractors comply with this confidentiality obligation. All information concerning areas relinquished to YPF shall become its exclusive property and YPF is entitled to freely dispose of such information, but the contractor and operator must maintain their confidentiality obligations for a period of two years after relinquishment.
Australia	2006	Minerals	Unless otherwise agreed by the Participants or required by law or the Listing Rules of ASX, all information obtained in relation to the Joint Venture and which is not in the public domain shall be kept confidential and shall not be disclosed by the Participants. If the release of any information is required in order to comply with the Listing Rules of the ASX, and the Participants agree that such information may be given to the ASX for release to the market, such release is permitted; provided that all Participants have been given a reasonable period of time, bearing in mind the circumstances, to comment on the draft announcement to ASX.
Australia/ Timor Leste	2003	Petroleum	No confidentiality clause.
Bahrain	1998	Petroleum	The Agreement and all data and information developed, received, or otherwise obtained pursuant to the Agreement is confidential and may not be disclosed to third parties without prior written consent. BANOCO may disclose to third parties information and data related to areas relinquished within the Contract Area and to the entire Contract Area after termination of this Agreement. The contents of any arbitral proceeding and award must be kept confidential.
Bahrain	1983	Petroleum	Contractor and its employees will keep secret all information related to the Area and its operations during and after the term of the Agreement, except where it has the prior written consent of BANOCO. Both Contractor and BANOCO and its employees will not disclose any information related to the other party not already in the public domain without prior written consent during or after the term of the Agreement.
Bangladesh	2008	Petroleum – Model	Data and information maintained by Parties is confidential until five years after termination of the Contract, unless permission to disclose is granted by either Party or required by law, or the information is already part of the public domain. Parties may disclose information to employees, Affiliates, Consultants, etc. to the extent required to efficiently conduct Operations, but those individuals/entities must be bound to confidentiality agreements no less restrictive than that of the Parties. Petrobangla may show data related to the Contract Area or a relinquished portion of the Contract Area to any other entity when seeking new offers on areas near the Contract Area or relinquished portions of the Contract Area, respectively, as long as the data at time of showing is at least 24 months old.

Country	Date	Contract Type	Confidentiality Clause or Clause Summary
Belize	2003	Petroleum	Information identified as “confidential” by the party originally in possession of it shall not be published or disclosed to third parties without the party’s prior written consent until the relinquishment of the area to which the information relates, except: 1) if the information is already publicly known or known (legitimately) to the other party; 2) if the information is necessary to provide to third parties in connection with the Agreement so long as the third parties are held to confidentiality requirements; or 3) if required by a Government agency. The Government has title to all original data resulting from petroleum operations compiled by the Contractor and any contractors, subcontractors, consultants, or affiliated companies during the contract term. The Government may not disclose such data to third parties before the area to which they relate is relinquished or prior to the end of the exploration period, except to professional consultants, legal counsel, etc. The Contractor may not disclose such data to any third parties without the Government’s prior written consent, except to professional consultants, legal counsel, etc. Recipients of the data must be bound to treat the data as confidential.
Belize	1991	Petroleum	Logs, records, plans, maps, accounts and information furnished by Licensees under the provisions of the License shall be treated by the Government Inspector of Mines as confidential, but may be used for arbitration or litigation between the Minister and Licensee and in preparing aggregate returns and general reports. After twelve months or upon termination of the Licenses, the Government Inspector has the right to use all information as he sees fit.
Bolivia	2006	Petroleum – Model	During the Contract, parties agree to treat as confidential and not communicate to third parties information, documents, maps and samples obtained during the execution of the Contract. If the Contract concludes for any of the grounds foreseen in the present Agreement, the Titleholder may not communicate to third parties any of the above materials obtained during the execution of the Contract. The Titleholder may communicate to third parties the materials mentioned above when required for good performance of the Oil Operations, with prior authorization from YPFB and through records of confidentiality.
Bolivia	1997	Petroleum	The Yacimientos Petrolíferos Fiscales Bolivianos (YPFB), the National Secretariat of Energy and any other State institution will keep the technical information obtained from the Title Holder confidential and may not disclose it to any other person not in the service of the State without prior written consent by the Title Holder (which shall not be denied without valid reasons), EXCEPT: a) to use the information to prepare statements of accounts and internal reports; and b) to prepare and publish reports or studies of a general or regional nature without revealing the source of the information. After the earlier of Title Holder returning the portion of the Contract Area or the expiration of two years since the date on which the information was delivered, YPFB and the National Secretariat of Energy may publish and make known geological, scientific and technical information through the National Information Center, for the purpose of promoting investments.
Bolivia	1991	Petroleum	All technical information shall be kept confidential by the Parties except when Yacimientos Petrolíferos Fiscales Bolivianos (YPFB) gives written authorization or when required by the Controlling Board, as required by law.
Bolivia	1992	Petroleum	Same as above.
Bolivia	1974	Petroleum	Unless otherwise authorized in writing by YPFB, all technical information related to this Contract will be kept confidential by the Parties, without prejudice to YPFB’s obligation to carry out and fulfill obligations contained in law.
Bolivia	1973	Petroleum	Same as above.
Brazil	2001	Petroleum – Model	Concessionaire shall treat this Agreement and all data and information produced, developed or obtained by any means whatsoever as a result of the Operations as strictly confidential, and shall not disclose without prior written consent from the National Agency of Petroleum, EXCEPT: when data and information are already in the public domain; when required by law or court order; when disclosed in accordance with rules and limits of stock exchanges; or when disclosed to Affiliates, consultants, or agents of the Concessionaire, possible assignees and their consultants and Affiliates, financial institutions used by Concessionaire and their consultants, and to Concessionaires of adjacent areas and their consultants and Affiliates for the execution of the agreement in paragraphs 12.1 and 12.2, subject to a confidentiality agreement with no exceptions and subject to sanctions and fines for breach. Concessionaire must notify the Agency of the disclosures within 30 days. Confidentiality obligation lasts forever. The Agency may not disclose any data or information obtained as a result of Operations and which pertains to the parts of the Concession Area retained by the Concessionaire, except when such disclosure is necessary under legal provisions or for the purposes for which the Agency was created.

Country	Date	Contract Type	Confidentiality Clause or Clause Summary
Brazil	2004	Petroleum – Model	Same as above.
Brunei	2003	Petroleum	Terms of the Agreement and Data are confidential for five years unless: there is prior written consent of the other Party; the information is to be released to a consultant, potential transferee, affiliate, etc. of Contractor or PetroleumBRUNEI, as long as such person or entity is subject to confidentiality agreements with Contractor or PetroleumBRUNEI; Data is released as part of an exchange by Contractor with other contractors for data and information pertaining to petroleum operations; Data is already publicly available; Data is required to be disclosed by arbitrators/Experts; Data is directly related to areas relinquished by Contractor or areas in which Petroleum BRUNEI intends to pursue a unitization effort; release of information is required by Government or related Government agencies (who are still subject to the same standard of confidentiality); or PetroleumBRUNEI considers disclosure to contractors in Block J offshore Brunei Darussalam would be in the national interest, as long as it gives the Operator six months' notice and similar information about Block J.
Bulgaria	1991	Petroleum	Parties must make available to the Operator and other Parties all geological and geophysical materials and other information directly relevant to the activities within the License Area, as well as interpretation of data of significance for the activities. Information concerning technical, scientific, economic or commercial activities shall not be made public to a third party without the consent of the other parties except: 1) to the extent necessary to comply with rules or requirements of a stock exchange or other institution with jurisdiction over a Party; 2) if provided to Parties' Affiliates or bona fide potential assignees, and consultants and other vendors, if necessary in order to carry out work; 3) if provided to financial institutions for purposes of financing Party's participation in the Joint Operations, provided that the other Parties are informed in advance. The Operator may, with the permission of COMMGEO, sell, exchange or release seismic data, drilling results, etc. to third parties. COMMGEO has the exclusive right to retain or dispose of data for an area relinquished by Licensees. A Party that ceases to be a Party has a continuing obligation to keep the information confidential.
Cambodia	2004	Petroleum – Model	Data and other information relating to Petroleum Operations or the Contract Area acquired or received by either Party from the other, the Contract and any amendments to it, and any correspondences between the Parties relating to the Contract are confidential until two years after the termination of the contract except: as permitted under the Contract or by prior written approval of the other Party; if either Party is entitled/required to disclose such information to a Government Ministry Authority or official, subcontractor, affiliated party of a contractor party, transferee in interest, consultant, bank or financial institution [last four require confidentiality agreement with those parties]; if required by law or regulation or by rules of an official Stock Exchange; if the information is already in the public domain.
Cambodia	2002	Petroleum	Same as above Model Contract
Cambodia	1991	Petroleum	Data from the Cambodian Government to the contractor relating to the Contract Area and areas adjoining the Contract Area and data resulting from Petroleum Operations shall be confidential during the term of the agreement. The Ministry may disclose data to other potential contractors on parts of the Contract Area already relinquished by Contractor. Contractor may release Data to subcontractors, affiliated parties, intended transferees of rights and obligations, an external consultant, bank or financial institution (the last 3 require a confidentiality agreement between the parties). Contractor may also release data to the extent that it is required by law or regulations or by rule of an Official Exchange or to the extent the data is already public.

Country	Date	Contract Type	Confidentiality Clause or Clause Summary
Cambodia	2009	Petroleum – Model	27.1 For the purposes of this Agreement, Confidential Information includes: (a) all Data and other information relating to the Petroleum Operations or the Contract Area acquired or received by either Party from the other, and which information is not in the public domain; (b) the text of this Agreement, any amendment thereto, or any correspondence between the Parties relating thereto; and (c) all Data required by either Party to be treated as Confidential Information under Article 26. 27.2 (a) Where a Party is required to treat Data, information or other documents or material as Confidential Information, or receives Confidential Information from the other, that Party shall keep confidential the Confidential Information and shall not disclose the Confidential Information except as permitted under this Agreement or with the prior written approval of the other Party, which approval shall not be unreasonably withheld if the intended recipient of the information gives an undertaking in form and substance satisfactory to the other Party to keep such information confidential. (b) The obligations described in Article 27.2(a) will continue for a period of two years after termination of this Agreement. 27.3 A Party is entitled to disclose Confidential Information to the following personnel and in the following circumstances: (a) to a Government Ministry, Authority or official where considered appropriate by CNPA; (b) to a Subcontractor involved in Petroleum Operations; (c) to any Affiliated Party of a Contractor Party; (d) to any entity to whom a Contractor Party intends to transfer any part of its interest under this Agreement, provided that a confidentiality agreement has been executed with the said entity; (e) to an external consultant whose services are required by CNPA or Contractor, provided that a confidentiality has been executed with the said consultant; (f) to a bank or financial institution from which Contractor is seeking finance, provided that a confidentiality agreement has been executed with the said bank or financial institution; (g) to the extent this Agreement obliges Contractor, by application of the laws or regulations applicable to Contractor, or in conformity with the rules of an official Stock Exchange on which shares of Contractor or its Affiliates are listed; (h) to the extent that the Confidential Information is already in the public domain; and (i) to directors, officers or employees of Contractor or its Affiliated Party.
Cameroon	1995	Petroleum – Model	The text of the Contract and information pertaining to the operations may not be disclosed to third parties without the written agreement of the other Parties, except: to Cameroon authorities upon official request; to Affiliated Companies; to third parties acting on orders from any governmental or municipal authorities; to the Party's advisors; to the extent required by laws or regulations, or rules or requirements of a stock exchange; to prospective assignees; or to the extent information is already public; provided that such third parties are also bound by this confidentiality provision. If a Party ceases to be a Party through withdrawal or relinquishment, they must still hold the information confidential for five years after the termination. The Operator is responsible for preparing and releasing all public announcements and statements regarding this Contract or Joint Operations, provided that copies of such announcements are first provided to all Parties and are approved by the Operating Committee, unless there is danger to or loss of life, damage to property or environment, or pollution (no prior approval needed).
Cameroon	2002	Minerals	The Republic of Cameroon hereby acknowledges that all reports, results of analyses, logs, geophysical data, maps and any other information received from Contractor, whether by way of inspection or other means, constitute "Industrial Secrets." The State shall guarantee to Contractor that neither the Republic of Cameroon nor any of its agents or officials shall communicate such Industrial Secrets to third parties without the prior and written approval of Contractor.
Canada	2006	Minerals	For the duration of the agreement and twelve months following its termination, Contractor shall hold in "strict confidence," and shall not, without permission of the Company, make use of information about the Company's affairs and properties which has not formally been released to the public domain, except as requested for the benefit of the Company.
Cayman Islands	1985	Petroleum	The Government shall treat all information supplied by the Contractor pursuant to this Contract as confidential for one year (in the case of technical information) or three years (in case of financial information) from date of submission. During such period, the Government may not disclose to third parties the information except: 1) for the purpose of preparing and publishing general reports on petroleum; 2) for purposes of unitization; 3) in connection with any dispute between Government and Contractor; 4) in connection with operation monitoring. Patents or know-how acquired from the Contractor may not be revealed without the consent of the Contractor. The Contractor must keep technical and financial information, data, or reports pertaining to the Contract Area confidential, even after termination of the Contract, unless it has consent of the Government. With the consent of the Joint Management Committee, the Government and Contractor may disclose relevant information and data to financial institutions, sub-contractors, or potential assignees, provided those third parties maintain confidentiality of the information.



Country	Date	Contract Type	Confidentiality Clause or Clause Summary
China	2002	Minerals	Geological and other technical information and figures and operational and production information is confidential and can only be used for related projects. If a Party wants to release detailed information to the public, it needs prior consent from the other Party, unless the information is already published.
China	2006	Minerals	The Parties acknowledge that the two Parties may be subject to legislation requiring the publication of results of exploration and mining development programs, and of operating results when production begins. All information shall be the property of the Company and will be held confidential by each of them.
China	2004	Minerals	During the term of this Contract and for a period of five (5) years from the date of termination and expiration of the Contract for any reason whatsoever, the Receiving Party of any Confidential Information shall: keep the Confidential Information confidential; not disclose the Confidential Information to any person other than with the prior written consent of the Disclosing Party or in accordance with Articles 9.2 and 9.3; and not use the Confidential Information for any purpose other than the performance of obligations under the Contract. During the term of the Contract the Receiving Party may disclose the Confidential Information to any of its employees (each a "Recipient") to the extent that such disclosure is reasonably necessary for the purposes of the Contract. The Receiving Party shall procure that each Recipient is made aware of and complies with all the Receiving Party's obligations of confidentiality under the Contract as if the Recipient was a party to the Contract. The obligations contained in Articles 9.1 to 9.3 shall not apply to any Confidential Information which: at the date of the Contract is in, or at any time thereafter the date of the Contract comes into, the public domain other than through breach of the Contract by the Receiving Party or any Recipient; can be shown by the Receiving Party to the reasonable satisfaction of the Disclosing Party to have been known by the Receiving Party before disclosure by the Disclosing Party to the Receiving Party; or subsequently comes lawfully into the possession of the Receiving Party from a third party. The provisions of this Article 11 shall survive the termination of the Contract and the dissolution or liquidation of the Joint Venture Company. [Note: Mistake in original contract language: Confidentiality is Article 9, not 11.]
China	1985	Petroleum	The Contract, documents, information, data and reports related to Petroleum Operations within the Contract Area are confidential for a period of time determined by the State Company, in conformity with applicable Chinese laws and regulations and taking into account international practices, except: if the State Company has given its written consent; if necessary for Third Parties or Affiliates related to the Petroleum Operations; or if required by law or regulation or rules of an Official Exchange. Without the written consent of the Contractor, the State Company may not disclose to any Third Party any patented, proprietary, or confidential technology transferred by the contractor except if patent has expired or the technology is in the public domain.

Country	Date	Contract Type	Confidentiality Clause or Clause Summary
China	2002	Petroleum	<p>22.1 CNPC shall, in conformity with applicable laws and regulations of the Government of the People's Republic of China on confidentiality and by taking into account international practice, determine the confidentiality periods for which the Contract and all documents, information, data and reports related to the Petroleum Operations within the Contract Area shall be kept confidential. 22.2 Without the written consent of the other Party, no party to the Contract shall disclose, during such confidentiality periods, the Contract, documents, information, data and reports referred to in Article 22.1 herein or any other information regarded by the JMC as confidential, to any Third Party except the Third Parties specified in Article 22.5 herein and to any Affiliate not directly connected with the implementation of the Contract, and no Party to the Contract shall otherwise transfer, donate, sell or publish them in any way within the confidentiality periods. However, if the Department or Unit decides to invite any Third Party to conduct cooperative exploration for and development of Petroleum in the sedimentary basin in which the Contract Area is located and/or other adjacent areas, CNPC may furnish the following original data and information or interpretation thereof with respect to the Contract Area to the relevant Third Parties: (a) original data and information and their interpretations held by CNPC for over two (2) years and which cover areas relinquished under Article 5 hereof; (b) original data and information and their interpretations covered by any discovery at the end of the second exploration phase if the Contractor has an option under Article 6.4(a) hereof, or at the end of the appraisal work if the Contractor has an option under Article 6.4(b) hereof. CNPC shall require relevant Third Parties to undertake to keep confidential the aforesaid data, information and interpretations thereof furnished to them by CNPC. CNPC shall, in conformity with relevant provisions of laws and regulations of the People's Republic of China and requests relevant government departments and units, provide them with all documents, information, data and reports as mentioned herein. 22.3 During the term of the Contract and after the termination of the Contract, CNPC shall not disclose to any Third Party any patent, know-how or proprietary technology transferred to CNPC by the Contractor without the written consent of the Contractor except for any technology, the patent of which has expired and any proprietary and confidential technology which have entered the public domain. 22.4 After the termination of the Contract or after any assignment of rights and/or obligations of the Contract under Article 23 hereof, the Contractor and any assignee shall ,within the confidentiality periods, continue to be obligated to keep confidential documents, information, data and reports mentioned in Article 22.2 herein except for official documents and information published with the consent of the Parties. 22.5 For the implementation of the Contract, CNPC and each company comprising the Contractor may, after review by JMC and CNPC, furnish the necessary documents, information, data and reports to Third Parties and Affiliates related to the Petroleum Operations. Third Parties and Affiliates include: 22.5.1 Banks or other credit institutions from which financing is sought by any Party to the Contract for the implementation of the Contract; 22.5.2 Third Parties and Affiliates which provide services for the Petroleum Operations, including Subcontractors and other services contractors; and 22.5.3 An assignee or assignees to whom the rights and/or obligations under the Contract may be assigned. 22.6 Necessary information, documents, data and reports may be furnished by the Parties in accordance with the laws of their home countries to the governments and stock exchanges, provided that the Parties report to JMC in advance. 22.7 CNPC and each company comprising the Contractor when furnishing the documents, information, data and reports to Third Parties and Affiliates as mentioned in Article 22.5 herein shall require them to assume the confidentiality obligations as set forth herein, or shall bear full responsibility for any violation thereof.</p>
China	2002	Petroleum	Same as above, but with minor variations for coalbed methane development.
China	2002	Petroleum	Same as above.
China	2002	Petroleum	Same as above.
China	2002	Petroleum	Same as above.
China	1998	Petroleum	Same as above, but with minor variations for onshore, shallow water development.
China	2002	Minerals	All the geological, other technical information and figures and operational and production information shall remain confidential and can only be used for the related projects. Other than the published information in existence, if a Party requires to release to the public any detailed information, prior consent should be sought from the other Party.

Country	Date	Contract Type	Confidentiality Clause or Clause Summary
Colombia	2004	Petroleum – Model	Parties agree that all data and information produced, obtained or developed as a result of the operations are considered strictly confidential for five years from the end of the calendar year in which they were produced, obtained, or developed, OR until the termination of the contract or partial return of area to which the information pertains, whichever occurs first. Interpretations based upon data are confidential for twenty years or until termination of the contract or partial return of the areas. Restrictions do not apply to: information legally required to be disclosed; or data required by affiliates, consultants, contractors, auditors, legal counselors, financial entities, competent authorities with jurisdiction over the Parties or their affiliates, or stock exchanges; provided disclosure is reported to the other Party. Contractor may also furnish data or information to potential assignees provided that party signs a confidentiality agreement.
Colombia	2005	Petroleum	Essentially the same as above with very minor word differences.
Colombia	2006	Petroleum	Essentially the same as above with very minor word differences.
Colombia	1987	Petroleum	No confidentiality clause.
Colombia	2005	Petroleum	All data and information produced, obtained or developed as a result of the operations are confidential for the earliest of: five years following the end of the calendar year in which they have been produced, obtained or developed; the completion of the contract; or the time of partial return of areas to which information pertains. Interpretations based on data obtained is confidential for twenty years from the date it is given to the National Agency of Hydrocarbons, or the termination of the contract or partial return of areas. Confidentiality obligation does not apply to: data or information required to be provided by law or regulations; provision to subsidiaries, consultants, contractors, auditors, legal advisers, financial entities; information required by competent authorities with jurisdiction over the Parties or their subsidiaries; information required by stock exchanges; or provision to potential assignees, provided they sign a corresponding confidentiality agreement. However, divulgence must be communicated to the other Party. The National Agency of Hydrocarbons agrees not to deliver to a third party any data or information obtained as a result of operations performed by the Contractor, except when necessary to comply with legal provisions or in the development of its functions. Otherwise, the Agency must receive Contractor's prior authorization.
Colombia	1998	Petroleum	No confidentiality clause.
Democratic Republic of Congo	2003	Minerals	All documents, information, and particular furnished to OKIMO or obtained by them during the execution of the present contract will be considered as confidential and cannot be the subject of any communication, divulgence, or consultation by third parties, without the prior written agreement of Contractor. The same obligation rests with Contractor concerning the documents and information which it has by fact of the present contract.
Democratic Republic of Congo	2005	Minerals	All particulars and information furnished to the parties or received by them concerning the present Convention, the other parties and/or the Goods, will be treated as confidential and will not be divulged without the prior written agreement of the other parties (who cannot refuse agreement without a reasonable motive) to any person except Affiliated Companies, unless such divulgence is necessary to realize a sale to third party conforming to the preemption clauses provided in the present Convention, is necessary to obtain financing, or is required by law or by a competent regulating authority. When a divulgence is required by law or by a competent regulating authority, a copy of the information of which divulgence is required, including, without limitation, all press releases, must be furnished to the other parties within as reasonable a period possible before the divulgence. If the divulgence is necessary to effect a cession to a third party or to obtain financing for the project, the third party of financier will be held to sign a confidentiality agreement. No party will be responsible, with respect to the other parties, for the interpretation, opinion, conclusion, or other non-factual information that the party has inserted in any report or other document furnished to the party who receives the information, whether by negligence or otherwise.

Country	Date	Contract Type	Confidentiality Clause or Clause Summary
Democratic Republic of Congo	2004	Minerals	Subject to Article 17.2 below, all reports, registers, particulars, or other information of any nature, elaborated or acquired by all parties within the framework of the activities of the Contractor or of the project in the DRC, or both, are treated in a confidential manner and no party may divulge or otherwise communicate such confidential information to third parties without the prior consent of the other parties. 17.2 The above restrictions do not apply: a) to the divulgence of confidential information to member companies of the same group as the parties or to private or public financial establishments, present or future, of the Contractor or the parties, or member companies in the same group as the stockholders or as the member companies in the same group as the stockholders; to contractors or subcontractors; to employees or to expert counsel of the parties or the DCP or in the framework of any fusion, unification, or reorganization or all regrouping envisaged of one party or its shareholders, or members of the same group, or within the framework of the sale of part of the assets or shares by one party or its shareholders or members of the same group; b) to the divulgence of confidential particulars to all Competent Authorities who have the right to demand the divulgence of confidential particular or to divulgences demanded of Contractor or its shareholders or members of the same group by virtue of the laws, rules, ore regulations issued by any Competent Authority or stock exchange; c) to confidential particulars which enter the public domain, except in the case of fault of one of the parties. 17.3 The obligation of confidentiality is maintained during a period of five years from the date of the termination/ dissolution of the present Convention. For information furnished by GECAMINES, the length remains that of the confidentiality compact foreseen.
Democratic Republic of Congo	2006	Minerals	The parties commit to treat in a strictly confidential manner all information on mining exploration and any other information exchanged between them or between one of the parties and the New Company. No party will make a public statement concerning the business of the New Company without the prior agreement of the Management Council of the New Company.
Denmark	1994	Petroleum – Model	All data and information acquired or received by any Party under this Agreement shall be held confidential during the duration of the Agreement and for five years after and may not be divulged to third parties without prior written approval of all the Parties, EXCEPT: to Affiliates upon similar undertaking of confidentiality; to outside professional consultants upon an absolute and unlimited undertaking of confidentiality from such consultants and notification to other Parties; to any bank or financial institution in obtaining financing, provided there is a similar undertaking of confidentiality by the financial institution; to the extent required by the License, law, or regulations of a stock exchange; to the extent generally available to the public; or to a bona fide potential assignee upon obtaining a like undertaking of confidentiality. If party ceases to hold a percentage interest, it is still bound by the above. The Operator may disclose data and information to persons as necessary in connection with the conduct of the Joint Operations, contingent upon similar confidentiality undertaking and notice to other Parties. Operator may, with approval of the Operating Committee and on such terms and conditions as it determines, exchange data and information for other similar data and information. The Operator must promptly provide Parties with copy of agreement and data and information acquired.
Denmark	2005	Petroleum – Model	Same as above except adds “insurance company” to the banks and financial institution exception; also allows divulgence “if ordered by a court or authority of applicable jurisdiction” to “required by law or regulations” exception.
Denmark	2003	Petroleum – Model	Same as above.
Denmark	2005	Petroleum – Model	Any authorities and persons performing duties pursuant to the Subsoil Act are subject to the confidentiality obligations under provisions of sections 152 to 152f of Straffeloven (Penal Code) with respect to information, samples, and other data received by the authorities from the Licensee under this License and the Subsoil Act. Such information, samples, and other data covered by section 34(1) of the Subsoil Act may be disclosed to parties other than public authorities after five years from the date when the above-mentioned information was produced and made available to the Licensee. This time period is reduced to two years if License expires, lapses, or is relinquished or revoked with respect to any information concerning areas no longer covered by the License. However, said authorities and persons can disclose such information if: no legitimate interest of the Licensee requires the information to be kept confidential; essential public interests outweigh Licensee’s interest in maintaining confidentiality; information of a general nature is furnished in connection with issuance of public statements, annual reports, or other public disclosures; or information is disclosed as part of cooperation with other countries’ authorities, provided they undertake a similar confidentiality agreement.
Denmark	1963	Petroleum	No confidentiality clause.

Country	Date	Contract Type	Confidentiality Clause or Clause Summary
Denmark	1962	Petroleum	No confidentiality clause.
Denmark	1976	Petroleum	No confidentiality clause, but there is a provision granting the Concessionaire the ability to allow scientifically trained staff from Danmarks Geologiske Undersogelse and engineers from Dansk Olie og Naturgas A/S to take part in the evaluation of material collected through drilling of exploration and production wells within the concession areas. This provision states that it is taken for granted that persons concerned accept competitive stipulations, the contents of which will be agreed upon so that for a certain time the knowledge obtained can only be used by the State.
Dominican Republic	1977	Petroleum	All confidential information furnished to the State as a result of petroleum operations under the Contract shall be treated as confidential except if necessary to make legal or financial public statements or to comply with request of a public entity or established stock exchange. All data obtained by officials and inspectors of the Supervision in their inspections of work related to exploration and exploitation, along with their reports and comments, shall be confidential.
Dominican Republic	1991	Petroleum	All geophysical and general geological data, well data, know-how and proprietary technology, and other technical data is confidential during the term of the contract and may not be disclosed to third parties without prior written consent of the other party except: 1) to comply with applicable law or the rules of a recognized stock exchange; 2) data is part of the public domain; 3) when disclosed to employees, Affiliates, etc. to the extent required for efficient conduct of Petroleum Operations, provided those entities are subject to a written confidentiality agreement; 4) as required by a government agency. Geophysical and general geological data shall be confidential for five years; well data for two years; know-how and proprietary technology for a period prescribed in a separate agreement; other technical data for five years. Data of importance with respect to the protection of the environment or health of personnel shall not be confidential.
Dubai	1979	Petroleum	Information, maps and reports as to the progress and results of the operations given to the Ruler shall be treated as confidential by the Ruler and his advisers, except as required for settlement by arbitration.
Dubai	1978	Petroleum	Same as above.
Dubai	1975	Petroleum	Same as above.
Dubai	1974	Petroleum	Same as above.
Germany	1995	Petroleum	No confidentiality clause.
Ghana	2004	Minerals	Any information or material supplied by the Company to the Government pursuant to the provisions of this Agreement shall be treated by the Government, its officers and agents as confidential and shall not be revealed to third parties, except with the consent of the Company (which consent shall not be unreasonably withheld), for a period of 12 months, with respect to technical information, or 36 months, with respect to financial information, from the date of submission of such information. The Government and persons authorized by the Government may nevertheless use any such information received from the Company for the purposes of preparing and publishing general reports on minerals in Ghana.
Ghana	2001	Minerals	Same as above.
Ghana	2001	Minerals	The Government shall treat all information supplied by the Company hereunder as confidential for a period of five (5) years from the date of submission of such information or upon termination of this Agreement, whichever is sooner; and shall not reveal such information to third parties except with the written consent of the Company, which consent shall not be unreasonably withheld. The Government and persons authorized by the Government may nevertheless use such information received from the Company for the purpose of preparing and publishing general reports on Minerals in Ghana and in connection with any dispute between the Government and the Company.
Ghana	1989	Minerals	Same as above.
Ghana	1989	Minerals	Same as above.
Ghana	2001	Minerals	Same as above.

Country	Date	Contract Type	Confidentiality Clause or Clause Summary
Guatemala	1993	Petroleum	The contractor can request that certain information delivered to the Ministry and/or Directorate be considered confidential during a period of two years from the date of information receipt. The period will be cut short if: 1) the contract ends for any cause; 2) contractor renounces his right to exploration or exploitation; 3) if the event established in article 131 in the General Regulation occurs.
Hungary	1995	Petroleum	No specific confidentiality provision; but under reporting requirements provision, parts of reports which the Company regards as confidential may be disclosed to third parties only with written approval of the Company.
Hungary	1995	Petroleum	During the term of the contract, all information provided by the company to the Minister and Bureau pursuant to reporting, data provision and accountability requirements shall be considered business secrets and may not be disclosed to third parties without prior written consent of the Company.
India	2007	Petroleum – Model	All Data, information and reports obtained or prepared by, for or on behalf of the Contractor pursuant to the Contract is confidential and may not be disclosed to any third party without the written consent of the other Parties except: when provided to Affiliates or other Third Parties in connection with Petroleum Operations (subject to confidentiality requirements for the recipient); to the extent required by applicable laws or regulations of a stock exchange or in connection with any legal proceedings; when required by Government departments; or to the extent data or information is generally known to the public. The Government may, subject to Contractors consent, disclose data, information and reports relating to the Contract Area that might have significance in connection with offers of acreage and exploration programmes by third parties in adjoining areas. After three years [or when areas are relinquished], the Government shall have the right to disclose and freely use all data and information at its discretion except for data of proprietary nature.
India	1998	Petroleum	All Data, information and reports obtained or prepared by, for or on behalf of the Contractor pursuant to the Contract is confidential and may not be disclosed to any third party without the written consent of the other Parties except: when provided to Affiliates or other Third Parties in connection with Petroleum Operations (subject to confidentiality requirements for the recipient); to the extent required by applicable laws or regulations of a stock exchange or in connection with any legal proceedings; when required by Government departments; or to the extent data or information is generally known to the public. The Government may, subject to Contractor's consent, disclose data, information and reports relating to the Contract Area that might have significance in connection with offers of acreage and exploration programmes by third parties in adjoining areas.

Country	Date	Contract Type	Confidentiality Clause or Clause Summary
India	2009	Petroleum – Model	<p>26.1 The Contractor shall, promptly after they become available in India, provide the Government, free of cost, with all data obtained as a result of Petroleum Operations under the Contract including, but not limited to, geological, geophysical, geochemical, petrophysical, engineering, Well logs, maps, magnetic tapes, cores, cuttings and production data as well as all interpretative and derivative data, including reports, analyses, interpretations and evaluation prepared in respect of Petroleum Operations (hereinafter referred to as “Data”). Data shall be the property of the Government, provided, however, that the Contractor shall have the right to make use of such Data, free of cost, for the purpose of Petroleum Operations under this Contract as provided herein.</p> <p>26.2 The Contractor may, for use in Petroleum Operations, retain copies or samples of material or information constituting the Data and, with the approval of the Government, original material, except that where such material is capable of reproduction and copies have been supplied to the Government, the Contractor may, subject to the right of inspection by the Government, export, subject to any applicable regulations, samples or other original Data for processing or laboratory examination or analysis, provided that representative samples equivalent in quantity, size and quantity, or, where such material is capable of reproduction, copies of equivalent quality, have been first delivered to the Government.</p> <p>26.3 The Contractor shall keep the Government currently advised of all developments taking place during the course of Petroleum Operations and shall furnish the Government with full and accurate information and progress reports relating to Petroleum Operations (on a daily, Monthly, Yearly or other periodic basis) as Government may reasonably require, provided that this obligation shall not extend to proprietary technology. The Contractor shall meet with the Government at a mutually convenient location in India to present the results of all geological and geophysical work carried out as well as the results of all engineering and drilling operations as soon as such Data becomes available to the Contractor.</p> <p>26.4 All Data, information and reports obtained or prepared by, for or on behalf of, the Contractor pursuant to this Contract shall be treated as confidential and, subject to the provisions herein below, the Parties shall not disclose the contents thereof to any third party without the consent in writing of the other Parties.</p> <p>26.5 The obligation specified in Article 26.4 shall not operate so as to prevent disclosure: (a) to Affiliates, contractors, or Subcontractors for the purpose of Petroleum Operations; (b) to employees, professional consultants, advisers, data processing centres and laboratories, where required, for the performance of functions in connection with the Petroleum Operations for any Party comprising the Contractor; (c) to banks or other financial institutions, in connection with Petroleum Operations; (d) to bonafide intending assignees or transferees of a Participating Interest of a Party comprising the Contractor or in connections with a sale of the stock or shares of a Party comprising the Contractor; (e) to the extent required by any applicable law or in connection with any legal proceedings or by the regulations of any stock exchange upon which the shares of a Party or an Affiliate of a party comprising the Contractor are quoted; (f) to Government departments for, or in connection with, the preparation by or on behalf of the Government of statistical reports with respect to Petroleum Operations, or in connection with the administration of this Contract or any relevant law or for any purpose connected with Petroleum Operations; and (g) by a Party with respect to any Data or information which, without disclosure by such Party, is generally known to the public.</p> <p>26.6 Any Data, information or reports disclosed by the Parties comprising the Contractor to any other person pursuant to Article 26.5(a) to (d) shall be disclosed on the terms that such Data, information or reports shall be treated as confidential by the recipient. Prompt notice of disclosures made by Companies pursuant to Article 26.5 shall be given to the Government.</p> <p>26.7 Any Data, information and reports relating to the Contract Area which, in the opinion of the Government, might have significance in connection with offers by the Government of acreages, may be disclosed by the Government for such purpose. Government may also disclose such Data or information for any exploration programme to be conducted by a third party in adjoining areas with the consent of the Contractor, for better understanding of the regional geological set-up and such consent by the Contractor shall not be unreasonably withheld.</p> <p>26.8 Where an area ceases to be part of the Contract Area, the Contractor shall hand over all the originals and copies of the Data and information with respect to that part to the Government within a period of one (1) year from the date of relinquishment or surrender. The Contractors shall, however, be allowed to retain one copy of the Data in its possession for its own use, where required, and shall not use the Data for sale or any other purposes. Subject to the provisions of this Article, the Contractor shall keep all Data/information confidential. (In this Original Text - Explanatory Note: Pursuant to this Article 26, and notwithstanding any provision in the Contract to the contrary the Government shall have the right to disclose and freely use all data and information at its sole discretion except for data of a proprietary nature such as interpretation report to any party on or after three (3) years from acquisition of such data in order to promote exploration and production activities in the country. For any relinquished areas the Government shall have the right to disclose and freely use all the data immediately after such relinquishment.)</p>



Country	Date	Contract Type	Confidentiality Clause or Clause Summary
Indonesia	1996	Minerals	Except as otherwise provided in this paragraph 6, the Government has title to all data and reports submitted by the Company to the Department or the Government pursuant to the provisions of this Agreement. Such data and reports will be treated as strictly confidential by the Government to the extent that the Company shall so request; provided, however, that the data in the public domain (because of having been published in generally accessible literature or for its mainly scientific rather than commercial value, such as geological and geophysical data) and data which have been published pursuant to laws and regulations of Indonesia or of a foreign country in which a shareholder may be domiciled (such as the annual report of public bodies or companies) shall not be subject to the foregoing restrictions; provided further that the term “data” as used in the above paragraph shall include, without limitation, any and all documents, maps, plans, worksheets and other technical data and information, as well as data and information concerning financial and commercial matters. In respect of data relating solely to areas relinquished by the Company from the Contract Area pursuant to Article 4, the foregoing restrictions shall cease to apply from the date of relinquishment of such areas. In addition, where this Agreement has been terminated pursuant to Article 20 or 22, the foregoing restrictions shall cease to apply. Notwithstanding the foregoing, exclusive know-how of the Company, its sub-contractors or Affiliates contained in data or reports submitted by the Company to the Department or the Government pursuant to provisions of this Agreement, and which shall have been identified as such by the Company, shall only be used by the Government in relation to the administration of this Agreement and shall not be disclosed by the Government to third parties without the prior written consent of the Company. Such exclusive know-how, as long as it remains exclusive know-how of the Company, its sub-contractors or Affiliates as the case may be, remains the sole property of the Company, its sub-contractors or Affiliates, as the case may be. The provisions of this subparagraph (c) shall survive the termination of this Agreement in accordance with laws and regulations from time to time in effect relating to intellectual properties. If any such exclusive know-how is not patentable in accordance with such laws, the Company may request the Government not to disclose such know-how for a period of not less than three years after the termination of this Agreement.
Indonesia	1994	Minerals	Same as above.
Indonesia	1991	Minerals	Same as above.
Iran	1997	Petroleum	All plans, maps, reports, records, scientific and technical data, and other similar information relating to the operations under this Contract shall be treated by Contractor as confidential and may not be disclosed without prior written consent, except: as required by law; for preparing and publishing reports and surveys of a general nature; or for seeking potential vendors and subcontractors. Both the Contractor and NIOC agree to comply with any license restrictions relating to proprietary technology during the term of such a license.
Iran	2003	Petroleum – Model	All plans, maps, sections, reports, records, scientific and technical data, and other similar information relating to the operation shall be treated by the contractor as confidential even after the termination of the Contract and shall not be disclosed by the contractor or its affiliates without prior written consent of NIOC except if required by law to prepare or publish a report. Both parties will fully comply with any license restrictions relating to proprietary technology contained in the license until the license restrictions terminate.
Iran	1973	Petroleum	Service Company may not disclose to third parties information related to the operations and determined by NIOC to be confidential without the prior consent of NIOC, except, if necessary, to sub-contractors or consultants, provided that those parties are bound by a confidentiality undertaking and NIOC is notified.
Iran	1971	Petroleum	All plans, maps, sections, reports, records, scientific and technical data, and other similar information relating to the technical operations under this Agreement shall be treated as confidential and not disclosed by any part without the consent of the Parties—such consent shall not be unreasonably withheld or delayed.
Iran	1969	Petroleum	All plans, maps, sections, reports, records, scientific and technical data, and other similar information relating to the technical operations under this Agreement shall be treated as confidential by the Contractor and not disclosed by any part without the consent of NIOC—such consent shall not be unreasonably withheld or delayed.
Iraq	1972	Petroleum	All plans, maps, sections, reports, records, scientific, technical and economic data, and other similar information relating to the operations under this Contract shall be treated by Contractor as confidential and may not be disclosed without the written consent of INOC.



Country	Date	Contract Type	Confidentiality Clause or Clause Summary
Iraq (Kurdistan Region)	2007	Petroleum – Model	All data and information relating to the Contract and Operations shall be kept confidential during the entire term of the Contract and shall not be disclosed to third parties without the consent of other Parties, except if the information or data becomes part of the public domain, is already known to the recipient before disclosure, or is required to be furnished in compliance with applicable law or rules/regulations of a government or recognized stock exchange. Contractor may also disclose data and information to affiliates, employees, officers, directors, consultants or agents for analyzing or evaluating data or information; and to banks or financial institutions, bona fide prospective assignees, or prospective or actual Subcontractors and suppliers of the Contractor; provided that those parties first enter into a confidentiality undertaking. Both the Government and Contractor may use data and information relating to relinquished areas for any purpose.
Iraq (Northern Region)	2002	Petroleum – Model	All information and data acquired or obtained by any Party respecting the Petroleum Operations is confidential and may not be disclosed during the term of the Agreement to third parties, except: to Affiliates also bound by confidentiality; to governmental agencies or entities as required by the Agreement; if required by law, regulation or court order; to prospective or actual Contractors, consultants and attorneys, if necessary for their work; to bona fide prospective transferees; to banks or other financial institutions to arrange for a Party's funding; or if data becomes part of public domain. Contractors, consultants, attorneys, prospective transferees, and financial institutions must be bound by a written confidentiality undertaking that lasts for at least three years.
Kazakhstan	2001	Minerals	The Contract and information obtained or acquired by any Party in the process of Contract execution is confidential. The Parties may utilize the confidential information for drafting the reports stipulated by the State's legislation. The parties are not entitled to pass the confidential information to third parties without another Party's consent, except for the following cases: if such information is utilized in the course of court examination or arbitration; when such information is provided to third parties performing services to the Contractor, on conditions that the third party bears the responsibility to treat this information as confidential and utilize it solely for the purposes and term established by the Parties; when such information is provided to a bank or other organization that endows financial resources to Contractor, on conditions that the bank or other organization bears the responsibility to treat this information as confidential and utilize it solely for indicated purposes; or when, in accordance with the State legislation, the Parties determine the terms of confidentiality with regard to all documents, information and reports related to the exploration and production on the contractual territory.
Liberia	2008	Minerals – Model	Subject to the limitations below and subject to applicable Law, for a period of [three] years from disclosure, each party agrees not to divulge information designated in writing at the time of delivery as confidential information ("Confidential Information") by the other party to any other Person without the prior written consent of the designating party. By designation of information as Confidential Information, a party will be deemed to have represented that after review of such information it has reasonably determined that the release of such information to third parties would materially adversely affect the party or its economic well-being. In any event, Confidential Information does not include: information that was publicly available or otherwise known to a party prior to the time of disclosure and not subject to a confidentiality obligation; subsequently becomes publicly known through no act or omission by a party; otherwise becomes known to a party other than through disclosure to such party by the other party; constitutes financial statements delivered to the Government under Section 17.5 that are otherwise publicly available; is mainly of scientific rather than commercial value, such as geological or geophysical data relating to areas in which the Company no longer holds a valid exploration license and has not designated as a Proposed Production Area; or has been disclosed pursuant to generally applicable Law or a final order of any court having jurisdiction that is not subject to appeal. Each party will maintain the confidentiality of Confidential Information disclosed to it in a manner consistent with procedures adopted by such party to protect its own confidential information, provided that such party may deliver or disclose Confidential Information: to its financial, legal and other professional advisors (to the extent such disclosure reasonably relates to the administration of this Agreement) or any other Person to which such delivery or disclosure may be necessary or appropriate to effect compliance with any law, rule, regulation or order applicable to such party; in response to any subpoena or other legal process; in connection with any litigation to which such party is a party if reasonably deemed necessary to protect such party's position in such litigation; or if an Event of Default has occurred and is continuing; but only to the extent such party reasonably determines such delivery and disclosure to be necessary or appropriate in the enforcement or for the protection of the rights and remedies under this Agreement. This Agreement is not confidential, and the Company is not entitled to confidential treatment of information relating to the timing and amount of royalties and other payments specifically due under the terms of this Agreement, or of Taxes and Duties payable by the Company or the rates at which such royalties, other payments or Taxes and Duties become due or are assessed, or information that is necessary to compute the amount of such royalties or other payments becoming due.

Country	Date	Contract Type	Confidentiality Clause or Clause Summary
Liberia	2009	Minerals	Same as above.
Liberia	2006	Minerals	All information exchanged between the Parties hereto in the context of this Agreement shall be considered and treated as confidential information, subject to Article VII, Section 2 of the MDA. The Parties hereto hereby agree not to divulge such information to any other Person without the prior written consent of the other party, which consent shall not be unreasonably withheld and/or delayed. However, the foregoing shall not be applicable to CONCESSIONAIRE's or the GOVERNMENT's bankers, advisors and all those who are, in a special way, connected with the Operations. The obligation of confidentiality set forth in Article VII, Section 1 above shall not apply either to information exchanged between the Parties hereto which is in the public domain, or to information exchanged by the Parties which the CONCESSIONAIRE is required to reveal to any other Person by applicable law.
Malta	2003	Petroleum	All information and data of a technically, geologically or commercially sensitive nature received from the Government in connection with the Exploration Study are strictly confidential and may not be released to third parties without prior written consent of the Government, except: to employees, consultants, contractors, legal counsel or auditors, provided they maintain confidentiality; to the extent necessary under laws, rules or requirements of the Government or a stock exchange; to the extent data is already part of the public domain; to arbitrators; to potential assignees; or to financial advisors or investors in execution of the Exploration Study. The Government has a reciprocal obligation for such information received from the Contractor. Confidentiality obligation continues until the Contract is executed, but shall not exceed one month from the date upon which Contractor notifies the Government of its desire to sign Production Sharing Contract.
Mexico	1991	Petroleum – Model	All information obtained by the Contractor in the performance of its operations under the contract are confidential and may not be disclosed to any other person or entity besides Pemex.
Mexico	2004	Minerals	No confidentiality clause.
Mexico	2003	Minerals	During the contract term (and for three years after termination), the parties shall treat all information acquired under this Agreement as confidential and shall not use the name of either party or any officer, director, employee or affiliated entity of either party or of the Property in any press release, announcement, ad or publication, or disclose any other information to the public without prior written consent of the other party. Parties shall not sell or make available to third parties or the public any knowledge or information relating to internal proprietary techniques and methods used by either party for purposes of geological interpretation, extraction, mining or processing of minerals, or any other proprietary information. Confidentiality obligation does not apply to: information already available to the public, or that which becomes so available; written information in party's possession prior to disclosure; information received from a third party; information independently developed; and information required by legal authority to be disclosed.
Mexico	2000	Minerals	No confidentiality clause.
Mexico	2005	Minerals	All information and data provided to the Royalty Holder under the agreement may not be disclosed by the Royalty Holder without prior written consent of the Grantor, except: to Affiliates or representatives that have a bona fide need to be informed; to a governmental agency or the public when required by law or rules of a stock exchange; or in connection with litigation or arbitration involving a Party where required by tribunal or on the advice of Party's counsel necessary for the case's prosecution (with prior notification given to other Party). Recipients of information must first agree to protect confidential information from further disclosure. Prior to any disclosure allowed pursuant to this Agreement, the Parties must disclose the existence and nature of any disclaimers that accompany geological, engineering or other data, as well as the requirements for public reporting of applicable law or regulation, or rules of the applicable stock exchange.
Mexico	2008	Minerals	All information obtained under the agreement may not be publicly disclosed except as required by the law or rules and regulations of a regulatory authority or stock exchange, or with written consent of other parties, which shall not be unreasonably withheld, where a party wishes to disclose such information to a third party for purposes of arranging bona fide financing for its contribution to the costs or for selling its interest, provided that the recipients of the information undertake to keep the information confidential.

Country	Date	Contract Type	Confidentiality Clause or Clause Summary
Mexico	2007	Minerals	Parties, and those to whom information is disclosed, must maintain all past, present and future information in relation to this instrument confidential indefinitely, except if its representatives or employees request access to information with justified cause. Confidential information does not include: information that might have been legitimately known and obtained by recipient Party before this agreement; information considered as public domain; or information required to be revealed according to administrative or judicial mandate, including requirements of stock exchange operations.
Mexico	1957	Petroleum	The Contractor shall have access to the geological information and geophysical exploration data corresponding to the work of exploration which the Institution may have performed on the lands assigned in the Clause First of this Contract. The Contractor binds itself to consider all this informative material, and other similar data of any kind whatsoever which it may secure on these lands, as strictly private information which in no case may be transmitted to third parties or leave the Republic of Mexico, except when Institution grants its permission. The information which the Contractor may obtain shall be the exclusive property of the Institution. The Contractor shall present to the Institution at such intervals as the latter may determine, the reports covering the study, arrangement and interpretation of said information.
Norway	2002	Petroleum	The Agreement and all information provided under it are confidential. Confidential information, plans, programs, maps, records, technical and scientific data, or any other information relating to technical, financial or commercial activities under the Agreement, shall not be given to third parties without the consent of the other Party, except: to Affiliated Companies to the extent needed for purposes of exercising the rights and obligations under the Agreement; if information becomes public knowledge or literature; if the information was already in the Party's possession prior to the time of disclosure; if acquired independently by a third party entitled to disseminate such information; if disclosed to stock exchanges, regulating authorities and governments as required by law or rules; to consultants and contractors directly engaged in the Agreement's activities (by the Technical Services Provider); or to professional consultants engaged by the Party to perform work related to the Agreement's activities. Any party receiving such information must undertake in writing that information will be treated confidentially. Does not apply to government authorities or agencies otherwise bound by similar confidentiality provisions under the law, but it does apply to Parties ceasing to be a Party.
Norway	1981	Petroleum	Plans, programs, maps, records, technical and scientific data or other information relating to technical, financial, or commercial activities under the agreement may not be disclosed by parties without consent of other parties, except: to credit institutions in connection with financing of party's share of the joint activities (must give prior notice to other party); from the operator to consultants and contractors directly engaged in the activities necessary for performing the work; or to affiliated companies. Disclosure of the information must be conditioned on receiver declaring that information will be treated confidentially. Confidentiality obligation binds parties ceasing to be parties to the agreement, and bind parties for a period of five years after expiry of the agreement.
Norway	1981	Petroleum	No confidentiality clause, but the licensees must take on an obligation to make public in the greatest possible extent information regarding exploration, development, production and landing in connection with activities under the License.
Norway	2003	Petroleum	Plans, programs, maps, records, technical and scientific data or other information relating to technical, financial, or commercial activities under the agreement may not be disclosed by parties without consent of other parties, except: to affiliated parties; to financial institutions in connection with financing of party's share of the joint activities (must give prior notice to other party); to potential assignees of a Party's participating interest (with advance notice to other Parties); from the operator to consultants and contractors directly engaged in the activities necessary for performing the work; and to professional consultants carrying out work for the Party. Parties must ensure information is kept confidential. Confidentiality obligation binds parties ceasing to be parties to the agreement
Pakistan	2007	Petroleum	All data concerning operations are confidential unless: data is in the public domain; data is disclosed to affiliates and other third parties in connection with petroleum operations; disclosure is required by laws and applicable stock exchange regulations. Geological and geophysical data is kept confidential for three years from date of acquisition or if the Agreement is terminated or area relinquished early. DGPC may keep data confidential for a longer period (but max five years) if such data is gathered for commercial purposes under a multi-client arrangement with DGPC. DGPC will disclose the following information into the public domain: operational information daily, monthly, and annually; commercial and financial after five years, except commercial sensitive information.

Country	Date	Contract Type	Confidentiality Clause or Clause Summary
Papua New Guinea	1995	Petroleum	No confidentiality clause. But see Petroleum Act confidentiality clause: "All geological and geophysical information supplied to the Minister, the Director or an inspector under the Act shall be confidential except: 1) if licensee has given written consent; 2) if information/cores/cuttings/samples are made available to an officer with express authorization by the Minister or director; 3) if a block or part of the block is no longer the subject of a license, information may be made available to the public; 4) with respect to a block that is the subject of a current petroleum development license, if at least one year has passed since the information, cores, etc. were supplied to the Minister, Director, or inspector. The Minister can at any time use the information or matter described above for preparing and publishing aggregate returns and general reports with respect to operations under the Act. Papua New Guinea Petroleum Act, 1977 (Act #46 of 25 November)
Papua New Guinea	1987	Petroleum	Same as above.
Poland	2007	Natural Gas	Each Party will keep the terms of the agreement and all information and data furnished or obtained pursuant to this Agreement confidential unless the other Party consents in writing, except: if data is already in the public domain; if required by law or rules of an official regulated securities market; if obtained from a third party lawfully in possession of such information or data without any disclosure preclusions; if disclosed to financial institutions, consultants, lawyers, other advisers, or bona fide potential assignees or transferees of a Party's rights under the Agreement, provided that those parties are bound by confidentiality obligations. Parties shall be bound by confidentiality for five years after the termination of the Agreement.
Saudi Arabia	1971	Minerals	All information acquired by any Party hereto in respect of the operations hereunder shall be considered as confidential and shall not be divulged to any other entity except on mutual agreement of the Parties. This restriction shall not apply in case of information submitted to or required by the Government.
Sri Lanka	1980	Petroleum	Cey Petco has title to all original data resulting from the Petroleum Operations but may not disclose the data to third parties during the contract term without informing the Contractor and giving Contractor the opportunity to discuss the disclosure and retain copies of the data. Contractor may not disclose data to third parties unless it has the consent of Cey Petco or to the extent necessary for the performance of its contractual obligations and only during the term of the contract.
Sudan	1997	Petroleum	The Minister shall treat all data and other information supplied by Contractor under this Article as confidential and may not disclose it to third parties without the consent of Contractor during the exploration operations in the parts of the Contract Area which Contractor has not relinquished, but it may nevertheless use such information to prepare and publish general or public records or statistics on petroleum or other conditions in the Sudan and in connection with any dispute between the Minister and Contractor. The Contractor shall treat technical data and information provided by the Government as confidential and may not disclose it to third parties without prior written approval of the Minister, except: if provided to Sub-Contractors, consultants or financial advisers that are bound by confidentiality; as required by a court, tribunal or arbitration panel; as required by law or regulations; or as required by a stock exchange. Same obligation with respect to all information, data, and interpretation and studies thereof acquired by the Contractor under the Agreement. No time limit specified.
Sudan	1981	Petroleum	For the duration of the exploration operations in the parts of the Area which the Contractor has not relinquished, the Government shall treat all data and other information supplied by the Operator on behalf of Contractor under this Agreement as confidential and may not reveal such information to third parties without consent of the Contractor, except: for purposes of preparing and publishing general or public records or statistics on Petroleum or other conditions in the Sudan; in connection with any dispute between the Government and Contractor; and regarding areas relinquished by Contractor.
Sudan	1982	Petroleum	Same provision as above, except that the Government may also reveal geophysical and geological data (more than one year old) with respect to portions of the Contract Area adjacent to the area for new offer.

Country	Date	Contract Type	Confidentiality Clause or Clause Summary
Sudan	2002	Petroleum	The Contractor shall treat technical data and information provided by the Government as confidential and may not disclose it to third parties without prior written approval of the Minister, except: if provided to Sub-Contractors, consultants or financial advisers that are bound by confidentiality; as required by a court, tribunal or arbitration panel; or as required by law or regulations. Same obligation with respect to all information, data, and interpretation and studies thereof acquired by the Contractor under the Agreement. The confidentiality obligation applies to the Government solely in respect of new technical data and information arising from the activities of the Contractor, but it may disclose such data and information to its employees, consultants and agents for promotional purposes, or as required by law. Term of confidentiality lasts five years after termination of the Agreement.
Sudan (South)	2005	Petroleum	For the duration of Exploration operations in the parts of the Contract Area which Contractor has not relinquished, the NP shall treat all data and other information supplied by Contractor under this Article as confidential and may not reveal such information to third parties without the consent of Contractor, but it may use such information for preparing and publishing general or public records or statistics and in connection with any dispute. All information, data and their interpretations and studies acquired by Contractor under this Contract is confidential and may not be disclosed to third parties without prior written approval of the Minister, except: if disclosed to sub-Contractors, consultants or financial advisors also bound by confidentiality; or as required by a court, tribunal or arbitration.
Tanzania	2005	Petroleum	All data, information and interpretations thereof provided by Contractor to TPDC shall, so long as it relates to an area which is a part of the Contract Area, be treated as confidential and not disclosed to third parties without consent of the other parties, except to Affiliated companies or contractors in the Operations and to advisers of TPDC and the Government, provided they are bound by confidentiality. The Minister may also use such data, information and reports to publish summaries about discovery wells (five years after completion of drilling) and in any other case, at any time. The Contractor's confidentiality obligation extends for four years from the date the area to which such data, information or any interpretation thereof relates ceases to be part of the Contract Area or from the date on which the agreement expires or terminates. Any public disclosure regarding the interpretation of information acquired in Petroleum Operations shall not be made without the Government's consent.
Tanzania	2004	Petroleum – Model	Same as above.
Tanzania	1995	Petroleum – Model	Same as above.
Tanzania	1990	Petroleum	Same as above EXCEPT that it also specifically provides that the Contractor may disclose information to an Affiliate; bona fide prospective assignee; its home Government or any department, agency or instrumentality thereof, if required by law; recognized stock exchanges; financial institutions and professional advisors; and arbitrators and experts appointed pursuant to the terms of the Agreement. Additionally, the Government or TPDC may disclose such information to any agency of the Government, financial institution, consultant or arbitrators and experts.
Tanzania	1985	Petroleum	All reports, data, books, maps, and other information and interpretations of them submitted by the Contractor shall be confidential, as long as it relates to an area which continues to be part of the Contract Area, and shall not be disclosed to third parties without prior written consent of the other party, except: by the Contractor to an Affiliate, bona fide prospective assignees, its home Government, recognized stock exchanges, financial institutions and professional advisors, and arbitrators and experts appointed pursuant to the Agreement; or by the Government or TPDC to any agency of the Government, financial institution, or person acting as a consultant, and to arbitrators and experts; provided the third parties are subject to confidentiality undertakings as well. Confidentiality does not extend to data, information, or reports already in the public domain
Thailand	2003	Petroleum	No confidentiality clause.
Thailand	1981	Petroleum	Same as above.

Country	Date	Contract Type	Confidentiality Clause or Clause Summary
Trinidad	1998	Petroleum	All technical data and other information related to Petroleum Operations in the Contract Area is property of the state and confidential. Data may not be divulged to third parties without written consent of the other Party except: 1) if necessary to comply with applicable law or the rules of a recognized stock exchange, 2) if the data becomes part of the public domain; 3) if disclosed to employees, Affiliates, etc. to the extent required for efficient conduct of Petroleum Operations, provided those parties are subject to a written confidentiality undertaking, or 4) for purpose of arbitration or litigation between the Minister and Contractor. Contractor shall be bound by confidentiality for five years after the termination of the Contract, but the Contractor may not trade, sell or publish data at any time without prior written consent of the Minister. The Minister may release data on 1) relinquishment of area, or 2) at the end of the ninth year of the Contract or one year after acquisition, whichever period is later. The Minister shall at any time be entitled to prepare and publish reports or studies using information derived from any information or data related to the Contract Area. However, all Contractor's proprietary technology shall remain property of the Contractor.
Uganda	1999	Petroleum – Model	This Agreement and any confidential information (defined as information identified as “confidential” by the Party originally in possession of it and disclosed to the other Party, except information previously known to the other Party or otherwise publicly known) may not be disclosed to third parties without the former Party's written consent, except if to legal counsel, accountants, other professional consultants, underwriters, lenders, agents, licensees or shipping companies to the extent necessary in connection with this Agreement, provided those parties maintain confidentiality, or to an agency of the government. Confidentiality expires upon relinquishment of the area to which the information relates. Article 8 provides that all Data submitted to the Government by Licensee shall be kept confidential. This provision is subject to essentially the same exceptions as provided in the general confidentiality article (plus bona fide prospective assignees of the Licensee, and the Government may disclose data for statistical purposes or in connection with an award of new acreage).
Uganda	1993	Petroleum – Model	The Agreement and any confidential information (which is information identified as confidential by the Party originally in possession of it and disclosed to the other Party, except if already known to the other Party or if it is already publicly known) may not be disclosed to third parties without the former Party's written consent, except: to legal counsel, accountants, other professional consultants, underwriters, lenders, agents, contractors or shipping companies to the extent necessary in connection with the Agreement, provided those parties maintain confidentiality; or to an agency of the government.
Venezuela	1992	Petroleum	Both Parties shall keep as confidential and take all reasonable measures to ensure their employees, Associated Companies, and subcontractors and their employees shall not disclose to third parties, without prior written consent of the other Party, information identified as confidential and produced or obtained by the Party in relation to the Operating Services, EXCEPT (conditioned on a prior confidentiality agreement from each party): to a government department or governmental or regulatory authority; to a professional consultant or agent retained by Contractor for carrying out the Agreement; to a bank financing Contractor for the Agreement; to the extent already in the public domain or received from third parties not bound by a confidentiality agreement; if already possessed by the Party before it was revealed; or if developed independently by the receiving Party or its Associated Companies. Confidentiality remains in force for an additional period of time equal to the term in force of this Agreement, until the date that the Certificate of Termination is issued by State.
Venezuela	2001	Natural Gas – Model	The Licensee must safeguard and keep within the national territory the original copies of all the License Information. The Ministry of Energy and Mines may use the License Information for any purpose, and the Licensee's authorization shall be required to disclose, assign or sell such information during the term of the license. The Licensee may use the License information in order to carry out the Operations, but not for the purpose of selling it or for any other purposes. The Licensee shall deliver to the Ministry the original copies immediately after termination of the License.

Country	Date	Contract Type	Confidentiality Clause or Clause Summary
Venezuela	1997	Petroleum	All data, records and information exchanged between any Parties or between the Operator and any Party in connection with this Agreement shall be treated as confidential by the receiving party and may not be disclosed without prior consent of the disclosing party, EXCEPT: to its officers, directors, employees, Associated Entities, agents, subcontractors and advisers who need to know to carry out the Operating Services and agree to comply with the confidentiality obligation; to the extent the information is already known to the Receiving Party at the date of disclosure; if already public or becomes public; if developed independently by the Receiving Party; if acquired independently from a third party under no confidentiality obligation; if required to be disclosed pursuant to any applicable law, decree, regulation, rule or order of any competent authority, provided the Receiving Party promptly notifies the Disclosing Party; or by the Contractor to third parties in bona fide negotiations for a transfer, financing or insuring of any activities, subject to limitations on the information and a confidentiality obligation binding on the potential third-party transferee, financier, insurer or adviser.
Venezuela	1997	Petroleum	Same as above.
Venezuela	2006	Petroleum – Draft Model	All geological, geophysical and any other information of a technical character relating to the primary activities carried out in the Designated Area shall be the property of the State, and the Joint Venture Company shall be entitled to use such information only in connection with the execution of the transferred activities. If the right to engage in primary activities is terminated for any reason, the Joint Venture Company shall deliver the original materials containing such information to the Ministry of Energy and Petroleum
Virgin Islands	2000	Petroleum	All summaries of Petroleum Reports and all information obtained by the Government under this Contract shall be treated as confidential and not disclosed by the Government to any other person without written consent of the Company. If, however, the Government believes the summaries may have significance in connection with an exploration program to be conducted by a third party in an adjacent area, the Government may disclose the summaries on conditions agreed upon between the Government and Company.
Zambia	1986	Petroleum – Model	The Agreement and any confidential information of any party (defined as any information identified as “confidential” by the party originally in possession of it and disclosed to the other party, but not information already publicly known or known by the other party) shall not be published or disclosed to third parties without the former party’s written consent, except: to legal counsel, accountants, other professional consultants, lenders, agents, contractors, or shipping companies to the extent necessary in connection with the Agreement, provided the parties maintain confidentiality; or to an agency of the government. Confidentiality obligations expire upon relinquishment of the area to which the information relates.
Zambia	2000	Minerals	GRZ undertakes that it shall (and shall procure that its relevant employees and officers shall), in relation to any Confidential Information: use all Confidential Information only for the purpose for which it was supplied to GRZ and not for any other purpose; to treat and safeguard as strictly private and confidential all Confidential Information; and ensure proper and secure storage of all Confidential Information. “Confidential Information” means any reports, records or other information or documents supplied to or made available for inspection by GRZ under Clause 10 [Records and Operating Reports Clause] (whether in writing, in disk or electronic form, orally or pursuant to discussion, and in any form or medium in which any such information may be recorded or kept).
Zambia	2000	Minerals	GRZ and the Ministry hereby acknowledge that all information supplied to them pursuant to Clause 10 [Records and Operating Reports Clause] above is confidential information and hereby agree to treat as secret and confidential, and not at any time for any reason disclose or permit to be disclosed to any person, or otherwise make use of or permit to be made use of, any such information where the information was received during the period of this Agreement pursuant to this Clause; and upon termination of this Agreement for whatever reason GRZ and the Ministry will deliver up to the Company all working papers, computer disks and tapes or other material copies provided to or prepared by the Company pursuant to this Agreement and still retained by it. For the avoidance of doubt and subject to the Act: all documents, reports, records or information made available to GRZ and the Ministry will remain the property of the Company and nothing herein contained shall preclude GRZ from using any such information as has been supplied for the purposes of the preparation of governmental statistics and data, or from publishing the same in statistical format.





## ■■■ APPENDIX C

# Countries with FOI Laws <sup>150</sup>

Country	Name of Law	Year Adopted
Albania	The Law on the Right to Information for Official Documents	1999
Angola	Law on Access to Administrative Documents	2002
Antigua and Barbuda	Freedom of Information Act	2004
Armenia	Law on Freedom of Information	2003
Australia	Freedom of Information Act 1982	1982
Austria	Federal Law on the Duty to Furnish Information	1987
Azerbaijan	The Law of the Right to Obtain Information	2005
Belgium	Law on the right of access to administrative documents held by federal public authorities	1994
Belize	The Freedom of Information Act	1994
Bosnia and Herzegovina	Freedom of Access to Information Act	2004
Bulgaria	Access to Public Information Act	2004
Canada	Access to Information Act	1983
Colombia	Law Ordering the Publicity of Official Acts and Documents	1985
Croatia	Act on the Right of Access to Information	2003
Czech Republic	Law on Free Access to Information	1999
Denmark	Access to Public Administration Files Act	1985
Dominican Republic	Law on Access to Information	2004
Ecuador	Organic Law on Transparency and Access to Public Information	2004
Estonia	Public Information Act	2001
Finland	Act on the Openness of Government Activities	1999
France	Law on Access to Administrative Documents	1978
Georgia	General Administrative Code of Georgia	1999
Germany	Act to Regulate Access to Federal Government Information	2005
Greece	Code of Administrative Procedure	1999
Honduras	Law on Transparency and Access to Public Information	2006
Hungary	Protection of Personal Data and Disclosure of Data of Public Interest	1992
Iceland	Information Act	1996
India	Rights to Information Act	2005
Ireland	Freedom of Information Act	1997
Israel	Freedom of Information Law	1998

Country	Name of Law	Year Adopted
Italy	No. 241 of 7 August 1990	1990
Jamaica	Access to Information Act	2002
Japan	Law Concerning Access to Information Held by Administrative Organs	1999
South Korea	Act on Disclosure of Information by Public Agencies	1996
Kosovo	Law on Access to Official Documents	2003
Kyrgyzstan	Law on Guarantees of Free Access to Information Held by State Bodies and Local Government	2006
Latvia	Law on Freedom of Information	1998
Liechtenstein	Information Act	1999
Lithuania	Law on the Right to Obtain Information from State and Local Government Institutions	2000
Macedonia	Law on Free Access to Information of Public Character	2006
Mexico	Federal Law on Transparency and Access to Public Government Information	2002
Moldova	The Law on Access to Information	2000
Montenegro	Law on Free Access to Information	2005
Netherlands	Government Information (Public Access) Act	1991
New Zealand	Official Information Act	1982
Norway	Freedom of Information Act	1980
Panama	The Law on Transparency in Public Administration	2001
Peru	The Law on Transparency and Access to Public Information	2003
Poland	Law on Access to Public Information	2001
Portugal	Law of Access to Administrative Documents	1993
Romania	Law Regarding Free Access to Information of Public Interest	2001
St Vincent and the Grenadines	Freedom of Information Act, 2003	2003
Serbia	Law on Free Access to Information of Public Importance	2004
Slovakia	Act on Free Access to Information	2000
Slovenia	Access to Public Information Act	2003
South Africa	Promotion of Access to Information Act	2000
Spain	Law on Rules for Public Administration	2002
Sweden	Freedom of the Press Act	1949
Switzerland	Federal Law on the Principle of Administrative Transparency	2004
Tajikistan	Law of the Republic of Tajikistan on Information	2002
Thailand	Official Information Act	1997
Trinidad and Tobago	Freedom of Information Act	1999
Turkey	Law on the Right to Information	2003
Uganda	The Access to Information Act	2005
Ukraine	Law on Information	1992
United Kingdom	Freedom of Information Act	2000
United States	Freedom of Information Act	1966
Uzbekistan	Law on the Principles and Guarantees of Freedom of Information	2002
Zimbabwe	Access to Information and Privacy Protection Act	2002



# Endnotes

1. Ted Moran, *Harnessing Foreign Direct Investment: Policies for Developed and Developing Countries*, Chapter Three “FDI in Extractive Industries and Infrastructure” at 76: “Across all types of FDI (foreign direct investment), contracts and concessions to foreigners in natural resources and infrastructure have proven to be the most unstable.”
2. Denmark Model License of 2005 for Exploration & Production of Hydrocarbons (emphasis added).
3. For examples of recent disclosures, see Chapter Five, “International Policy and Practice on Contract Transparency.”
4. IMF Guide on Resource Revenue Transparency, 2007.
5. *See, e.g.*,
  1. The right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned.
  2. The exploration, development and disposition of such resources, as well as the import of the foreign capital required for these purposes, should be in conformity with the rules and conditions which the peoples and nations freely consider to be necessary or desirable with regard to the authorization, restriction or prohibition of such activities.

U.N. General Assembly Resolution 1803 (XVII) of 14 December 1962, “Permanent Sovereignty over Natural Resources.”
6. *See, e.g.*, “The property of all land and water within national territory is originally owned by the Nation, who has the right to transfer this ownership to particulars. [...] All natural resources in national territory are property of the nation, and private exploitation may only be carried out through concessions,” Mexican Constitution (of 1917), Article 27; “All lands of the public domain, waters, minerals, coal, petroleum, and other mineral oils, all forces of potential energy, fisheries, forests or timber, wildlife, flora and fauna, and other natural resources are owned by the State,” Constitution of the Philippines (1987), Section 2; and
  - (1) All public lands in Ghana shall be vested in the President on behalf of, and in trust for, the people of Ghana. [...]
  - (6) Every mineral in its natural state in, under or upon any land in Ghana, rivers, streams, water courses throughout Ghana, the exclusive economic zone and any area covered by the territorial sea or continental shelf is the property of the Republic of Ghana and shall be vested in the President on behalf of, and in trust for the people of Ghana.

Constitution of the Republic of Ghana (1992), Chapter 21 “Lands and Natural Resources,” Section 257 “Public Lands.”

7. See Amnesty International, *Human Rights on the Line*, (2005) at 16, available at <http://www.amnestyusa.org/business/humanrightsontheline.pdf> (last visited July 31, 2009); “Issues in the Mineral Development Agreement Between the Government of the Republic of Liberia and Mittal Steel Holdings” *Daily Observer* (April 13, 2006) at p.6; “Heavy Mittal?” Global Witness (October 2006) available at [http://www.globalwitness.org/media\\_library\\_detail.php/156/en/heavy\\_mittal](http://www.globalwitness.org/media_library_detail.php/156/en/heavy_mittal) (last visited July 31, 2009).
8. See Chapter Five, International Policy and Practice on Contract Transparency.
9. *Ibid.*
10. Amnesty International, *Human Rights on the Line*, (2005) at 16, available at <http://www.amnestyusa.org/business/humanrightsontheline.pdf> (last visited July 31, 2009).
11. In the case of the Mittal contract, the parliament also voted on the contract, but further research indicates that they never actually received the full text. See Chapter Five, International Policy and Practice on Contract Transparency.
12. Benjamin Esty, *Modern Project Finance: A Casebook* (John Wiley and Sons, Inc New Jersey 2004), 2.
13. *Ibid.*
14. Much of this section relies on “Transparency of Extractive Industries Contracts: The Case for Public Disclosure” by Heike Mainhardt-Gibbs, Bank Information Center (October 2007) available at <http://www.bicusa.org/en/Region.KeyIssues.3.aspx> (last visited July 31, 2009).
15. Mittal Steel Holdings A.G. and the Government of Liberia, Amendment of December 28, 2006 to the Mineral Development Agreement Date August 17, 2005 (emphasis added; capitals in original).
16. Iran: Sample Exploration Service Contract Between National Iranian Oil Company and Contractor, 2003.
17. Marcel Fontaine & Filip de Ly, *Drafting International Contracts: An Analysis of Contract Clauses*, Chapter 5: Confidentiality Clauses in International Contracts (Transnational Publishers, Inc. 2006), 272–274.
18. *Ibid.*, 239.
19. See, e.g., “Data and other information relating to Petroleum Operations or the Contract Area acquired or received by either Party from the other, the Contract and any amendments to it, and any correspondences between the Parties relating to the Contract are confidential until two (2) years after the termination of the contract.” Cambodia Oil Contract, 2002; “Information identified as ‘confidential’ by the party originally in possession of it shall not be published or disclosed to third parties until the relinquishment of the area [...]” Belize PSA, 2003; “KUFPEC and its employees will keep secret all information related to the Area and its operations during and after the term of the Agreement [...]” Bahrain: Production Sharing Agreement, 1983.
20. Audit Review of Government Contracts: Contracting, Privatization, Probity & Disclosure in Victoria 1992–1999—An Independent Report to Government, Volume 1: Main Report (May 2000) at 105. Available at <http://www.dpc.vic.gov.au/auditreview/> (last visited July 31, 2009).

21. *Ibid.* at 105–106.
22. Mittal Steel Holdings A.G. and the Government of Liberia, Amendment of December 28, 2006 to the Mineral Development Agreement Date August 17, 2005 (emphasis added).
23. *See* Chapter Five, International Policy and Practice on Contract Transparency.
24. Contract disclosure under securities regulations is discussed in Chapter Five, International Policy and Practice on Contract Transparency.
25. Freeport McMoRan’s disclosure of the contract can be found at <http://phx.corporate-ir.net/phoenix.zhtml?c=63811&p=irol-SECText&TEXT=aHRocDovL2NjYm4uMTBrd2l6YXJkLmNvbS94bWwvZmlsaW5nLnhtbD9yZXBvPXRLbmsmaXBhZ2U9NjQyNTk5MyZhdHRhY2g9To4mchCUkw9MQ%3d%3d> (last visited August 31, 2009).
26. *See* Chapter Four, Section E “Will companies ever agree to disclose contracts?”
27. *See* Chapter Three: Commercially Sensitive Information and the Public Interest
28. Fontaine & de Ly, 282–283.
29. *Ibid.*, 284–285.
30. The full text of Article 33, Property and Confidentiality of Data, reads:
  1. All information of a technical nature developed through the conduct of the Petroleum Operations shall be the property of Sonangol. Notwithstanding the above, and without prejudice to the provisions of the following paragraphs, Contractor Group shall have the right to use and copy, free of charge, such information for internal purposes.
  2. Unless otherwise agree by Sonangol and Contractor Group, while this Agreement remains in force, all technical, economic, accounting or any other information, including, without limitation, reports, maps, logs, records and other data developed through the conduct of Petroleum Operations, shall be held strictly confidential and shall not be disclosed by any Party without the prior written consent of the other party hereto. Provided, however, that either Party may, without such approval, disclose the aforementioned data:
    - a) To any Affiliate or potential assignee of such Party upon such Affiliate or potential assignee giving a similar undertaking of confidentiality;
    - b) In connection with the arranging of financing or of a corporate reorganization upon obtaining a similar undertaking of confidentiality;
    - c) To the extent required by any applicable law, regulation or rule (including without limitation, any regulation or rule of any regulatory agency, securities commission or securities exchange on which the securities of such a Party or of any such Party’s Affiliates are listed);
    - d) To consultants, contractors or other third parties as necessary in connection with Petroleum Operations upon obtaining a similar undertaking of confidentiality.
  3. The Contractor Group’s obligation of confidentiality of the information referred to in paragraph 2 above shall continue after the termination of the Agreement.
  4. In the event that any entity constituting Contractor Group ceases to hold an Interest under this Agreement, such entity will continue to be bound by the provisions of this Article.
  5. To obtain offers for new Petroleum Exploration and Production agreements, Sonangol may, upon informing Contractor Group, disclose to third parties geophysical and geological data

and information, and other technical data (the age of which is not less than one (1) year) or Contractor Group’s reports and interpretations (the age of which is not less than five (5) years).

6. The confidentiality obligation contained in this Article shall not apply to any information that has entered the public domain by any means that is both lawful and does not involve a breach of this Article.
31. “Angola’s state-owned Sonangol complained to BP in 2001 when BP revealed it had paid a \$112 million ‘signature bonus’ for an offshore block. Sonangol suggested the revelation violated contract provisions and Angolan law.” Houston Chronicle “Oil Firms Face Tough Disclosure Rules,” December 13, 2008.
32. Pursuant to industry regulations in Norwegian law, the company must disclose its operations figures at the official registry for companies (Broennoeysund Registret). The registry, with an English page, is available at <http://www.brreg.no/english/>.
33. See [http://www.house.gov/apps/list/hearing/financialsvcs\\_dem/hro62608.shtml](http://www.house.gov/apps/list/hearing/financialsvcs_dem/hro62608.shtml) (last visited March 26, 2009).
34. David Ivanovich and Kyle Pendergast, “Oil Firms Face Tough Disclosure Rules,” Houston Chronicle, December, 14, 2008, A1 ([http://www.chron.com/CDA/archives/archive.mpl?id=2008\\_4677693](http://www.chron.com/CDA/archives/archive.mpl?id=2008_4677693) viewed August 13, 2009) (emphasis added).
35. “Big Oil Fears US Bill to Force Oversight May Be Anti-Competitive,” Dow Jones newswire (May 22, 2008).
36. Beating a SLAPP Suit, *Alternative Law Journal*, Vol. 2, No. 2 (June 2007) at 1. Available at [http://www.thechangeagency.org/\\_dbase\\_upl/Beating\\_a\\_SLAPP\\_Suit\\_Ogle.pdf](http://www.thechangeagency.org/_dbase_upl/Beating_a_SLAPP_Suit_Ogle.pdf) (last visited July 31, 2009).
37. 7/03/06 letter from Cassels Brock to Fasken, on file with authors.
38. Letter on file with authors.
39. Discussions with writer for Financial Times, summer 2006.
40. For example, recently an activist was harassed and jailed by authorities on charges of making defamatory statements after he denounced a uranium contract the country had signed. See <http://www.publishwhatyoupay.org/en/resources/democratic-republic-congo-publish-what-you-pay-calls-immediate-release-transparency-activi> and <http://www.revenuewatch.org/news/073009.php> (last visited July 31, 2009).
41. *Claude Reyes et al. v. Chile (Trillium Case)*, Inter-Am. Ct. H.R. (ser. C) No. 151 (Sept. 19, 2006) at 86–87.
42. Note that “commercially sensitive information” is different from “private” information, like personal bank records and health histories, which are protected by privacy laws. Such information is secret or sensitive not because it derives value from not being known, but because of a legally protected sphere of individual privacy rights.
43. Restatement (First) of Torts, § 757(b). In comment b, The Restatement sets forth six criteria to be used to determine whether particular information qualifies as a trade secret, in particular whether or not there is a competitive advantage in knowing the information:
  - (1) the extent to which the information is known outside of [the company];

- (2) the extent to which it is known by employees and others involved in [the company's] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing the information; the ease or difficulty with which the information could be properly acquired or duplicated by others.

In the US, the Trade Secrets Act (TSA), 18 U.S.C. § 1905, prohibits government personnel from disclosing trade secrets or confidential commercial or financial information unless authorized by law.

44. The downside to trying to keep information a trade secret is that if the information comes into the public domain, it will no longer be protected by law, i.e., through legal suits for the “misappropriation” of trade secrets, which is essentially an action for “stealing” information, otherwise known as “industrial espionage.” Reverse engineering, however, is legal. A company can always take a finished product, like Coca-Cola, attempt to come up with the formula based on that final product, and sell its own imitating product.
45. In the oil industry, the R-Factor used and the rate of return used are often cited as commercially sensitive information. The R-Factor calculation is widely used throughout petroleum-producing countries, as it allows the contractor to adjust royalty payments to changes in real costs, including those affecting income (price of oil/gas) and those affecting costs.
46. Where technical reports, such as feasibility studies, are required to be disclosed, nearly all of this information will be included in such a document, though often as a future forecast of costs and processes used, for example, and not what is in fact being incurred as a cost or used in processing.
47. A surety is a security against loss or damage or for the fulfillment of an obligation, the payment of a debt; a pledge, guaranty, or bond.
48. Banisar, David. “Freedom of Information and Access to Government Records,” online at <http://www.freedominfo.org/survey> (last visited July 31, 2009); “The Public’s Right to Know: Principles on FOIA Legislation,” the Article 19 Principles, London 1999, online at [www.article19.org/docimages/512.htm](http://www.article19.org/docimages/512.htm) (last visited March 27, 2009).
49. <http://right2info.org/access-to-information-laws/access-to-information-laws-overview-and-statutory> (last visited on November 29, 2008).
50. Banisar, David. “Freedom of Information and Access to Government Records,” available at [http://www.freedominfo.org/documents/global\\_survey2004.pdf](http://www.freedominfo.org/documents/global_survey2004.pdf) (last visited March 27, 2009) and “The Public’s Right to Know: Principles on FOIA Legislation,” the Article 19 Principles, London 1999, online at [www.article19.org/docimages/512.htm](http://www.article19.org/docimages/512.htm) (last visited March 27, 2009).
51. A notable and potentially important exception is South Africa’s FOI law, the Promotion of Access to Information Act (PAIA), which applies not just to government bodies, but also to private parties that affect the fulfillment of citizens’ rights. The guide on how to use the act explains:
 

The unique horizontal application of the Bill of Rights in the Constitution makes South Africa’s freedom of information legislation unique in the world, in that PAIA is the only freedom of information legislation that permits access to records held by private bodies.



We commend the drafters of PAIA for this futuristic unique feature of PAIA especially in the light of the considerable power that multinational companies wield in the global arena today, particularly the negative impact of some of their activities on fundamental human rights in some regions—especially the third world regions.

Guide to Using the Promotion of Access to Information Act, p.2, available at <http://www.southafrica.info/services/rights/information-030305.htm> (last visited March 27, 2009).

52. The Public’s Right to Know: Principles on FOIA Legislation, the Article 19 Principles, London 1999, online at [www.article19.org/docimages/512.htm](http://www.article19.org/docimages/512.htm) (last visited March 27, 2009).
53. <http://right2info.org/exceptions-to-access> (last visited November 29, 2008).
54. The Public’s Right to Know: Principles on FOIA Legislation, the Article 19 Principles, London 1999, online at [www.article19.org/docimages/512.htm](http://www.article19.org/docimages/512.htm) (last visited March 27, 2009).
55. *Ibid.*
56. *Ibid.*
57. The US FOIA includes an unusual exception that would seem to have implications for extractives contracts. Called “The Texas Touch,” the exception allows the government to refuse disclosure of geological and geophysical information and data, including maps, concerning wells. However, there have been very few cases concerning this exemption.
58. The substantial harm test requires actual competition and a substantial likelihood of competitive injury. The Public’s Right to Know: Principles on FOIA Legislation, the Article 19 Principles, London 1999, online at [www.article19.org/docimages/512.htm](http://www.article19.org/docimages/512.htm) (last visited March 27, 2009).
59. IMF Guide on Resource Revenue Transparency, 2007.
60. 5 U.S.C.A. § 552.
61. *Freeman v. Bureau of Land Management* (D.Or., 2007) 526 F. Supp. 2d 1178.
62. 30 U.S.C. §§ 22–54 and §§ 611–615.
63. Article 81 of Ecuador’s Constitution, available at <http://pdba.georgetown.edu/Constitutions/Ecuador/ecuador98.html>; Commentary on Ecuador’s FOI law is available at <http://www.freedominfo.org/countries/ecuador.htm#1> (last visited on March 20, 2009).
64. Ecuador’s LOTAIP is available at <http://www.aedep.org.ec/paginas/leydere.htm> (last visited March 20, 2009).
65. *See* [http://www4.petroecuador.com.ec/lotaip/lotaip\\_contratos01.cfm](http://www4.petroecuador.com.ec/lotaip/lotaip_contratos01.cfm).
66. Uganda’s Access to Information Act is available at [http://www.freedominfo.org/documents/uganda\\_ati\\_act\\_2005.pdf](http://www.freedominfo.org/documents/uganda_ati_act_2005.pdf).
67. *See* “Ugandan Government Agreed to Release the Secret Oil Profit Sharing Contracts to MPs” on Uganda News (March 15, 2009) available at [http://www.africanoiljournal.com/03-15-2007%20ugandan\\_government\\_agreed\\_to\\_release%20the%20secret%20oil%20profit%20sharing%20contracts%20to%20mps.htm](http://www.africanoiljournal.com/03-15-2007%20ugandan_government_agreed_to_release%20the%20secret%20oil%20profit%20sharing%20contracts%20to%20mps.htm) (last visited March 20, 2009).
68. *See* “US Expert Says Uganda Oil Agreement Good,” Business Week (March 21, 2009) available at [http://www.busiweek.com/index.php?option=com\\_content&task=view&id=1235&Itemid=2](http://www.busiweek.com/index.php?option=com_content&task=view&id=1235&Itemid=2) (last visited July 31, 2009).



69. See “Parliament Receives Oil Agreements,” Uganda Monitor (February 28, 2009) available at [http://www.monitor.co.ug/artman/publish/news/Parliament\\_receives\\_oil\\_agreement\\_80643.shtml](http://www.monitor.co.ug/artman/publish/news/Parliament_receives_oil_agreement_80643.shtml) (last visited March 20, 2009).
70. One example of this approach is BP’s *Citizen’s Guide to the BTC Project Agreements: Environmental, Social and Human Rights Standards*, published as part of its response to the Amnesty International’s report on the project. See <http://subsites.bp.com/caspian/citizens%20guide%20final.pdf> (consulted August 13, 2009).
71. Ted Moran, *Harnessing Foreign Direct Investment: Policies for Developed and Developing Countries*, Chapter Three, “FDI in Extractive Industries and Infrastructure” at 76.
72. IMF Guide to Resource Revenue Transparency, 2007.
73. See “Tullow, Heritage Face Tough Choices on Uganda Oil” Dow Jones Newswire on The Independent (June 10, 2009) available at <http://www.independent.co.ug/index.php/business/business-news/54-business-news/1052-tullow-heritage-face-tough-choices-on-uganda-oil> (last visited July 31, 2009).
74. Ownership, at the time of contract signing, was as follows: BP (UK), 30.1%; State Oil Company of Azerbaijan, 25.00%; Chevron (USA), 8.90%; Statoil Hydro (Norway), 8.71%; TPAO (Turkey), 6.53%; Eni/Agip (Italy), 5.00%; Total (France), 5.0%; Itochu (Japan), 3.4%; Inpex (Japan), 2.5%; ConocoPhillips (USA), 2.5%; Hess Corporation (USA), 2.36%.
75. Production Sharing Agreements are available at BP’s Caspian website <http://www.bp.com/genericarticle.do?categoryId=9006654&contentId=7013493> (last visited March 26, 2009) and the pipeline agreements at <http://www.bp.com/genericarticle.do?categoryId=9006628&contentId=7013492> (last visited March 26, 2009).
76. Among other issues, the pipeline was to run through Borjomi Valley in Georgia, an area that has unique biodiversity and supports an important sector of Georgia’s economy, mineral water from the valley. See “Action Alert: BTC Pipeline Protest in Borjomi” at <http://www.bankwatch.org/active/archive/2003/borjomi.html> (last visited March 23, 2009). Human rights concerns included having a pipeline run through war-torn areas, which could become a target of terrorist activity and create instability and further militarization of an already unstable region. See, e.g., ECA Watch “The BTC Pipeline” available at [http://www.eca-watch.org/problems/oil\\_gas\\_mining/btc/index.html](http://www.eca-watch.org/problems/oil_gas_mining/btc/index.html) (last visited March 23, 2009).
77. For a detailed account of the politics, economics, and social, environmental and technical aspects of the BTC pipeline, see the compilation report *The Baku-Tblisi-Ceyhan Pipeline: Oil Window to the West*, Eds. S. Frederick Starr & Svante E. Cornell, Central Asia-Caucasus Institute, Silk Road Studies Program, Johns Hopkins University-SAIS and Uppsala University, 2005. For a recent article on US diplomacy and Caspian oil, see [http://www.upi.com/Energy\\_Resources/2008/10/15/Analysis\\_Kazakhstan\\_and\\_the\\_BTC\\_pipeline/UPI-54001224110687/](http://www.upi.com/Energy_Resources/2008/10/15/Analysis_Kazakhstan_and_the_BTC_pipeline/UPI-54001224110687/) (last visited March 26, 2009).
78. *Ibid.* See also Michael Klare “Bush-Cheney Energy Policy: Procuring the Rest of the World’s Oil” in *Petro Politics*, January 2004, describing Clinton’s support for the BTC pipeline. Available at <http://www.fpi.org/pdf/petropol/ch1.pdf>; field interviews in Baku and Tbilisi, May 2008 and in London, June 2008.
79. *Ibid.*

80. See Energy Information Administration, Official Energy Statistics from the US Government, Country Analysis Briefs: Azerbaijan at <http://www.eia.doe.gov/cabs/Azerbaijan/Oil.html> (last visited March 26, 2009).
81. *Ibid.*
82. An IFC Internal Memorandum, “Azerbaijan Republic, Georgia, Turkey – ACG Phase 1/BTC Pipeline Projects: Lessons Learned” April 16, 2004,” notes that the project sponsors and the governments involved in the BTC project were amenable to disclosing the contracts, but that in other projects, governments may not. There is no mention of company resistance. The memorandum states that “for instance, in the Bujagali Hydropower (Uganda) project, the government was not interested in disclosing publicly the Power Purchase Agreement (PPA).” On file with author.
83. Interviews on field missions in Baku, Azerbaijan and London UK, Summer 2008.
84. *Ibid.*
85. In fact, that remains the case with Liberia, though the government intends to create a library of contracts that citizens can access at the National Investment Commission. Representative from the National Investment Commission, August 2008 field study in Monrovia, Liberia. Similarly, mining contracts in Peru are available by application to the relevant government agency. January 2009 field research, Lima, Peru.
86. See Thomas Walde, “Rule of Law and the Resource Industries’ Cycles: Acquired Rights versus the Pressure Inherent in the Political Economy of the International Energy and Resource Industries” (September 2007).
87. See, e.g., <http://permanent.access.gpo.gov/lps3997/9902subs.htm> “Each PSA must be approved separately by the Azerbaijan Parliament. See also [www.uea.ac.uk/env/all/teaching/eiaams/pdf\\_dissertations/2005/Salimov\\_Parviz.pdf](http://www.uea.ac.uk/env/all/teaching/eiaams/pdf_dissertations/2005/Salimov_Parviz.pdf) stating that “[t]he PSA is a contractual agreement between [the contractor-foreign oil company] and the Azerbaijan Government (normally represented by...SOCAR) for the exploration or development of oil and gas fields. The PSAs...get ratified by the Milli Majlis. After ratification by parliament, [the] PSA constitute[s] a law of [Azerbaijan]” and takes precedence over any other current or future law, decree or administrative order.”
88. Adeoye Adefulu, “Fundamental Legal Issues in the Oil and Gas Industry III: A Brief Discussion of Production Sharing Contracts” available at <http://www.scribd.com/doc/6412033/Fundamental-Legal-Issues-in-the-Oil-and-Gas-Industry-III> (last visited March 26, 2009).
89. See Law of Georgia on Normative Acts available at [http://www.irisprojects.umd.edu/georgia/Laws/English/law\\_normative\\_acts.pdf](http://www.irisprojects.umd.edu/georgia/Laws/English/law_normative_acts.pdf) (last visited March 26, 2009).
90. See “Information Report about Business in Kyrgyzstan” [http://www.kyrgyzembassy.ru/data/Business\\_in\\_kyrgyzstand.pdf](http://www.kyrgyzembassy.ru/data/Business_in_kyrgyzstand.pdf) (dated 2007).
91. Constitution of the Republic of Liberia, Article 34 (f).
92. See [www.daco-sl.org/encyclopedia/1\\_gov?1\\_2/MMR/MMR\\_newsletter\\_July%202008.pdf](http://www.daco-sl.org/encyclopedia/1_gov?1_2/MMR/MMR_newsletter_July%202008.pdf).
93. Parliamentary approval was not obtained for the extension of the PSA with joint venture partners Hunt Oil and ExxonMobil. The companies initiated arbitration proceedings against the government in the International Chamber of Commerce in Paris for \$7 billion, which, as noted above, were ultimately unsuccessful, as the arbitration panel reaffirmed that the parliamentary

- approval was necessary for a valid contract. *See* <http://www.arabianbusiness.com/537650-exxonmobil-and-hunt-oil-rocked-by-iccs-unprecedented-ruling>.
94. *See, e.g.*, <http://permanent.access.gpo.gov/lps3997/9902subs.htm> “Each PSA must be approved separately by the Azerbaijan Parliament. *See also* [www.uea.ac.uk/env/all/teaching/eiaams/pdf\\_dissertations/2005/Salimov\\_Parviz.pdf](http://www.uea.ac.uk/env/all/teaching/eiaams/pdf_dissertations/2005/Salimov_Parviz.pdf) stating that “[t]he PSA is a contractual agreement between [the contractor-foreign oil company] and the Azerbaijan Government (normally represented by... SOCAR) for the exploration or development of oil and gas fields. The PSAs... get ratified by the Milli Majlis. After ratification by parliament, [the] PSA constitute[s] a law of [Azerbaijan]’ and takes precedence over any other current or future law, decree or administrative order.”
  95. *Ibid.*
  96. Field mission included interviews with former and current SOCAR employees, former international oil company employees, academics, and activists. All confirmed that the vast majority of PSAs were not available to the public. Some questioned whether Parliament was ever given the full contract.
  97. Jos Boonstra, Edward Burke, Richard Youngs, “The Politics of Energy: Comparing Azerbaijan, Nigeria and Saudi Arabia.” September, 2008 Working Paper. [www.fride.org/descarga/WP68\\_Politics\\_of\\_energy\\_eng\\_sep08.pdf](http://www.fride.org/descarga/WP68_Politics_of_energy_eng_sep08.pdf). The Working Paper reports that “the Parliament has a mere rubber-stamp role; the opposition is ineffective; and elections are characterized by fraud and misconduct.”
  98. *See* “‘Stealth’ Oil Agreements Threaten Azerbaijan’s Reputation and Policy Progress” press release by Azeri NGO coalition, July 1, 2009. Available at [http://www.osi.az/index.php?option=com\\_content&task=view&id=1639&Itemid=223](http://www.osi.az/index.php?option=com_content&task=view&id=1639&Itemid=223) (last visited August 31, 2009).
  99. Constitution of the Republic of Liberia, Article 34 (f).
  100. Interviews during field mission to Monrovia, Liberia, summer 2006 and summer 2008.
  101. For example, a recent contract submitted to the legislature for approval did not initially contain annexes with critical information about the fiscal regime of the contract. These were, however, eventually released. For more information about this process, *see* <http://www.revenuewatch.org/news/022709.php> (last visited July 30, 2009).
  102. For example, an activist was recently harassed and jailed by authorities on charges of making defamatory statements after he denounced a uranium contract the country recently signed. *See* <http://www.publishwhatyoupay.org/en/resources/democratic-republic-congo-publish-what-you-pay-calls-immediate-release-transparency-activi> and <http://www.revenuewatch.org/news/073009.php> (last visited July 31, 2009).
  103. August 2008 Field study in Monrovia, Liberia.
  104. Ghana has recently announced that its oil contracts will be made public. Ecuador has made some of its oil contracts public pursuant to its FOI law. Sao Tome and Principe requires the public disclosure of all contracts and these can be found at public information offices in the country. Congo-Brazzaville, Bolivia and Peru have published many of their production sharing agreements on government websites.
  105. “Congo Launches Mining Contract Review” June 11, 2007, available at <http://www.mineweb.net/mineweb/view/mineweb/en/page504?oid=22056&sn=Detail> (last visited March 26, 2009).

106. *See* “Transparency Fears Lead to Review of Congo Mining Contracts” *Financial Times*, January 3, 2007, describing the leaked World Bank report and its warning that the country had sold the national assets without a valuation of their worth, and likely for far less than their value. Available at [http://www.ft.com/cms/s/c918d3a2-9a8a-11db-bbd2-0000779e2340,Authorized=false.html?\\_i\\_location=http://www.ft.com/cms/s/o/c918d3a2-9a8a-11db-bbd2-0000779e2340.html%3Fnclick\\_check%3D1&\\_i\\_referer=&nclick\\_check=1](http://www.ft.com/cms/s/c918d3a2-9a8a-11db-bbd2-0000779e2340,Authorized=false.html?_i_location=http://www.ft.com/cms/s/o/c918d3a2-9a8a-11db-bbd2-0000779e2340.html%3Fnclick_check%3D1&_i_referer=&nclick_check=1) (last checked March 26, 2009).
107. Discussions with Congolese officials were ongoing during a Columbia-Carter Center joint effort to assist the Congo in designing a transparent and beneficial review process. For details, see [http://www.cartercenter.org/countries/democratic\\_republic\\_of\\_congo.html](http://www.cartercenter.org/countries/democratic_republic_of_congo.html) (last visited March 26, 2009).
108. Letters between The Carter Center and the Congolese government are on file with the author.
109. All but the Tenke Fungurume Mining Convention, with Freeport McMoRan as operator and Lundin Mining joint venture partner, were eventually made public on the Ministry of Finance website. They remain available on the Ministry of Mines website, where they can still be found under the heading “Contracts de partenariat” on the DRC Ministry of Finance website <http://www.minfinrdc.cd/> (last visited July 31, 2009).
110. *See* “Review of Congo Mining Contracts Marred by Lack of Transparency” *Global Witness*, January 10, 2007 available at [http://www.globalwitness.org/media\\_library\\_detail.php/577/en/review\\_of\\_congo\\_mining\\_contracts\\_marred\\_by\\_lack\\_of](http://www.globalwitness.org/media_library_detail.php/577/en/review_of_congo_mining_contracts_marred_by_lack_of) (March 26, 2009).
111. *See* “Small Print Spells Raw Deal” *Intermon Oxfam*, at 11. Available, in Spanish, at [http://www.intermonoxfam.org/UnidadesInformacion/anexos/10144/080925\\_letra%20pequeña.pdf](http://www.intermonoxfam.org/UnidadesInformacion/anexos/10144/080925_letra%20pequeña.pdf).
112. *See* “Historic Record in Signing Petroleum Contracts in Peru” *Perupetro* press release November 21, 2007, available at <http://mirror.perupetro.com.pe/noticiasdes-e.asp?id=128> (last visited March 25, 2009).
113. *See, e.g.*, “The reason usually advanced by governments (and to some extent by companies) is that disclosure would erode their bargaining power for future contracts.” *IMF Guide on Resource Revenue Transparency* 2007, p.14.
114. Field mission, January 2009. *Perupetro S.A.*, the state enterprise responsible for promoting the investment of hydrocarbon exploration and exploitation, also has relevant information on the country’s petroleum industry on its website. This includes information on oil and gas production; charts on royalties, payments and fiscal incomes; and lists of the contracts in force and companies operating in Peru. There is a model contract in both English and Spanish, the rules of fair play, and relevant legislation. *See* <http://mirror.perupetro.com.pe/home-e.asp>.
115. <http://www.pj.gob.pe/>.
116. Peruvian law requires that private legal entities are obliged to give information about public services offered, fees, and administrative functions, which is comparatively broad. For an explanation of Peru’s legislation regarding access to information and a civil society group’s experience using it to gain access to information about Peru’s Camisea pipeline, *see* <http://www.dar.org.pe/hidrocarburos/libro%20completo%20Camisea.pdf>.
117. <http://ipsnews.net/news.asp?idnews=44402>.
118. <http://ipsnews.net/news.asp?idnews=44402>.

119. For a detailed background and analysis of the recent strikes in Peru, *see* <http://www.revenuewatch.org/news/062509.php> (last visited July 31, 2009).
120. *See* “Peru See Energy Investments Up Despite Protests” Reuters Newswire (August 6, 2009) available at <http://www.reuters.com/article/latestCrisis/idUSNo5283599> (last visited August 6, 2009).
121. Field mission to Lima, Peru, January 2009.
122. *See, e.g.*, “Contratos favorecen a inversores” *La Republica* (June 18, 2009).
123. Allegedly, a civil servant was disaffected and leaked the contract. Some say the government official did not receive an adequate bribe; others believed he was blowing the whistle on a bad contract. From interviews in Monrovia in August 2006 and August 2008.
124. “Issues in the Mineral Development Agreement Between the Government of the Republic of Liberia and Mittal Steel Holdings” *Daily Observer* (April 13, 2006) at p.6.
125. “Misrepresentations of Mittal Steel MDA” *Daily Observer* (April 19, 2006) at p.6.
126. “Government-sponsored Review Calls for Renegotiating Liberia’s Mittal Deal” *The Associated Press*, October 3, 2006.
127. “Heavy Mittal?” *Global Witness* (October 2006) available at [http://www.globalwitness.org/media\\_library\\_detail.php/156/en/heavy\\_mittal](http://www.globalwitness.org/media_library_detail.php/156/en/heavy_mittal) (last visited July 31, 2009).
128. Speech by President Ellen Johnson-Sirleaf: “Remarks by Her Excellency Madam Ellen Johnson-Sirleaf, President of the Republic of Liberia, on the Occasion of the Formal Launching of the Extractive Industries Transparency Initiative in Liberia” (July 10, 2007).
129. For more information about GEMAP, *see* <http://www.gemapliberia.org/> (last visited on March 26, 2009).
130. For a much more detailed account of Liberia’s renegotiation of the Mittal contract, *see* “Getting a Better Deal from the Extractive Sector: Concession Negotiations in Liberia 2006–2008” by The Revenue Watch Institute (February 2009) available at <http://revenuewatch.org/images/RWI-Getting-a-Better-Deal-final0226.pdf>.
131. *Global Witness*, Update on the Renegotiation of the Mineral Development Agreement between Mittal Steel and the Government of Liberia, August 2007.
132. Field research in Monrovia, August 2008. The renegotiated Mittal Steel Mineral Development Agreement is available on The Revenue Watch Institute website, at <http://www.revenuewatch.org/news/publications/getting-a-better-deal-app.php> (last visited August 24, 2009).
133. *See* Chapter Four, Section E “Will Companies Ever Agree to Contract Transparency?” for more about the BTC consortium’s disclosure of the BTC pipeline and upstream exploitation contracts.
134. On IFI failure to require contract transparency, *see* *Global Witness & Bank Information Center* “Assessment of IMF and World Bank Group Extractive Industries Transparency Implementation” October 2008, p.1.
135. For example, Anvil Mining’s disclosure of the major terms of the renegotiation of its contract with the DRC is available on the filings site for the Toronto Exchanges, SEDAR, at [www.sedar.com](http://www.sedar.com).

136. Chaparral has been acquired by Lukoil. *See* [http://www.lukoil-overseas.com/press.asp?div\\_id=1&id=359](http://www.lukoil-overseas.com/press.asp?div_id=1&id=359) (last visited on March 25, 2009).
137. A litigation battle with Lukoil that seems to have essentially been a proxy fight over the Karakuduk field, Chaparral's only operating asset, may have played a role in the disclosure of the contract. For more information about the litigation *see* <http://thedealsleuth.wordpress.com/2008/01/22/chaparral-resources-shareholders-have-last-laugh-as-lukoil-settles-litigation/>. For information on Chaparral generally, *see* [http://findarticles.com/p/articles/mi\\_m0EIN/is\\_2005\\_Oct\\_4/ai\\_n15659988](http://findarticles.com/p/articles/mi_m0EIN/is_2005_Oct_4/ai_n15659988); [http://www.rigzone.com/search/sites/Chaparral\\_Resources1713.asp](http://www.rigzone.com/search/sites/Chaparral_Resources1713.asp).
138. *See* <http://www.secinfo.com/dV5ud.83r.7.htm>.
139. IMF Guide on Resource Revenue Transparency 2007, p.13.
140. It seems this policy is still being determined. Oil contracts would seem to have fit this criteria, but the IFC did not require contract transparency. The government of Ghana later adopted a contract transparency policy for its oil sector, nonetheless. *See* <http://www.revenuewatch.org/news/030909.php> (last visited July 31, 2009).
141. *See* World Bank EITI++ Fact Sheet available at <http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:21727813~pagePK:64257043~piPK:437376~theSitePK:4607,00.html> (last visited on March 26, 2009).
142. IMF Guide on Resource Revenue Transparency 2007, p.14.
143. *Ibid.* Emphasis added. Some experts are now recommending that governments do exploration themselves with the assistance of donors, thus the competitive dynamics of this field could change if there was a strong turn towards this in the future.
144. *Ibid.* Emphasis added.
145. Global Witness & Bank Information Center "Assessment of IMF and World Bank Group Extractive Industries Transparency Implementation" October 2008, p. 1.
146. *See* "Position Statement on Transparency of Mineral Revenues" International Council of Mining and Metals, January 13, 2009. Available at [www.icmm.com/document/628](http://www.icmm.com/document/628) (last visited August 31, 2009).
147. *See* <http://www.gasandoil.com/contracts/> (last visited March 24, 2009).
148. *See* <http://www.barrowscompany.com/> (last visited March 24, 2009).
149. *See* <http://www.ogel.org/> (last visited on March 24, 2009).
150. Are PSCs Subject to Disclosure under Freedom of Information Laws? LLM Candidate Paper, University of Dundee. On file with Author.





# Index

## A

Abu Dhabi, 65  
Albania, 65, 87  
Alexander's, 56  
Aliyev, Heydar, 28, 44  
Amnesty International, 16–18, 95n71  
Angola  
    confidentiality clauses in, 30, 65–66, 91n31, 92n32  
    freedom of information laws in, 87  
    PSAs of, 30  
Antigua, 66, 87  
Argentina, 66–67  
Armenia, 87  
Australia, 67, 87  
Austria, 87  
Azerbaijan, 28, 44, 48–49, 87, 96n83, 96n88, 96n94, 97n95

## B

Bahrain, 67, 90n20  
Baku-Tblisi-Ceyhan pipeline (BTC), 16–18  
    disclosure issues with, 28, 96n83  
    ownership of, 95n75  
    report on, 95n78  
    route of, 95n77  
    transparency campaign against, 44–45  
Bangladesh, 67  
Barbuda, 87  
Barrows Company, 56  
Belgium, 87  
Belize, 68, 87, 90n20  
BLM. *See* Bureau of Land Management  
Bolivia, 68, 97n105  
Bosnia and Herzegovina, 87  
BP, 28, 44–45, 53, 92n32, 95n71, 95n75, 95n76  
Brazil, 68–69  
Broederlijk Delen, 32  
Brunei, 69  
BTC. *See* Baku-Tblisi-Ceyhan pipeline  
Bujagali Hydropower, 96n83  
Bulgaria, 69, 87  
Bureau of Land Management (BLM), 38

## C

Cambodia, 69–70, 90n20  
Cameroon, 16–18, 69–70  
Canada, 70, 87  
The Carter Center, 28, 50, 98n108  
Cayman Islands, 70  
Celi, Miguel, 51  
Center for Strategic and International Studies, 31

## Chad

    pipeline agreement in, 16–18  
    transparency in, 17  
Chad-Cameroon pipeline, 16–18  
Chaparral Resources, 54, 100n138  
Chevron, 95n75  
China, 71–72  
citizen ownership, 15  
*Citizen's Guide to the BTC Project Agreements: Environmental, Social and Human Rights Standards* (BP), 95n71  
civil society institutions, 11, 61  
Coca-Cola, 34, 93n45  
Colombia, 73, 87  
Columbia Human Rights Clinic, 52  
Columbia Law School, 56  
commercially sensitive information, 12–13  
    defining, 33–34  
    as distraction, 58  
    in extractive industries, 34–35  
    as freedom of information exception, 37  
    primary contracts and, 35–40  
    private information v., 92n43  
company policies, contract transparency and, 53  
competitive position, confidentiality protecting, 39  
concession agreements, 19  
confidentiality clauses, 12–13  
    in Angolan PSAs, 30, 65–66, 91n31, 92n32  
    best practice examples for, 63–64  
    consequences of breaching, 29–31  
    disclosures required by law and, 27  
    exceptions to, 26–27  
    in extractive contracts, 23–26  
    leaks and, 31, 99n124  
    misunderstandings of, 31  
    patterns of similarity in, 25–26, 60  
    preventing contract disclosure with, 27–28  
    in primary contracts, 20  
    public domain and, 27  
    scope of, 24–25  
    survey of, 65–85  
    as symptom of secrecy, 58  
    third parties and, 31, 92n41  
    timeframe of, 25, 90n20  
Congo-Brazzaville, 43, 47, 97n105  
ConocoPhillips, 95n75  
contract disclosure, 11  
    BTC pipeline and, 28, 96n83  
    conditions for, 28  
    confidentiality clauses preventing, 27–28  
    in Democratic Republic of Congo, 47, 58  
    in Ecuador, 43, 47  
    freedom of information laws and, 36–40

legal mechanisms for, 28  
in Liberia, 43, 58, 96n86  
in Peru, 58, 96n86, 97n105, 98n115, 98n117

contract transparency  
arguments for, 59  
benefits of, 12, 57  
case studies of, 50–52  
company policies for, 53  
confidentiality exceptions for, 26–27  
contract complexity and, 41–42  
countries committed to, 47  
detering corruption with, 16–17, 41  
fighting fear/mistrust with, 16  
home country policies for, 53–54, 60  
host country policies for, 47–52, 59–60  
importance of, 11  
as incentive for better deals, 16  
industry-wide policies for, 56  
information asymmetry and, 13, 16  
international campaigns for, 16  
international financial institution policies for, 54–56  
negotiating positions and, 43, 58, 98n114  
private enterprise support of, 44–46  
recommendations for, 59–62  
renegotiations and, 42  
resistance to, 12–13, 17, 41–46  
resource management and, 15–17  
securities regulations and, 53–54  
UN and, 61

contracts. *See also* extractive contracts; primary contract  
access to, 16–17  
importance of, 12  
information asymmetry in, 13  
information found in, 36  
laws of, 11  
leaks of, 31  
model, 12  
natural resource development value chain and, 16  
parliamentary approval of, 48–49, 96n88, 96n94, 97n95, 97n98  
primary, 18–19  
public availability of, 11–12  
in resource extraction projects, 18–19  
resource management law from, 16

corruption, 11  
contract transparency deterring, 16–17, 41  
discouraging, 12, 58–60

Croatia, 87  
Czech Republic, 87

**D**

defamation, 92n41, 97n103  
democracy, secrecy v., 16  
Democratic Republic of Congo, 27–28, 32, 98n108  
confidentiality clauses in, 73–74  
contract disclosures in, 47, 58  
contract transparency campaigns in, 16  
mining contract review in, 50, 97n106, 98n107, 98n108

Denmark, 60  
confidentiality clauses in, 74–75  
freedom of information laws in, 87  
Model License of 2005 for Exploration & Production of Hydrocarbons, 13

Discover Petroleum, 51  
Dominican Republic, 75, 87  
Dubai, 75

**E**

EBRD. *See* European Board of Reconstruction and Development  
ECA. *See* export credit agencies  
Ecuador, 40  
contract disclosure in, 43, 47  
freedom of information laws in, 40, 87

Egypt, 48  
EITD. *See* Extractive Industries Transparency Disclosure Act  
EITI. *See* Extractive Industries Transparency Initiative  
11.11.11 (organization), 32  
Eni/Agip, 95n75  
environmental mitigation, 35  
Equator Principles, 61  
Estonia, 87  
European Board of Reconstruction and Development (EBRD), 44  
export credit agencies (ECA), 61  
extractive agreements  
importance of, 12  
information asymmetry in, 16  
transparency in, 12  
extractive contracts  
complexity of, 41–42  
confidentiality clauses in, 23–26  
extractive industries  
commercially sensitive information in, 34–35  
secrecy in, 12, 17  
transparency recommendations for, 60–61  
Extractive Industries Transparency Disclosure Act (EITD), 30  
Extractive Industries Transparency Initiative (EITI), 15, 28, 54, 61–62  
Exxon-Mobil, 18, 96n94

**F**

Fasken Martineau DuMoulin, 32  
Financial Times, 32  
Finland, 87  
FOI. *See* freedom of information laws  
FOIA. *See* Freedom of Information Act  
foreign direct investment (FDI), 42, 89n1  
Forrest, George, 32  
France, 87, 95n75  
Freedom of Information Act (FOIA), 38, 88, 94n58  
freedom of information laws (FOI), 28, 33  
civil society use of, 61  
countries with, 87–88  
disclosure frameworks in, 36–40  
in Ecuador, 40, 87  
principles of, 37–39  
secrecy at odds with, 57  
trade and commercial secrets exception to, 37–38  
in Uganda, 40, 88  
in United States, 38, 88, 94n58  
*Freeman v. Bureau of Land Management*, 38  
Freeport McMoran, 27–28, 45, 98n110

**G**

Gecamines, 32  
GEMAP. *See* Governance and Economic Management Assistance Program  
General Mining Law of 1872, 38  
Georgia, 28, 45, 48, 87, 95n77, 96n83  
Germany, 75, 87  
Ghana, 44, 97n105, 100n141  
confidentiality clauses in, 75  
constitution of, 89n7  
contract transparency in, 15, 47  
Global Witness, 16, 52  
Governance and Economic Management Assistance Program (GEMAP), 52



- government accountability, 11  
 Greece, 87  
 Guatemala, 75  
 Gutiérrez Peña, César, 51
- H**
- Hess, 95n75  
 HGA. *See* Host Government Agreements  
 home countries  
     contract transparency policies of, 53–54  
     recommendations for, 59–60  
 Honduras, 87  
 host countries  
     contract transparency policies of, 47–52  
     recommendations for, 59–60  
 Host Government Agreements (HGA), 18  
 human rights abuses, 11  
 Human Rights Institute, 28  
 human rights legislation  
     promoting, 61  
     secrecy at odds with, 57  
     in Turkey, 18  
*Human Rights on the Line* (Amnesty International), 17–18  
 Hungary, 75, 87  
 Hunt Oil, 96n94
- I**
- Iceland, 87  
 ICMM. *See* International Council on Mining and Metals  
 IFC. *See* International Finance Corporation  
 IMF. *See* International Monetary Fund  
 IMF Guide on Resource Revenue Transparency (IMF Guide), 54–55, 60  
 India, 76–77, 87  
 Indonesia, 78  
 industry groups, transparency initiatives of, 56  
 information asymmetry, 13, 16  
 Inpex, 95n75  
 intellectual property, 34  
 Inter-American Human Rights Courts, 33  
 International Chamber of Commerce, 96n94  
 international commercial relations, laws of, 11  
 International Council on Mining and Metals (ICMM), 56, 59  
 International Finance Corporation (IFC), 15, 44, 54, 96n83, 100n141  
 international financial institutions. *See also specific institutions*  
     contract transparency policies of, 54–56  
     transparency recommendations for, 61  
 International Monetary Fund (IMF), 15, 43, 54–56, 61. *See also* IMF Guide on Resource Revenue Transparency  
 Iran, 78  
 Iraq, 78–79  
 Ireland, 87  
 Israel, 87  
 Italy, 88, 95n75  
 Itochu, 95n75
- J**
- Jamaica, 88  
 Japan, 88, 95n75  
 Johnson-Sirleaf, Ellen, 49, 52
- K**
- Kazakhstan, 54, 79  
 KFL. *See* Kinross-Forrest Limited  
 Kinross-Forrest Limited (KFL), 32  
 Kosovo, 88  
 Kyrgyzstan, 48, 88
- L**
- Latvia, 88  
 Liberia  
     confidentiality clauses in, 79–80  
     contract disclosure in, 43, 58, 96n86  
     contract transparency campaigns in, 16  
     contract transparency policy in, 47  
     contract/concession review by, 52  
     EITI bill in, 15  
     Mittal Steel in, 16, 23–24, 26, 32, 49, 52, 90n12, 99n131  
     parliamentary ratification of investment contracts in, 48  
 license agreements, 19  
 Liechtenstein, 88  
 literacy, 16  
 Lithuania, 88  
 LOTAIP. *See* Organic Law on Transparency and Access to Public Information  
 Lukoil, 100n138  
 Lundin Mining, 98n110
- M**
- Macedonia, 88  
 Malta, 80  
 Mexico, 80–81, 88, 89n7  
 mismanagement, 11  
 Mittal Steel, 16, 23–24, 26, 32, 49, 52, 90n12, 99n131  
 Mo\*, 32  
 model contracts, 12  
 Model License of 2005 for Exploration & Production of Hydrocarbons (Denmark), 13  
 Moldova, 88  
 Montenegro, 88
- N**
- natural resource development, contracts in value chain of, 16  
 negotiating positions, 43, 58, 98n114  
 Netherlands, 88  
 New Zealand, 88  
 Norway, 81, 88, 92n33, 95n75
- O**
- Oil, Gas and Energy Law forum, 56  
 Organic Law on Transparency and Access to Public Information (LOTAIP), 40  
 oversight, primary contract defining, 21  
 Oxfam, 16
- P**
- Pakistan, 81  
 Panama, 88  
 Papua New Guinea, 82  
 patents, 34  
 Peru, 43, 47  
     freedom of information laws in, 88  
     hydrocarbon contract publication by, 50–51  
     model contract publication by, 58  
     public disclosure in, 58, 96n86, 97n105, 98n115, 98n117  
 Perupetro, 98n115  
 PetroPeru, 51  
 the Philippines, 89n7  
 Poland, 82, 88  
 primary contract  
     commercially sensitive information and, 35–40  
     confidential information and, 36–40  
     confidentiality clauses in, 20  
     defining, 18–19  
     information in, 19–21

information not in, 21  
oversight in, 21  
principal-agent problem, 16  
private information, 92n43  
production sharing agreements (PSA), 19, 90n20, 95n76  
Promotion of Access to Information Act (PAIA), 93n52  
PSA. *See* production sharing agreements  
public accountability, 57  
public domain  
    freedom of information laws and, 38  
    information in, 26–27  
    trade secret protection and, 93n45  
Publish What You Pay, 15, 61

**Q**

Quimper, Alberto, 51

**R**

RAID. *See* Rights & Accountability in Development renegotiations, 42  
resource extraction projects, contracts involved in, 18–19  
resource management  
    citizen ownership and, 89n6, 89n7  
    citizens' right to know, 15  
    contract transparency and, 15–17  
    contracts as law of, 16  
    improving, 16–17  
    UN resolution on, 89n6  
Revenue Watch Institute (RWI), 15  
reverse engineering, 93n45  
R-Factor, 93n46  
Rights & Accountability in Development (RAID), 32  
Romania, 88  
RWI. *See* Revenue Watch Institute

**S**

Saba, Daniel, 51  
Saudi Arabia, 82  
SDI. *See* Sustainable Development Institute  
SEC. *See* Securities and Exchange Commission  
secrecy  
    arguments for, 12–13, 17  
    confidentiality clauses and, 58  
    democracy v., 16  
    disadvantages of, 57  
    in extractive industries, 12  
    as ingrained practice, 17  
Securities and Exchange Commission (SEC), 31, 54  
securities regulations, 53–54  
Serbia, 88  
service agreements, 19  
Sierra Leone, 48  
SLAPP. *See* strategic lawsuit against public participation  
Slovakia, 88  
Slovenia, 88  
SOCAR. *See* State Oil Company of the Azerbaijani Republic  
SOFAZ. *See* State Oil Fund of Azerbaijan  
Sonangol, 30, 91n31, 92n32  
South Africa, 88, 93n52  
South Korea, 88  
sovereignty, 89n6  
Spain, 88  
Sri Lanka, 82  
St. Vincent and the Grenadines, 88  
State Oil Company of the Azerbaijani Republic (SOCAR), 48, 95n75, 97n97  
State Oil Fund of Azerbaijan (SOFAZ), 48  
state-investor agreements, 18

state-investor contracts, transparency in, 11  
Statoil Hydro, 95n75  
strategic lawsuit against public participation (SLAPP), 31–32, 61  
Sudan, 82–83  
sunshine laws, 33  
surety, 35, 93n48  
Sustainable Development Institute (SDI), 52  
Sweden, 88  
Switzerland, 88

**T**

Tajikistan, 88  
Tanzania, 83  
Tenke Fungurume Mining (TFM), 27–28, 45, 98n110  
termination clauses, 29–30  
TFM. *See* Tenke Fungurume Mining  
Thailand, 83, 88  
Timor Leste, 43, 47, 67  
Total, 95n75  
trade secrets, 34, 35, 37–38, 58, 92n44, 93n45  
Trade Secrets Act, 93n44  
Trinidad and Tobago, 84, 88  
Tullow Oil, 44  
Turkey, 28, 45, 95n75, 96n83  
    freedom of information laws in, 88  
    human rights legislation in, 18

**U**

Uganda, 40, 44, 84, 88  
Ukraine, 88  
UN. *See* United Nations  
UN Development Program (UNDP), 61  
UN High Commissioner for Human Rights, 61  
UN Special Representative on Business & Human Rights, 61  
UNDP. *See* UN Development Program  
United Kingdom, 88  
United Nations (UN), 61  
    resource management resolution by, 89n6  
United States, 38, 95n75. *See also* Extractive Industries Transparency Disclosure Act  
    anti-corruption laws in, 60  
    contract transparency policy in, 53  
    freedom of information laws in, 38, 88, 94n58  
    trade secrets in, 93n44  
Uzbekistan, 88

**V**

Venezuela, 84–85  
Verrastro, Frank, 31  
Virgin Islands, 85

**W**

World Bank, 15, 17, 32, 50, 54, 56, 61

**Y**

Yemen, 48

**Z**

Zambia, 85  
Zimbabwe, 88



Contract transparency is sorely needed to improve the management of natural resource wealth, particularly in developing nations where oil, gas and minerals often account for more than half of the national income.

When contracts are publicly available, government officials have an incentive to stop negotiating bad deals with industry, and citizens can allay their suspicions over hidden abuses. The result is better contracts, greater public trust and a more stable investment climate.

This report, based on legal research, in-person interviews and a comprehensive review of more than 150 extractive industry contracts, concludes that most government and private sector objections to contract disclosure are unwarranted, and counsels civil society institutions on how to better confront the challenge of secret deals.