



# The Critical Minerals Rush – Why is contract transparency so important?

October 2023

## Executive Summary

With a global rush for critical minerals to achieve a clean energy transition, responsible mineral resource governance is increasingly important. This transition will see heightened demand for critical minerals, which will require accelerated mining development and increased production rates. But this poses the risk that contracts between companies and host countries for the extraction of these mineral resources will be hastily entered. This creates the risk that contracts contain terms that do not fairly share risks and rewards and that the fast-tracked process of their negotiation is susceptible to corruption by unscrupulous actors or other illegality.

Contract transparency is a key component of good mineral resource governance. There is a strong link between the level of governance and the degree of social progress that is enabled by mining, particularly in mining dependent countries. The higher quality of governance, the stronger the socio-economic progress observed. Recognising this link, and the importance of a fair and socially equitable energy transition, this briefing paper explores the role of contract transparency for good mineral resource governance through the transition.

Contracts set out the rights and responsibilities of companies and host country governments for the extraction of natural resources. Their publication is an important contribution to good governance, as it promotes the negotiation of fair terms between parties, helps establish corporate social licence to operate and enables stakeholders to understand the terms of these agreements. In the context of the energy transition, these agreements may also provide insight on the extent to which governments are aligning their energy transition commitments with broader socio-economic development aspirations.

This paper looks at international commitments to contract transparency and the progress being made on implementation. It provides examples to evaluate the spectrum of progress towards transparency and assesses the benefits, challenges and opportunities for countries and companies. Despite some progress on contract transparency, there is opportunity for further improvement. This paper includes a call to action to encourage greater adoption of contract transparency across the mining industry with considerations for good practice.

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ICMM and the EITI have been actively working together since 2010 to promote the open and transparent management of natural resources in the mining industry. As part of this partnership and through the [ICMM Mining Principles](#), ICMM members are required to publicly support the implementation of the [EITI Standard](#). Our organisations recognise the importance of transparency around payments to ensure that natural resources can benefit all citizens. This is particularly critical as the clean energy transition is driving an increased demand for minerals across the world. Contract transparency is a central part of this and an important ingredient in building trust between local communities, governments, and mining companies. This paper sets out ICMM and EITI's commitments around contract transparency, the benefits and challenges it presents, and considerations for good practice.



# 01 Introduction

## The Critical Minerals Rush

Mineral resource governance is key to mining's contribution to sustainable development. Good governance helps ensure that citizens receive maximum benefit from the development of these natural resources. In 2021, ICMM produced the [Social Progress in Mining-Dependent Countries report](#) that found that the quality of life in mining-dependent countries had improved significantly in the last 23 years. But it also found that governance mattered. The research strongly suggested that the higher the quality of governance, the stronger the socio-economic progress observed.

This briefing paper takes a deep dive into one key aspect of good mineral resource governance: contract transparency. Evaluating contract transparency now is particularly important given the prediction that by 2040, the world will need quadruple the volume of minerals it currently uses in order to address climate change, one of the most serious threats that humankind has faced.<sup>1</sup> Speed in accessing these minerals will be key to promote the energy transition. Yet, the average time required to develop a mineral resource is 17 years.<sup>2</sup> It is the urgency with which these minerals are needed and their strategic importance that make them critical. However, this urgency also potentially increases governance risk (and environmental and social risks) that contracts between companies and host countries contain terms that do not fairly share the risks and rewards, and that the fast-tracked process is susceptible to corruption or other illegality, as a result of contracts being hastily put in place.

Critical minerals are those such as copper, lithium, nickel, cobalt and rare earth metals that organisations such as the European Union and the International Energy Agency have identified as playing a strategic role in the production of clean energy technologies and for which demand will increase markedly as the energy transition occurs.

Transparency via public disclosure of the contracts entered by countries and companies for the extraction of natural resources is a critical aspect of good mineral resource governance. Greater transparency is an important part of risk mitigation as it contributes to increased accountability, which helps ensure a

responsible approach to mineral production that contributes to a fair and socially equitable energy transition.

This briefing paper investigates the connection between contract transparency and responsible mineral resource governance, particularly of critical minerals needed for the energy transition. It provides examples of successful implementation of contract transparency by countries and companies while also looking at key requirements and challenges. Through an evaluation of the evolution of countries' and companies' progress on contract transparency, this paper provides considerations for better practice in ongoing implementation.

This paper highlights how increased contract transparency can lead to enhanced mineral resource governance, increased stakeholder trust and confidence, and better economic, social and environmental outcomes for the citizens of resource rich countries. By discussing the benefits and zooming in on some country and company examples, this paper demonstrates the positive impact of contract transparency and makes the case for wider adoption across the extractive industry.

This work was informed by stakeholder interviews and a review of relevant documents in the public domain. The authors conducted the interviews on a non-attributable basis. A list of collaborating organisations is provided in Appendix 1.

Contract transparency is the public disclosure of contracts and licences that explain the rights and obligations of the parties involved in the exploration and production of minerals, this including all annexes, amendments and supplementary agreements such as local development plans. These agreements provide the terms by which a specific mineral resource will be explored, exploited and the benefits that the government and citizens can expect from development of their resources. Both ICMM's commitment on contract transparency and the 2023 EITI Standard require disclosure of these documents after a prescribed date (see sections 1.2.1 and 1.2.4).

The scope of this paper does not include the disclosure of agreements between joint venture partners or contracts with suppliers and sub-contractors.

1. *The Role of Critical Minerals in Clean Energy Transitions*, May 2021, International Energy Agency, <https://iea.blob.core.windows.net/assets/ffd2a83b-8c30-4e9d-980a-52b6d9a86fdc/TheRoleofCriticalMineralsinCleanEnergyTransitions.pdf>  
2. *Triple Win: How Mining Can Benefit Africa's Citizens, Their Environment and the Energy Transition*, November 2022, <https://resourcegovernance.org/publications/triple-win-mining-africa-environment-energy-transition>





### 1.1 The Critical Minerals Rush: Implications for Mineral Resource Governance

Responsible mining requires robust governance. But what specific features of critical mineral production create or heighten governance risks? And what role can contract transparency play in mitigating those risks?

- **Insufficient due diligence:** In a bid to capitalise on the projected demand for critical minerals, governments and companies may expedite signing of agreements thus exposing themselves to corruption risks. They risk (inadvertently) cutting corners and negotiating contracts that may be inequitable and may not provide appropriate risk/reward balance. Under pressure to fast-track contracting and approval processes, there is a risk that governments may reduce the scope or quality of necessary checks and balances such as properly scrutinising applicant companies' credentials or undertaking insufficient and rushed community consultation. This time pressure can lead to either side failing to conduct sufficient due diligence in the rush to marry the government's control over resources with companies' technical and financial capacity to exploit them.
- **Imbalance in risk and reward:** The rush for critical minerals and the expected supply constraints may result in higher commodity prices and potentially higher profits. Governments may offer incentives, such as tax breaks, to attract investors that will have an impact on economic benefits in later years. Operating companies and governments may also come under pressure to secure higher levels of tax or royalties. Any taxes or incentives determined in contracts will be important factors in setting the balance of risk and reward, and having these publicly

available will help governments and companies to demonstrate that balance. Companies may demand terms that place too much of the risk burden on the government, or vice versa.

- **Insufficient capability:** Future sources of critical minerals will not be confined to just those countries with developed and mature mining industries. Development of resources in countries with new mining industries also brings potential governance risks. Governments of these countries may not have the capabilities to manage the range of issues associated with building the industry in a responsible manner. This could include lack of capacity and capability in state-owned enterprises (SOEs) that are given the mandate to exploit resources, as well as with licencing authorities and environmental regulators. This is a particular risk in countries where SOEs have existing poor governance structures. Also, these governments may not have the resources to access the technical capabilities from elsewhere. Putting in place fast-track processes for mining permits in countries without a robust institutional infrastructure for the industry creates potential for contracts to be negotiated that short-change a country's citizens. Contracts that would not stand up to public scrutiny can lead to disputes and/or allegations of wrongdoing, eroding trust between stakeholders and within mining communities.
- **Corrupt speculation:** Government officials or mining company executives who have market sensitive information on the reserves of a critical mineral, either at a particular site or in the country, may use this inside information to award mining licences in a corrupt manner (e.g. to relatives or close associates) or use this information to artificially inflate the value of the company's shares and make a profit on selling the shares or the underlying land.
- **Suspicion and mistrust:** Permitting issues are not confined to countries with emerging mining industries. In countries with a long history of mining, legacy issues are likely to shape the governance environment. Companies may face suspicion and mistrust due to past disputes over the equitable distribution of benefits or social or environmental impacts, for example, potentially creating opposition from communities to develop new resources. Governments may be reluctant to approve new mining licences, fearful of a popular backlash.

Exploitation of critical minerals provides an opportunity to reinforce good governance practices and demonstrate responsible mining development.

## 1.2 Existing Transparency Standards and Commitments

Contract transparency has not yet become the norm in the mining sector but there are several existing initiatives promoting better practice. International organisations supporting greater transparency include the Extractive Industries Transparency Initiative (EITI), Open Government Partnership (OGP), Natural Resource Governance Institute (NRGI) and ICMM.

### 1.2.1 Extractive Industries Transparency Initiative

The first EITI Standard, launched in 2013, was a landmark in encouraging contract transparency and requiring a clear policy on contract disclosure for its member countries. The 2019 EITI Standard took this further by requiring countries to disclose contracts signed or amended after 1 January 2021. This requirement was further strengthened and clarified in 2023. As shown in the graphic below, 57 countries currently implement the EITI Standard.

Under Requirement 2.4, “Implementing countries are required to disclose any contracts and licenses that are granted, entered into or amended from 1 January 2021. Implementing countries are encouraged to publicly disclose any contracts and licenses that provide the terms attached to the exploitation of oil, gas and minerals.”<sup>3</sup> EITI requires the disclosure of the full text of the contract or licence document along with any annexes and addendums. The requirement also requires countries to publish a list of all active mining

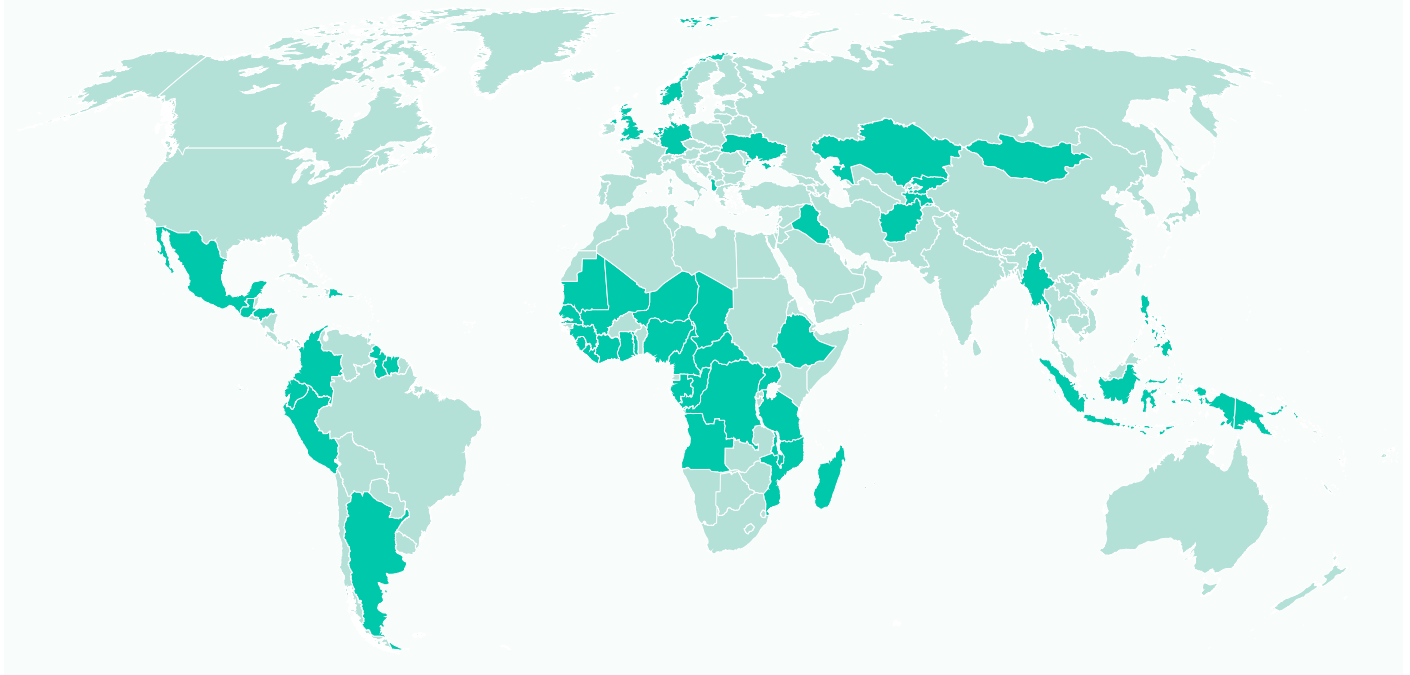
contracts and licences (including exploration), as well as to document government policy on contract transparency, any obstacles to disclosure and where disclosure does occur, any deviations to the policy.

Countries are now encouraged to disclose significant exploration contracts, agreements detailing the terms of the sale of the state’s share of production or other in-kind revenues, and contracts outlining infrastructure and barter provisions, including resource-backed loan agreements.

Countries must also report if licensing and contracting practices deviate from the law and are encouraged to explain why certain methods for awarding licenses are used, especially in cases of fast-tracked approvals. These disclosures provide citizens with a more comprehensive understanding of whether companies fulfil their contractual obligations beyond the stipulations in the main contracts.

While the EITI has driven progress on and raised awareness of the issue of contract transparency, not all EITI implementing countries have met all the components of Requirement 2.4. Nonetheless, in a recent stocktake the EITI identified that 41 implementing countries are now disclosing either all or some contracts. Publish What You Pay comparatively found that 70% of EITI implementing countries (40 of 57) have partially or fully disclosed extractives industry contracts.<sup>4</sup> For example, a study on contract transparency in the 11 implementing countries in Latin

Global implementation of the EITI Standard



3. EITI Standard 2023, June 2023, <https://eiti.org/collections/eiti-standard>

4. *Unfinished Business: Contract Transparency in the Extractive Industries Transparency Initiative*, 11 June 2023, <https://resourcegovernance.org/sites/default/files/documents/unfinished-business-contract-transparency-in-the-eiti.pdf>

America and the Caribbean published in November 2022 highlighted the range of progress in meeting this requirement of the EITI Standard.<sup>5</sup> Some countries, such as the Dominican Republic (evaluated later in this paper), publish all contracts while others, such as Trinidad and Tobago, faced significant legal obstacles.

In addition to the Standard, EITI supporting companies, of which there are more than 60 across the globe, are subject to nine expectations, which include:

“Expectation 8: Publicly declare and publish support for governments’ efforts to publicly disclose contracts and licenses that govern the exploration and exploitation of oil, gas and minerals in line with the EITI Standard, and contribute to public disclosure of contracts and licenses in EITI implementing countries consistent with government procedures.”<sup>6</sup>

The EITI assesses how supporting companies adhere to these nine expectations and engages with companies to encourage increasing compliance.

### 1.2.2 Open Government Partnership

The 75 member countries of OGP make commitments to improve transparency, participation, inclusivity, and accountability in government. They make these commitments in action plans agreed every two years in a process that brings together government and civil society. Some countries have chosen to use these action plans to advance transparency in the mining sector and in particular contract transparency. For example, Mongolia has included contract transparency commitments since 2014. The country now has a database of contracts covering the mining and oil and gas sectors.<sup>7</sup> The database contains more than 950 contracts and is searchable in both Mongolian and English, although most documents are available only in Mongolian.

### 1.2.3 Natural Resource Governance Institute

The NRGi is a global civil society organisation that provides advice and advocacy to support natural resources making an equitable contribution to the social and economic development of countries. In addition to conducting research, NRGi has two tools which are relevant to contract transparency: the Resource Governance Index (RGI)<sup>8</sup> and the Resource Contracts website.<sup>9</sup> The RGI for 2021 looks at the oil, gas and mining sectors in 18 countries and overall

shows that there has been an improvement in governance since 2017. The most improved country was Guinea which was one of only three countries in the sample that fully discloses all mining contracts.

The Resource Contracts website contains more than 2,900 documents from 99 countries, an indication that there are already a considerable number of mining, as well as oil and gas, contracts from a wide range of countries publicly available. The database contains contracts that have come into the public domain through a variety of avenues including government or company publication, contracts shared by civil society organisations or due to disclosure as the result of legal action. The website does not necessarily provide a complete set of all mining contracts for each country. However, for countries not yet disclosing, the Resource Contracts website can aid a precedent that contributes to overcoming concerns about confidentiality or the perceived negative implications of making a contract public.

### 1.2.4 ICMM

In December 2021, ICMM updated its member commitment to contract transparency.<sup>10</sup> Under this commitment, ICMM members are required to “Disclose all mineral development contracts granted or entered into from 1 January 2021 that they have signed with host governments, where such disclosure is not prohibited by law or regulation.”

ICMM represents 25 of the world’s largest diversified mining and metals companies, reaching across more than 50 countries.

ICMM set a deadline of 31 August 2022 for its members to comply with its contract transparency commitment or explain why they are unable to do so. The commitment requires that the full text of the contract, annexes and addendums are published in an accessible place, at least in their original language and where they exist, official translations of the contract. ICMM also encourages its members to disclose mineral development contracts granted or entered before 2021. In cases where confidentiality or other provisions prohibit disclosure, ICMM encourages member companies to seek consent from relevant parties to publish the contract. Assessment of the level of implementation of this commitment is ongoing.

5. *Contract transparency in Latin America and the Caribbean Identifying obstacles and opportunities for EITI implementation*, 29 July 2022, <https://eiti.org/sites/default/files/2022-11/Latin%20America%20and%20the%20Caribbean%20-%20Contract%20Transparency%20Report%202022.pdf>

6. *Expectations for EITI supporting companies*, <https://eiti.org/documents/expectations-eiti-supporting-companies>

7. *Resource Contracts Mongolia*, <https://www.iltodgeree.mn>

8. *NRGI's Resource Governance Index*, <https://resourcegovernanceindex.org>

9. *ResourceContracts.org*, <https://www.resourcecontracts.org>

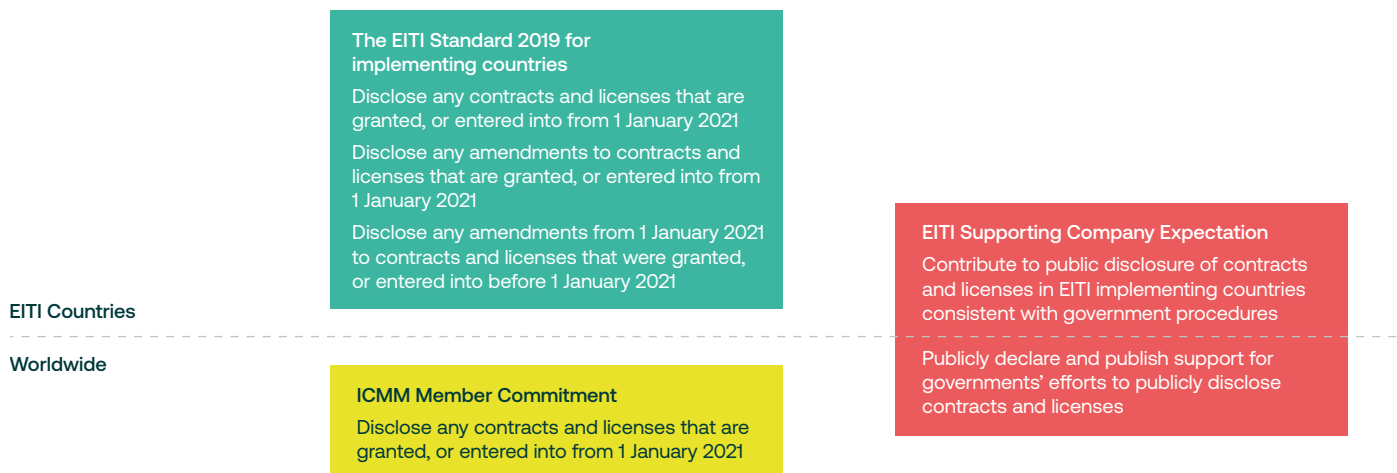
10. *ICMM's Transparency of Mineral Revenues Position Statement, 2021*, <https://www.icmm.com/en-gb/our-principles/position-statements/mineral-revenues>

## 02 Examples of Successful Implementation

There has been progress in a number of countries disclosing contracts and licenses, but challenges still remain. Of the 48 countries reporting on their mining sector, 11 (23%) publish all or nearly all contracts, 20 (42%) countries publish some mining

contracts, 17 (35%) countries do not publish mining contracts at all. Some of the 57 EITI implementing countries have not yet been validated or do not have a validation assessment of their progress in meeting requirement 2.4.

### ICMM and EITI Commitments for Implementing Bodies



The country examples below take a deeper look at how three EITI implementing countries are progressing.

### 2.1 Country Examples

#### 2.1.1 Democratic Republic of Congo (DRC): Perception and Reality

Cobalt is a critical mineral used in batteries that has few viable substitutes. Good governance of cobalt production is important to achieving energy transition.<sup>11</sup> The DRC is the world's largest cobalt miner and hosts the highest quality copper reserves globally, in 2021 the production of resources increased from 10 thousand tons to almost one million.<sup>12</sup>

The DRC is an EITI implementing country, the 2022 EITI Validation rated the country as 90/100 for contract transparency and assessed that:

*“DRC has fully met Requirement 2.4, including the objective of ensuring the public accessibility of all licenses and contracts underpinning extractive activities (at least from 2021 onwards) as a basis for the public’s understanding of the contractual rights*

*and obligations of companies operating in the country’s extractive industries.”*

Indeed, the DRC has published a large number of contracts and related documents over the course of the last two years. However, there remain concerns that some contracts or agreements remain unpublished.

*“Congo has strongly distinguished itself ... on the quality of the public debate around transparency in the extractive industries. Congo stakeholders are still requesting the publication of the latest agreement signed between Dan Gertler and the state on the transfer of certain mining assets.”* Jean-Jacques Kayembe, EITI National Coordinator.<sup>13</sup>

Full contract disclosure across the entire mining sector is important to ensure that the terms for all mining projects are subject to public review.

11. Manley, David, et al. "No Time to Waste: Governing Cobalt amid the Energy Transition". *Natural Resource Governance Institute*, 25 March 2022, <https://resourcegovernance.org/publications/no-time-waste-governing-cobalt-amid-energy-transition>

12. *International Trade Administration*, 2022, <https://www.trade.gov/country-commercial-guides/democratic-republic-congo-mining-and-minerals>

13. Reuters (2022). *Congo improves extractive sector transparency but more needed - anti-graft body* [online] <https://www.reuters.com/markets/commodities/congo-improves-extractive-sector-transparency-more-needed-anti-graft-body-2022-10-20/>



### 2.1.2 The Dominican Republic: Disclosed, but Not Universally Accessible

Mining is an important economic sector in the Dominican Republic, accounting for 4.2% of GDP in 2018, having grown from 0.7% in 2010.<sup>14</sup> This contributed to the country experiencing some of the fastest economic growth in the Latin America region prior to the coronavirus pandemic. Gold and ferronickel are the country's two main mineral products and account for approximately 40% of exports. The country has been an EITI implementing country since 2016 and is an OGP member.

In the Dominican Republic, all mining contracts and licenses are publicly available. This is a legal

requirement under the country's 2004 Free Access to Public Information Law. As a result, the full text of all mining contract and license documents is available on a government website.<sup>15</sup> While the country provides a good example of the public disclosure of mining contracts, there are some limits to effectiveness. Poor internet infrastructure limits the ability of remote communities (including those in mining areas) to access the documents. Also, the complexity of the documents creates barriers to stakeholders interpreting the documents and understanding the implications for the economy and impacted communities. Progress has been achieved, but there is still room for improvement.

### 2.1.3 Ghana: Oil and Gas Pave the Way

Ghana provides an example of where the emergence of new production creates an opportunity for contract disclosure to happen from the onset. Oil and gas production are relatively new activities in the country. Nonetheless, Ghana's Petroleum Commission maintains a register of contracts for the oil and gas sector which contains copies of all the relevant contractual documents, licences and permits related to each field as well as a summary of the key points, including contracting parties, current status of operations and the size and location of the field.<sup>16</sup> The register is searchable and has an interactive map so that fields can be identified easily. This register provides a model that the mining sector in Ghana could emulate.

Ghana is Africa's largest gold producer with 4.8 million ounces in output and gold is the country's most commercially exploited mineral and accounts for about 95% of the country's mineral revenue.<sup>17</sup> While the Ghanaian government does not have a formal policy on contract disclosure, it has published some mining contracts on government websites, in part, due to support from industry and advocacy efforts by civil society. The Resource Contracts website contains 42 documents relating to mining in Ghana.<sup>18</sup> This demonstrates the opportunity for leading mining companies in Ghana to engage with the government to put in place a systematic and consistent approach to contract disclosure, this would make a contribution to building trust and enhance Ghana's reputation as an investment destination.

### 2.1.4 Disclosure Globally

The EITI has advanced countries' progress in contract transparency implementation around the world. The EITI process has contributed to public debate on the importance of disclosure in Cameroon and has enabled public scrutiny of mining rights in Germany. In the Republic of Congo, contract disclosure has enabled financial modelling of extractive revenues to inform policy discussions. Efforts to meet the requirement on contract disclosure have facilitated interagency

discussions in the United Kingdom and Nigeria. Systematic disclosure of contracts has significantly improved in some countries including in Guatemala where all licenses are available on the Ministry of Energy and Mines website.

### 2.2 Company Examples

Many mining companies are also making progress in embedding contract transparency into their responsible business practices.

14. EITI Dominican Republic, <https://eiti.org/countries/dominican-republic>

15. Gobierno de la Republica Dominicana, Energía y Minas Contratos especiales, <https://mem.gob.do/transparencia/contratos-especiales/>

16. Ghana Petroleum Register, 2017, <https://www.ghanapetroleumregister.com>

17. International Trade Administration, 2019, <https://www.trade.gov/country-commercial-guides/ghana-mining-industry-equipment>

18. Resource Contracts.org, Ghana, <https://www.resourcecontracts.org/countries/gh>



### 2.2.1 Rio Tinto: One of the World's First

Rio Tinto was one of the first global mining companies to systematically disclose its contracts with host governments. As an ICMM member company and an EITI supporting company with current representation on the EITI Board, it first disclosed a limited set of contracts in 2019, where there were no significant legal and contractual obstacles to doing so. In 2020, it disclosed all remaining contracts. On its website, it publishes a downloadable table listing the contracts by country and sub-divided by mineral. For each contract there is a link to the document, the name of the Rio Tinto entity holding the contract along with its percentage interest share in the project, the host

government, the contract duration and the governing law. For countries where the original contract is not in English, a translation is provided. The website also contains a brief general explanation of the content of the contracts. The company has also committed to add any new contracts to the website.

This is an example of how companies can champion contract transparency where there may be barriers to disclosure in certain countries, such as where there are confidentiality provisions, Rio Tinto is encouraging governments to allow for contract disclosure. Several stakeholders interviewed for this paper referenced the company as a leading example.

### 2.2.2 BHP: Strengthening Disclosure through Partnerships

ICMM company member BHP supports initiatives by governments of the countries where it operates to publicly disclose the content of its licences or contracts for the development and production of minerals that form the basis of its payments to government. BHP partners with several external

organisations to multiply its efforts in good mineral resource governance and transparency. This includes its partnership with Transparency International, representation on the EITI Board, financial support for and Steering Committee membership of the Bribery Prevention Network (in Australia) and funding of the BHP Foundation, including its Natural Resource Governance Global Program.

### 2.2.3 ArcelorMittal: Contract Renegotiation for Countries to Maximize Value

In 2006, Luxembourg-based multinational steel manufacturer ArcelorMittal, entered into a period of review and renegotiation of its contracts with the Government of Liberia. While the Government of Liberia did not then have systems in place for the systemic disclosure of contracts, these concession agreements were made public.

The renegotiation process added 30 improvements into the original contract which covered terms including transfer pricing, taxes, duties, infrastructure ownership, requirements for local Liberian employment and training and social benefits such as housing and sanitation. This resulted in ArcelorMittal increasing its investment in the country by \$0.5 billion, strengthening trust and relations with the government and community where it continues to operate to this date.<sup>19</sup>

### 2.2.4 Wider Company Disclosure

While the above looks at three mining companies in more depth, there are many other EITI supporting companies and ICMM members operating across the globe that have sought to embed contract disclosure into their responsible business practices.

As a signatory to the EITI, and member of ICMM, Alcoa publicly supports enhancing the transparency of mineral revenues and will disclose contracts with governments related to minerals development (where they are not subject to a confidentiality undertaking) and encourages governments to allow such disclosure.

The company also fosters policies to engage and support governments that implement the EITI's principles to ensure mining revenues are used appropriately to address a host country's and host community's social needs. This transparency assists communities and other stakeholders to understand the economic contributions from operations.

Another example includes the Norwegian aluminium and renewable energy company Norsk Hydro ASA has reported voluntarily in line with its support for the EITI. From 2017, EITI reporting has been included in Hydro's country-by-country reporting to comply with Norwegian

19. Kaul, Raja, et al. "Getting a Better Deal from the Extractive Sector Concession Negotiation in Liberia, 2006-2008". *Revenue Watch Institute*, 2009. <https://resourcegovernance.org/sites/default/files/documents/rwi-getting-a-better-deal-final0226.pdf>

legislative requirements. As an ICMM member Hydro has also committed to disclose related contracts with authorities for operations owned more than 50 percent.

### 2.2.5 Putting it to the Test: Assessment of Adherence to the Expectations for EITI Supporting Companies

The EITI's 2021 and 2023 assessments of whether its supporting companies are meeting the Expectations provide a helpful appraisal of progress on contract transparency and highlight areas for improvement.

Data from the EITI demonstrates that approximately 70% (43 of 62) supporting companies published a statement of support for contract transparency in line with Expectation 8.<sup>20</sup> This includes seven of the ten supporting companies that do not operate in EITI implementing countries.

The EITI assessed ICMM companies as 'meeting' this first aspect of Expectation 8 (statement of support for

contract transparency) in recognition of ICMM's 2021 commitment. Nevertheless, nearly 30% (17 of 62) of other companies were assessed as not publishing a statement of support for contract transparency in line with Expectation 8. Informed by the EITI's draft assessment, several companies explained that they were working to provide a statement of support for contract transparency in line with the expectation.

#### Expectation 8

All EITI supporting companies are expected to publicly declare and publish support for governments' efforts to publicly disclose contracts and licenses that govern the exploration and exploitation of oil, gas and minerals in line with the EITI Standard, and contribute to public disclosure of contracts and licenses in EITI implementing countries consistent with government procedures.

## 03 Benefits of Contract Transparency

### 3.1 Enhanced Governance and Accountability

In general, the benefits of contract transparency for critical minerals development apply in a similar way to the rest of the mining sector. However, these benefits are of particular importance in the context of the risks identified in 1.1 above. As long as support for contract transparency remains uneven within the mining industry, with some companies expressing explicit support while others oppose it or remain silent, the equitable governance of critical minerals negotiations remains at risk for governments who do not support the publishing of contracts. Governments can address this risk by making all contracts public, so there is nothing to infer, essentially levelling the playing field to attract companies and investors.

Contract transparency allows stakeholders to hold governments and companies to account.

- For governments, contract transparency means stakeholders can:
  - Determine if they are collecting and accounting for the revenues they are supposed to be collecting from companies.
  - Understand if they are enforcing social, environmental and local content procurement commitments that are typically set out in annexes

or supplementary agreements to the main contract.<sup>21</sup> For example, delivery of social and economic benefits is even more important in the context of the energy transition where more communities, including those predominantly inhabited by Indigenous Peoples, who could be displaced by the expansion of projects. Negotiation of social commitments risks being rushed in an effort to meet the demand for new projects. Disclosing these commitments as embodied in contracts mitigates this risk.

- For companies, contract transparency means stakeholders can:
  - Determine if they are delivering the social and economic benefits they committed to in the contract and that their reported contribution matches the contractual commitments.
  - Understand if they are otherwise operating in accordance with the contract.
  - Develop trust in the company and its project(s) by understanding the rights and obligations of the parties, and the risks and rewards of the development, and help establish the company's social licence to operate.

For contract disclosure to be meaningful, it should be done together with analysis and review to ensure all stakeholders understand the information contained in

20. 2023 Assessment of EITI supporting companies, June 2023, <https://eiti.org/documents/2023-assessment-eiti-supporting-companies>

21. EITI's 2022 *Strengthening Governance of Critical Minerals* report evaluates how contract transparency makes tax structuring transparent and could therefore mitigate the risk of transfer pricing leading to revenue loss.

these agreements. Contract transparency can also have greater impact when it is combined with other transparency and governance measures such as beneficial ownership transparency. Combining these sources of information can allow stakeholders to do effective due diligence to better understand and challenge potential poor performance, mismanagement or corruption by knowing what has been agreed, and who exactly owns or controls the parties to that agreement.

### **3.2 Increased Stakeholder Trust and Confidence**

Projects in the mining sector can span decades from exploration to closure. A vital part of building and maintaining government and community trust throughout that extended period is the sharing of risk and reward, and ensuring that countries and their citizens appropriately benefit from their natural resources.

Contract transparency provides all parties and stakeholders in those contracts with visibility of the commitments made by companies and governments and how they are meeting those commitments. In this way, it can be an important part of building and maintaining trust over the long term.

The rush for critical minerals will mean new companies entering the market, new mining locations opening, and new communities being impacted and engaged who might not have previously experienced mining activities. All of these bring risk of mistrust, in particular where new companies do not have an established track record of responsible behaviour. Contract transparency is a key ingredient in building that trust.

### **3.3 Improved Economic Outcomes**

Knowing that contracts will be out in the open encourages negotiating parties to incorporate equitable terms. This may prove to be particularly relevant to critical minerals where the time between discovery, contracting, production and even closure may be much shorter than in the past.

Contracts frequently set out various payments and benefits which can include the terms of tax, royalty and other payments made by mining companies to government, and information on tax incentives or holidays. It is only through understanding what has been

agreed that communities and other stakeholders can appreciate the full economic picture of the benefits the mining activities bring. These payments and benefits can be the subject of amendments made to existing contracts. Where critical minerals are the by-product of an existing operation the increased value of these minerals may be the trigger for such changes. Requirement 2.4 of the EITI Standard already requires disclosure of amendments to contracts after 1 January 2021, which also triggers disclosure of the underlying contract(s).

Further, the balance of risk and reward in the negotiation process can be difficult to assess, and access to contracts alone is unlikely to provide complete insight into that. However, contract transparency can play an important role in allowing stakeholders to see what the terms of the contract are and assess those against their expectations (and company and government progress towards meeting those terms). In the absence of contract transparency, lack of accountability and trust in both governments and companies can undermine the ability of companies to operate efficiently and government to collect the revenues due.

### **3.4 Improved Local Social and Environmental Outcomes**

Mining operations often undertake social and environmental initiatives to mitigate impacts and meet community expectations for improved social and environmental outcomes. These may include local job creation and business development, improved access to health and education, contribution to skills, infrastructure, and institutional strengthening, biodiversity conservation, water and/or land quality improvements and others. When administered responsibly, these contributions can lead to better outcomes for host communities. Sharing information on the benefits of mining operations ensures that citizens are empowered to take full advantage of the benefits. Contract transparency may also motivate stipulations in contracts, such as to adhere to gender policies in an effort to create jobs for women in the mining sector.

Unless there is sufficient governance around the process, the compressed timetables for negotiating and contracting as a result of the critical minerals rush could result in these benefits being missed or misappropriated.

## 04 Challenges to Contract Transparency

While the benefits of contract transparency to all stakeholders are numerous, there are still obstacles that mining companies must overcome to realize the objectives of contract transparency.

### 4.1 Legislative and Contractual Confidentiality Clauses

Commercial confidentiality is a common reason cited as an obstacle to contract transparency. Sometimes that confidentiality is enshrined in either legislation or the contract itself.

Confidentiality clauses in legislation can either be broadly related to commercial secrets or specific to the mining sector. For example, Papua New Guinea has both. Section 51 of the Constitution of Papua New Guinea gives ten exemptions to the right of access to information, including trade secrets/commercial confidentiality and geological/geophysical information. In addition, the country's Mining Act 1992 section 163 and Mineral Resources Authority Act 2005 section 52 impose confidentiality requirements on the disclosure of information in contracts.

Confidentiality clauses in contracts can specify particular aspects of the contract which can't be disclosed, but often restrict access to the whole document and any annexes. These clauses can include the ability to disclose by mutual agreement between the parties but securing that agreement on a case-by-case basis can present a practical obstacle.

This can be seen in the statistics as well. Data from the EITI demonstrates that 18 countries have explicitly identified legal barriers including confidentiality clauses in contracts or the need to show legitimate interest to be given access to contracts.

Even where there is enabling legislation, such as freedom of information laws, contradictory legislation can obstruct contract transparency. The EITI report on contract transparency in Latin America and the Caribbean noted above included findings on the extent to which legislative frameworks both helped and hindered contract transparency. In some cases, freedom of information laws have exemptions for commercial information or countries may have privacy laws limiting certain disclosures.<sup>22</sup>

### 4.2 Political Will and Leadership

Government resistance to contract transparency can result from a lack of appetite to tackle the legislative and contractual challenges above, as these can be difficult changes to make and may not be top of a government's agenda. However, a lack of political will can also be the result of more specific issues.

- **Short term political gains** – Condensed contracting timeframes could encourage governments to make decisions for short-term political gain rather than the long term benefit of the country.
- **Undisclosed conflicts** – Contracts may contain information which puts a person in a position of political influence in a difficult position if the terms of the contract could imply a conflict of interest, even if no such conflict exists.
- **Unfavourable terms** – The terms negotiated and included in a contract may not now appear to equitably balance risk and reward between the parties. This is particularly problematic if the government is perceived to have agreed to a bad deal, as this could reflect badly on individuals involved.
- **Unhelpful drafting** – Even in the absence of any potential conflict or unfavourable terms, the wording of a historic contract may include terminology or phraseology which is not considered acceptable now.
- **Administrative challenges** – A lack of funding to digitise and maintain open data platforms and lack of coordination among agencies can impede the actual publishing of key documents.

However, these issues are more relevant to contracts already in place and can be addressed at the time that contracts are entered into or amended. These challenges are part of the opportunity described below.

### 4.3 Prevailing corruption

While contract transparency is regarded as a tool contributing to combatting corruption, it is by no means the complete solution. As seen in the case study on the DRC, the publication of contracts can expose government wrongdoing and prevailing corruption. Published contracts there revealed that billionaire businessman Dan Gertler acquired mining and oil licenses from the DRC government for comparatively

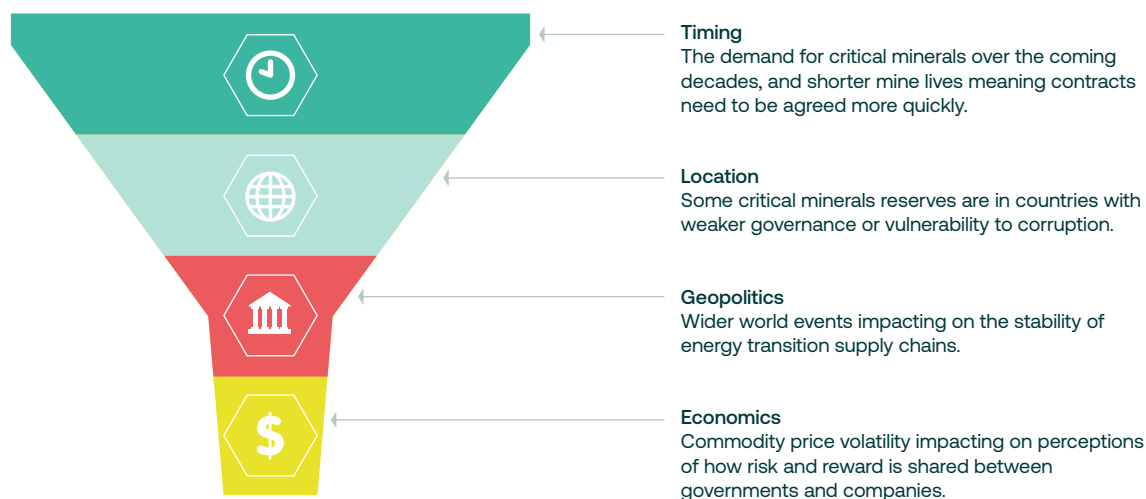
22. *Contract transparency in Latin America and the Caribbean Identifying obstacles and opportunities for EITI implementation*, 29 July 2022, <https://eiti.org/sites/default/files/2022-11/Latin%20America%20and%20the%20Caribbean%20-%20Contract%20Transparency%20Report%202022.pdf>



low prices and made large profits from selling these licenses to multi-national companies.<sup>23</sup> In exploiting the country's reserves of critical minerals of cobalt and copper, as well as gold and diamonds, the U.S. Treasury Department estimates that its operations generated more than \$1.36 billion of loss for the DRC in just two years.<sup>24</sup>

Contract transparency can expose corrupt practices demonstrating that while disclosure is a useful tool in stakeholders' anti-corruption arsenal, it cannot be the only measure in place. Contract transparency should be a key part of a wider regime of good mineral resource governance practices.

## The Mineral Resource Governance Risks to the Critical Minerals Rush



## 05 Opportunities for Contract Transparency

Despite the existing challenges to disclosure, there are opportunities for mining companies to drive progress on contract transparency, particularly through countries' and companies' obligations under the EITI and ICMM, respectively.

### 5.1 Existing contracts EITI Standard

Full implementation of the EITI Standard will bring transparency to contracts entered into or amended after 1 January 2021, and that will include most of the contracts governing newly developed critical minerals extraction. Many EITI countries, particularly in Africa, are likely going to be the focus of critical minerals development.

The EITI requires disclosure of contracts once they are in place and the EITI Standard provides a model for contract transparency. Requirements 1.1, 1.2 and 1.4 make it a clear joint responsibility between governments and companies to work toward contract transparency. Further, under Requirements 4.2 companies are encouraged to disclose sales agreements and under

Requirement 6.1 to disclose contract pertaining to social and environmental payments.

The EITI has a positive impact on contract transparency by:

- Increasing the number of implementing countries, particularly those with material critical minerals reserves.
- Building stakeholder capacity in understanding contracts and in addressing barriers to publication.
- Increasing the level of compliance with the contract transparency elements of the Standard.
- Promoting the analysis of published contracts.
- Increasing tangible support for contract transparency by supporting companies.

### ICMM Commitment

ICMM's members represent some of the largest and most globally diverse mining companies. The membership includes companies with existing critical minerals operations as well as those who might be the

23. Human Rights Watch, *146 Organisations Condemn Lawsuit Brought by Dan Gertler against the "Congo Is Not for Sale"*, April 2023, <https://www.hrw.org/news/2023/04/17/146-organisations-condemn-lawsuit-brought-dan-gertler-against-congo-not-sale-anti>

24. United States Treasury, *Treasury Targets Corruption Linked to Dan Gertler in the Democratic Republic of Congo*, December 2021, <https://home.treasury.gov/news/press-releases/jy0515>

operators of those mines which will be needed to meet increasing demand.

Compliance with ICMM's contract transparency commitments:

- Puts some contracts into the public domain which might not otherwise have been published.
- Clearly identifies the obstacles to publication.
- Demonstrates support for contract transparency and helps debunk the myth that companies who do disclose are commercially disadvantaged.

## 5.2 New Contracts

Embedding a focus on contract transparency from the outset of negotiations or within a country's legal framework is key to successfully ensuring the terms included in those signed contracts are in the mutual best interests of all parties, and then holding the contracting parties to account.

Contract transparency can have a positive impact at the contracting and pre-production stages in several ways:

- **Standardisation:** Maximising the use of standardised contracts in the public domain means that the terms and conditions which might allow for poor governance or corruption are minimised and contributes to a wider understanding of contract terms.

- **Negotiation:** Knowledge that contracts will be made public can impact on negotiations in a positive way, as parties to the agreement are likely to be less willing to include terms or conditions which would not stand up to public scrutiny. For example, the Natural Resource Governance Institute (NRGI) provided technical assistance to a review of mining contracts in Guinea and trained local civil society representatives, leading to enhanced technical understanding of the contracts, implementation of regulatory reform, and higher level of both disclosure and governance.

- **Facilitation:** Improved governance in the sector can reduce disruption by facilitating the approval process and constructive stakeholder engagement.<sup>25</sup> Reduced disruption can lead to shorter lead times in moving from discovery to production.<sup>26</sup>



## 06 Considerations for good practice and wider adoption of contract transparency

There are a number of considerations that would support better mineral resource governance by companies and countries.

### 6.1 Industry Practices

**6.1.1** As contract transparency is a relatively new issue on the policy agenda, there is a lack of systematic evidence on the outcomes it produces. Research on the contribution contract transparency makes to stronger governance of the exploitation of critical minerals would assist companies and countries to support the case for better practice. Research could include evaluation of the risks posed by uncertainty over technological innovation, the challenges to contract transparency posed by shorter-term projects, case studies of the

impact on contract negotiations entered into knowing that the final contract will be disclosed, benefits that companies have derived from contract transparency, and the absence of damage to a company or to an economy from the disclosure of contracts. The contributions of companies to such research will build the evidence base, which may help alleviate concerns that contract transparency negatively impacts competitiveness or levels of investment.

Companies are also actively encouraged to disclose more than just contracts entered, such as the disclosure of sales agreements, infrastructure agreements, and social and environmental agreements. Industry engagement in this discourse is key

**6.1.2** Knowledge sharing amongst companies would allow them to share lessons learned from implementing

25. Tehmina Khan, Trang Nguyen, Franziska Ohnsorge, and Richard Schodde, "From Commodity Discovery to Production", Policy Research Working Paper (World Bank, 2016) <https://documents1.worldbank.org/curated/en/573121473944783883/pdf/WPS7823.pdf>

26. Papa Daouda Diene, David Manley, Silas Olan'g and Thomas Scurfield, "Triple Win" (NRGI, 2022) <https://resourcegovernance.org/analysis-tools/publications/triple-win-how-mining-can-benefit-africa-citizens-their-environment-energy-transition>

commitments and requirements on contract transparency and best practices on disclosing contracts.

This would also include cases where companies have sought consent from other parties to disclose contracts that would otherwise have been blocked from disclosure. It could consider the measures that companies have taken to provide context and narrative around disclosed contracts to make them more accessible to stakeholders such as community members. Such knowledge sharing could also include alerting relevant stakeholders when amendments to contracts are undertaken.

## 6.2 Policy Commitments

Companies are encouraged to develop and publish clear policy statements in support of contract transparency. This should include an unambiguous commitment to adhere to both the ICMM commitment on contract transparency and to co-operate with governments in EITI implementing countries where they have operations to support their adherence to Requirement 2.4 in line with Expectation 8. They could include commitments to enter all new contract negotiations for exploitation of mineral resources from a stated date, with the intent to publish the resulting contract. This could include publishing details of the actions the company is taking to meet the commitment (for example in an annual sustainability report or similar), including actions taken to overcome any obstacles to publishing contracts. EITI's assessment of company progress in meeting the EITI Expectations can be used as a helpful tool to track and measure companies' progress on this commitment.

## 6.3 Stakeholder Collaboration

**6.3.1** Where there is no systematic disclosure of contracts for mineral exploitation in particular countries, governments could be encouraged to develop policies on contract transparency in the mining sector that lead to the creation of databases of all mineral development agreements. This could be informed by studies into the factors that may be obstructing contract transparency, such as legal barriers, lack of political will, lack of enabling legislation, perceived opposition from business or lack of awareness of the benefits.

**6.3.2** Civil society organisations could develop awareness campaigns of the benefits of contract transparency and how it contributes to stronger

governance. Campaigns might be particularly effective in countries with an emerging mining sector that is focussed on critical minerals. These campaigns should target amongst others, international institutions and industry bodies to include contract transparency as a principle as part of anti-corruption programmes and initiatives.

**6.3.3** Civil society organisations could also contribute to raising awareness of the benefits of contract transparency through providing specific evidence both at a country and company level.

**6.3.4** Building awareness of the EITI and undertaking successful outreach initiatives to extractive companies can increase support for the organisation's mission of disclosure and increase the scope of company disclosures. In countries where EITI supporting companies operate, the EITI International Secretariat could communicate directly with any supporting companies reported not to be contributing to public disclosure of contracts and licenses in EITI implementing countries to address the reported concerns and to encourage support for contract transparency in line with Expectation 8.

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## 07 Conclusion

The evidence is clear: good mineral resource governance is critical to stronger socio-economic progress and contract transparency is an important tool in the good governance toolkit. When applied through companies' and countries' responsible mineral resource governance regimes, contract transparency benefits all parties involved in mineral resource development: citizens, governments, investors, civil society organisations and the mining industry. With the opportunities – and associated challenges – brought by the rush for the critical minerals that are necessary for the clean energy transition, good mineral resource governance, assisted by contract transparency, is critical to a fair and socially equitable transition.

The role of responsible mining has assumed greater importance in light of the urgent imperative for climate action. It has the power to effect long-term change and benefit citizens for generations to come. Contract transparency is a contributor to responsible mining practices designed to fulfil the potential of the sector to deliver sustainable development and poverty reduction.

## Appendix 1: List of organisations interviewed

Anglo American	NRGI
BHP	Open Contracting Partnership
EITI	Open Government Partnership
Gold Fields	Oxfam America
IFC	Trinidad & Tobago EITI
Latitude Five	Zambia EITI

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### About ICMM

ICMM stands for mining with principles. We bring together a third of the global metals and mining industry, along with key partners to drive leadership, action and innovation for sustainable development, ultimately delivering a positive contribution to society. Through collaboration, ICMM member companies set the standard for responsibly produced minerals and metals in a safe, just and sustainable world.

### About the EITI

The EITI's mission is to promote understanding of natural resource management, strengthen public and corporate governance and provide the data to inform greater transparency and accountability in the extractives sector.

By becoming members of the EITI, countries commit to disclose information along the extractive industry value chain – from how extraction rights are awarded, to how revenues make their way through government and how they benefit the public. Through participation in the EITI, more than 50 countries have agreed to a common set of rules governing what has to be disclosed and when – the EITI Standard.

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