



CONTRACT TRANSPARENCY IN OIL, GAS AND MINING OPPORTUNITIES FOR EITI COUNTRIES

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SUMMARY

The EITI encourages implementing countries to publish contracts and license agreements governing oil, gas and mining operations. To this end, the paper brings together findings from implementing countries on the contract transparency requirements of the EITI Standard as documented during Validation.

This document recaps some of the stakeholder views gathered during Validation on the benefits and challenges with contract disclosure.

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1. INTRODUCTION

The EITI encourages implementing countries to publish contracts and license agreements governing oil, gas and mining operations.

The following key findings have been identified:

- i. The EITI has significantly influenced the contract transparency debate in implementing countries. Five years after the EITI began encouraging contract disclosure, multi-stakeholder groups (MSG) around the world have considered or taken up the encouragement to publish contracts.
- ii. Validation has highlighted several benefits of contract transparency for many stakeholders. This includes improved ability to monitor contractual obligations, improved inter-agency collaboration, greater potential for forecasting future revenues and assessing the implications for affected communities. Yet, it is also clear that there is still limited use and analysis of contracts that have been made public.
- iii. There appears to be little focus on the EITI's encouragement of contract transparency in Validation. The EITI encourages implementing countries to disclose any contracts and licenses that provide the terms attached to the exploitation of oil, gas and minerals. Yet, given that validation only measures *the level of transparency* in a government's policy and practice in terms of contract publication, a country whose stated policy is zero public disclosure can nonetheless show satisfactory progress by stating that policy and disclosing no further information.
- iv. There continues to be a discrepancy between policy and practice in countries that provide for full disclosure. In at least six countries, the government's policy provides for full contract transparency but in practice not all the contracts are published¹. In countries with contract transparency provisions, it was unclear to stakeholders whether all contracts had been published, such as **Liberia** and **Niger**, and whether the legal provisions were retroactive, such as in **Burkina Faso** and **Cote d'Ivoire**.
- v. Validation has shown a need for clarification of the meaning of confidentiality clauses, and to what extent they prevent contract publication. There was general confusion on the role of confidentiality clauses, government's ability to use their sovereign prerogative to break confidentiality clauses, and the use of model contracts to progress on these issues. This was highlighted as an issue in **Albania**, **Cote d'Ivoire**, **Ghana**, **Iraq**, **Mozambique**, **Timor-Leste** and **Ukraine**.
- vi. EITI Reports could provide further contextual information for stakeholders. Reports could pay further attention to the distinction between the mining and oil and gas sectors, the different types of contracts, whether the full text is published and accessibility of such contracts.

¹ EITI Contract Transparency Brief: <https://eiti.org/document/eiti-brief-contract-transparency-in-eiti-countries>

SUGGESTIONS FOR IMPROVING CONTRACT TRANSPARENCY

- **EITI Reports could more clearly describe the types of contracts and agreements used in the oil, gas and mining sector and distinguish between the contract transparency policy and practice in the two sectors.** In most instances, EITI Reports do not distinguish clearly between government's policy on the oil and gas and mining sectors.
- **EITI Reports could increase public understanding of what terms and conditions are negotiated in the contract/agreement, and which terms and conditions are set out in law.** This would help highlight the need for contract transparency in cases where terms are mainly negotiated. Validation has shown that for countries where most of the terms are in the legislation, there were few objections to the publication of contracts.
- **EITI and its partners could help governments bridge gaps in between policy and practice.** Validation has shown that in some countries where contract transparency is a legal requirement, there is a discrepancy between the government policy and practices, and retroactive effects of legal amendments are not always clear.
- **EITI countries could consider provisions enabling contract transparency when reforming oil, gas and mining legislation.** Validation has shown that many EITI countries are undertaking legal reforms which could be used as an opportunity to consider embedding contract transparency provisions in sector legislation or make transparency rather than confidentiality the default in model contracts, with provisions for redactions if necessary.
- **EITI and its supporters could help countries establish more accessible disclosure frameworks, helping countries to achieve contract transparency in a timely manner with data available in open data formats.** Validation has highlighted ongoing reforms to disclosure frameworks.
- **The EITI could continue to consider ways of acknowledging countries that practice contract transparency in Validation and to provide more clarity on how the EITI Requirement on contract transparency is assessed.**

2. BACKGROUND

2.1 Contracts

Contracts, licenses and associated agreements are crucial parts of the legal framework which establish the rights, terms and obligations governing the exploration and production of oil, gas and minerals. Such terms and obligations vary but will typically include work obligations, fiscal terms, social and environmental provisions, safety standards, local content requirements etc. In some countries, these rights, terms and obligations are primarily set out in legislation. In other countries, there might be a practice of mostly negotiating the terms and obligations on a case-by-case basis for each individual extractive project. In such cases, the terms and conditions will primarily be found in the contract or agreement between the investor and the host-government governing the project.

As contracts are legal documents that governments enter into on behalf its people, a case can be made that citizens have the right to know the terms and conditions of these contracts, just like any terms and conditions that are set out in law. The call for such transparency is particularly pressing in countries where most of the terms and conditions are negotiated. It has also been argued that contract transparency can help reduce information asymmetry and improve the level playing field as all actors know the terms that apply, improve inter-agency collaboration and prompt enforcement of contractual obligations, and increase the perceived legitimacy of contracts which could ensure more stability of investments and reduce calls for revisions of terms. Although there continues to be some concern that contract transparency could harm the commercial competitiveness, experience with contract publication has shown that commercially sensitive data (e.g. seismic data, samples, well logs, geological structure maps, use of certain technologies etc.) do not tend to appear in the contract itself but rather stem from the implementation of the contract. It is common for petroleum contracts to be signed by consortiums of companies and for the companies within those consortiums to change overtime. This may mean that competing companies will have access to contracts. In such circumstances, it is unlikely that any company would risk writing trade secrets into any contract. Further, it appears that where there are justifiable concerns that commercially sensitive data is contained in a contract, this could be resolved through redaction or delayed publication of the contract.

2.2 EITI Requirements

The EITI began encouraging contract transparency in 2013. According to research undertaken by NRGi in 2017, contract disclosure has now become the norm among EITI member countries. This research found that 29 EITI implementing governments—well over half—have disclosed at least some of these agreements, and several more were taking concrete steps to join their ranks². A recent

² NRGi Past the Tipping Point – Contract disclosure within the EITI:
<https://resourcegovernance.org/sites/default/files/documents/past-the-tipping-point-contract-disclosure-within-eiti-web.pdf>

Oxfam survey of contract disclosure policy among leading extractives companies, out of 29 EITI supporting companies in their sample, 16 supported contract transparency in some form³.

The decision whether to publish contracts or not ultimately lies with a country's government, and will be determined through the legislation and/or contracts governing the extractive sector. Following consultations with stakeholders in developing the [2013 EITI Standard](#), the EITI therefore agreed that it was necessary to ask countries to document the government's policy and practice on contract transparency as well as any reforms underway in a bid to support the national debate on the issue⁴. Countries are also encouraged to disclose the full-text of any agreement to exploit oil, gas and/or mineral resources, as well as any annexes or amendments. Requirement 2.4 of the EITI Standard thus requires that countries document the government's policy on disclosure of contracts and licenses that govern the exploration and exploitation of oil, gas and minerals. Documentation of government's policy should include: relevant legal provisions, actual disclosure practices and any reforms that are planned or underway. Where applicable, countries should provide an overview of the contracts and licenses that are publicly available, and include a reference or link to the location where these are published. The EITI Requirements are set out in full in Box 1 below.

The EITI evaluates adherence to Requirement 2.4 as part of its country evaluations, known as Validation. [Validation](#) is intended to provide all stakeholders with an impartial assessment of whether EITI implementation in a country is in line with the provisions of the EITI Standard. There are four levels of progress: no progress, inadequate progress, meaningful progress and satisfactory⁵. An overview of countries' performance during Validation on all EITI Requirements is available on the EITI website⁶.

Box 1 – EITI Standard 2016: Requirement 2.4

- a) Implementing countries are encouraged to publicly disclose any contracts and licenses that provide the terms attached to the exploitation of oil, gas and minerals.
- b) It is a requirement that the EITI Report documents the government's policy on disclosure of contracts and licenses that govern the exploration and exploitation of oil, gas and minerals. This should include relevant legal provisions, actual disclosure practices and any reforms that are planned or underway. Where applicable, the EITI Report should provide an overview of the contracts and licenses that are publicly available, and include a reference or link to the location where these are published.
- c) The term contract in 2.4(a) means:
 - i. The full text of any contract, concession, production-sharing agreement or other agreement granted by, or entered into by, the government which provides the terms attached to the exploitation of oil gas and mineral resources.

³ OXFAM survey of contract disclosure policy among leading extractive industry companies: <https://policy-practice.oxfam.org.uk/publications/contract-disclosure-survey-2018-a-review-of-the-contract-disclosure-policies-of-620465>

⁴ Further details are included in the consultation on contract transparency: EITI Secretariat, February 2013 <https://eiti.org/document/consultation-on-contract-transparency>,

⁵ Explanation of country status and degrees of progress: <https://eiti.org/about/how-we-work#degrees-of-progress-country-statuses-explained>

⁶ Performance during Validation: https://eiti.org/sites/default/files/inline/validation_comparison_table_0.png

- ii. The full text of any annex, addendum or rider which establishes details relevant to the exploitation rights described in 2.4(c)(i) or the execution thereof.
 - iii. The full text of any alteration or amendment to the documents described in 2.4(c)(i) and 2.4(c)(ii).
- d) The term license in 2.4(a) means:
- i. The full text of any license, lease, title or permit by which a government confers on a company(ies) or individual(s) rights to exploit oil, gas and/or mineral resources.
 - ii. The full text of any annex, addendum or rider that establishes details relevant to the exploitation rights described in in 2.4(d)(i) or the execution thereof.
 - iii. The full text of any alteration or amendment to the documents described in 2.4(d)(i) and 2.4(d)(ii).

Source: EITI 2016 Standard, page 19.

2.3 Methodology

This brief is based on a review of EITI Validation reports and initial assessments⁷. Validation of requirement 2.4 includes a review of the relevant documentation related to contract transparency. This may include commitments in EITI workplans, statements in EITI Reports and multi-stakeholder group (MSG) meeting minutes documenting contract transparency discussions. Secondary sources of data such as provisions in laws or contracts and information on contract publication portals, are also considered. The Validation process involves stakeholder interviews on the issue of contract transparency. Based on these consultations, the International Secretariat prepares a report making an initial assessment of progress against the contract transparency requirement, in accordance with the Validation Guide. The EITI Board will appoint an Independent Validator who will assess whether the Secretariat's initial assessment has been carried out in accordance with the Validation Guide⁸.

Validation is a snapshot evaluation of EITI implementation at a given time. This paper is based on Validations undertaken in 32 countries (where Validation began in the period 1 January 2016 to 31 December 2017), regardless of whether a final decision on the outcomes of Validation has been taken by the EITI Board⁹.

The EITI Board has made a final Validation decision for 24 of these 32 countries, namely **Albania, Azerbaijan, Burkina Faso, Ghana, Honduras, Iraq, Kazakhstan, Kyrgyz Republic, Liberia, Mali, Mauritania, Mongolia, Mozambique, Niger, Nigeria, Norway, Peru, Philippines, Sao Tome & Principe, Solomon Islands, Tajikistan, Tanzania, Timor-Leste** and **Zambia**.

As at 1 May 2018, the EITI Board had not decided the outcome for eight countries, namely **Afghanistan, Cameroon, Cote d'Ivoire, Madagascar, Republic of Congo, Senegal, Togo** and **Ukraine**.

⁷ Overview of EITI Validation reports and initial assessments: <https://eiti.org/document/validation-schedule-decisions#underway>

⁸ EITI Validation Guide: <https://eiti.org/document/eiti-validation-guide>

⁹ Explanation of country status and degrees of progress: <https://eiti.org/about/how-we-work#degrees-of-progress-country-statuses-explained>

The initial assessment, Validation Report and associated MSG comments are considered confidential until the Board has reached a decision.

This paper also considers two countries which were subject to second Validations, namely **Mongolia** and **Timor-Leste**. In both cases, the evaluation on contract transparency remained the same during the first and second evaluation. As such, no distinction is made between first and second Validations in this analysis.

3. IMPACT OF EITI ON CONTRACT TRANSPARENCY DEBATE

Given that the EITI encourages contract disclosure, many countries have adopted the practice of disclosing contracts because of the global and national debates facilitated by EITI. By providing a space where citizens, companies and governments can share experiences and lessons learned across stakeholder groups and national boundaries, EITI has helped these actors share concerns and potential benefits, and discuss possible approaches and ways of achieving contract transparency. The section below highlights the EITI's impact on contract transparency as documented through Validation.

Creating a forum for debate: Civil society organizations from multi-stakeholder groups in **Cameroon, Ghana, Kazakhstan** and **Madagascar**, have put contract transparency on the MSGs' agenda as part of their advocacy for full contract disclosure. In Ghana, these efforts culminated in the publication of all contracts through a portal established by the Petroleum Commission. In Kazakhstan, the MSG was used to debate the pros and cons of contract disclosure.

Facilitating disclosures: EITI stakeholders have been creative in getting contracts published. In two countries, **Azerbaijan** and **Tanzania**, surveys were used to push for contract disclosure. The national EITI secretariat in Azerbaijan conducted a survey to obtain permission to upload the Production Sharing Agreements (PSAs) on the Azerbaijan EITI website for public access¹⁰. Five PSAs had been uploaded following the company survey. Similarly, in Tanzania, the former Ministry of Energy and Minerals communicated with extractive companies that had entered mineral development or production sharing agreements with the government¹¹. The Ministry informed them that its plans to publish the agreements on its website, and requested comments on the disclosure. Two companies, British Gas and Statoil, responded, noting the need to protect proprietary information and to undertake an awareness-raising campaign for the public before the disclosures of the agreements are made. The Ministry replied to the companies and proposed that the two companies and the Tanzania EITI Committee meet to discuss the way forward.

Providing access to contracts: In **Liberia**, Section 3.2.f of the LEITI Act defines one of the objectives of LEITI "to promote the public disclosure of contracts and concessions bearing relationship with the extraction of forest and mineral resources". Section 4.1.f requires LEITI "To serve as one of the national depositories of all concessions, contracts, and licenses and similar agreements and rights

¹⁰ Azerbaijan production sharing agreements: <http://www.eiti.az/index.php/en/senedler-2/agreements>

granted by the Government of Liberia”. EITI websites and reports were stated as the forum for disclosure in **Azerbaijan, Kyrgyz Republic, Liberia and Mongolia**.

Supporting legal reform enabling contract transparency: In **Mozambique**, civil society’s push for contract disclosure through the MSG and other fora have led to a higher-level policy dialogue on contract transparency in the country. In part as a result of these efforts, the Mining Law 20/2014 includes Article 8.4 requiring companies to publish all their new contracts. In **Madagascar**, civil society has also proposed contract transparency provisions as part of the ongoing revisions to the Petroleum and Mining Code. In **Mongolia**, the MSG’s involvement in the working group on contract disclosures in collaboration with the Petroleum Authority of Mongolia (PAM), successfully removed the confidentiality clause from new model PSAs developed following the revised Petroleum Law in 2014. In **Cameroon**, although contracts are not published, several civil society organisations noted that civil society calls for contract transparency had been a key factor in the publication of the model Petroleum Sharing Contract (PSC) on the state-owned company, Société Nationale des Hydrocarbures (SNH) website.

4. BENEFITS OF CONTRACT TRANSPARENCY

One of the key objectives of contract transparency is to ensure that the contracts that are entered into conform with the overall legal framework of the petroleum sector. It can also serve additional purposes such as increasing public trust in how the government manages the petroleum sector through improved monitoring of contract implementation. It helps guard against the spread of misinformation about contract terms. Contract disclosure may also lead to improved tax collection and domestic resource mobilisation through better inter-agency collaboration. Contracts may not only be useful to government actors but also development partners and civil society through fiscal modelling and revenue projections. In some countries, contract transparency has been difficult to achieve in practice for a variety of reasons. This section recaps some of the stakeholder views gathered during Validation on the benefits and challenges with contract disclosure.

Improving monitoring and compliance with contractual obligations: Contract transparency could enable better monitoring of the implementation of contractual obligation and ensure consistency between contractual obligations and the overall legal framework. According to EITI stakeholders, contract transparency affects the work of governmental auditing institutions in terms of monitoring government activities. In **Cote d’Ivoire**, the General State Inspectorate (IGE) is responsible for the audit of government revenue and expenditure. By scrutinizing public financial management and reporting, it provides assurance that resources are used as directed by national parliaments and governments for the benefit of citizens. Representatives of the IGE mentioned that they did not have access to the contracts which limited their role in overseeing the management of public finances. Further, when notified that the contract transparency provisions of the Petroleum Code of Côte d’Ivoire were not yet implemented, the IGE decided to investigate potential violations of the legislation on contract transparency during their next audit. In **Liberia**, the LEITI 2013 post-award audit showed that some contracts entered into by the government contained tax and other stabilisation clauses that exceeded the timeframe allowed by the Internal Revenue Code.

Improving interagency collaboration: Validation has highlighted that access to contracts can help ensure proper tax collection and auditing of the sector. Where multiple government agencies are involved in collecting taxes and administering the fiscal regime, contract disclosure can strengthen inter-agency collaboration as access to the contract would no longer be confined to one ministry, and

is essential for other ministries to levy and collect the right taxes for example. This could also have benefits for industry actors who have an interest in prompt enforcement of the terms. In **Afghanistan**, a 2016 Supreme Audit Office compliance audit report found that the various departments in the Ministry of Finance, including the Revenue Department, did not systematically have access to extractives contracts. This was despite requirements for the Ministry of Mines and Petroleum to make all contracts available to the Ministry of Finance. In **Ghana**, the Ghanaian Revenue Authority expressed strong support for contract transparency, given that they were among the main users of contracts in the country. Similarly, in **Togo**, the Togolese Revenue Office lamented that contracts were not systematically available, which caused errors in their data collection related to contractual data. This affects the Revenue Office's ability to monitor the sector and collect the appropriate payments due to them in a given fiscal year.

Improving fiscal projections and revenue forecasting: Contracts constitute part of the web of sector specific and general legislations and regulations that together make up the total legal framework for the petroleum industry in a country. Some governments, in particular where there is weak institutional capacity, might face challenges in navigating this web. It has therefore been argued that contract transparency could help ensure proper government monitoring and enforcement of terms that are specific to individual contracts. Fiscal modelling may also be useful to development partners and civil society actors within the country. In **Cameroon**, stakeholders consulted during Validation emphasised how the International Monetary Fund (IMF) highlighted in its Article 4 consultations how the lack of publicly-available PSCs hinders its ability to refine its modelling of oil and gas fiscal revenues and thus the accuracy of its medium-term fiscal models for Cameroon. A civil society representative noted that while the government had asked the IMF to undertake a review of its oil and gas fiscal regime in 2014, it had never provided the fund with copies of the oil and gas contracts, thereby hindering the ability to model fiscal terms.

Improving monitoring of the impact of the extractive sector on affected communities. Contracts often contain terms and obligations that could be relevant for the local communities where the extractive activities take place. Civil society has found access to contracts helpful in monitoring such impacts. In **Albania**, civil society requested access to the full text of mining, oil and gas contracts in preparing the 2013-14 EITI Report in order to assess the existence of mandatory social expenditures. In **Cameroon**, several civil society members noted that the sections of mining, oil and gas contracts of greatest relevance for civil society were clauses affecting host communities most directly, including social expenditures. In **Mali**, civil society representatives explained that they have access to contracts in the mining sector, which allowed them to undertake a comparative analysis of publicly accessible contracts.

Box 2 – Use of contracts in Mali

Gold production in Mali came to 46.9 MT in 2016, making the country Africa's third-largest gold producer after South Africa and Ghana. However, gold production remains controversial in Mali, since a large proportion of gold is produced by artisanal miners and recurring incidents of fatal accidents, smuggling, child labor and environmental damage. The PWYP-Mali Coalition, with the financial support of the Extractive Industries Governance Support Project (PAGIE-GIZ), conducted a comparative analysis of mining contracts in March 2016. The study reviewed nine contracts signed between the Malian government and mining companies between 1987 and 2014 covering 10 to 30-year gold and iron mining agreements.

The study aimed to equip local communities, regional MPs and civil society actors with an understanding of the evolution of the mining legislation and variations between the different mining contracts affecting them.

Following a desk review and stakeholder consultation in the Kayes region, the report noted that the opacity of the sector combined with the complexity of contracts, led to a limited understanding of the terms of the contract by both the public and other local decision-makers. The report called for a review of tax exemptions and stability clauses have led to significantly reduced revenues for the Malian State; training for government staff on transfer pricing and strengthened interagency collaboration in the monitoring of the sector.

The report was subsequently translated into local languages in August 2016 and then formed part of a dissemination campaign. The report was picked up by local media and stimulated a national debate on the topic. The 2015 EITI Report, published in 2017, included contextual on tax exemptions for the year under review. The Mali multi-stakeholder group aims to include the value of tax exemptions in its 2016 EITI Report.

Source: PWYP-Mali 2017, Study on the distribution of the 'Patente' sub-national payments to the mining region communities in the mining regions of Kayes and Sikasso and their impact on their impact on the funding of social services in the Sadiolo and Sanso communities.

5. CHALLENGES IN DISCLOSING CONTRACTS

Despite great potential usefulness of contracts, the use of contracts in practice remains limited. Obstacles to effective use of contracts as identified by stakeholders included the lack of an appropriate instrument for the publication of contracts; conflicting sources of contract information and the lack of a common understanding of the confidentiality disclosures.

Accessibility: A survey of the initial assessments and EITI Reports shows that little attention has been given to data accessibility and the format in which contracts are disclosed. Stakeholder views differ across countries on the desired format for disclosures. Some contracts are disclosed in PDF format, whilst others are available in searchable formats online. These differences of opinions may be linked to the level of computer literacy in the country. For example, in **Burkina Faso**, civil society representatives consulted did not consider online publication as particularly important. They explained that free access to the contracts at the Ministry of Mines and Energy would be considered as adequate. Stakeholders had not conducted a thorough review of the contracts or licenses that were available online. In **Liberia**, the simplified contract matrix has helped civil society organisations such as Rights and Rice to run roadshows in concessions areas to help local populations gain a better understanding of the terms of the contracts. In the **Kurdistan region of Iraq**, none of the stakeholders consulted aside from some analysts were aware that PSCs awarded to Chevron, ExxonMobil and Dana Gas had not been published by the government.

Stakeholders noted that in some instances technical problems and a lack of an appropriate instrument prevented the publication of this information online. Civil society representatives in **Burkina Faso** confirmed that they have access to all contracts, upon request, but contracts are not systematically published online. In the **Kyrgyz Republic**, a government representative noted that the challenge was mainly technical. Although all license agreements have been scanned and were available in an electronic format on the internal part of the license database, the current IT system

did not have capacity to load such big files. In **Niger**, stakeholders noted that the official journal had experienced a back log on the publication of contracts.

Conflicting sources and outdated information: Validation revealed that there is often lack of clarity on which government agency is responsible for publishing contracts and challenging in keeping contract databases up to date. In the case of the **Kurdistan region of Iraq**, there were differences in the number of contracts published on the various public sources of information. Some Production Sharing Contracts were published on the Kurdistan Regional Government (KRG) Ministry of Natural Resources website, whereas the ResourceContracts.org website and the OpenOil contracts database host a different number of contracts related to Kurdistan. In **Liberia**, it appeared that the final versions of all contracts were not publicly available from the LEITI website. For instance, the website provided only some of the PSCs, including at times initial PSCs that had subsequently been amended (e.g. Block 13), ratified PSCs or PSC amendments without the original.

The EITI Standard encourages publication of the full text of any addendum, alteration, amendment, annex, or rider to contracts and licenses. Stakeholders in several countries commented on the availability of full text of contracts and addendums. In **Mozambique**, stakeholders noted that the 2014 Petroleum Law states that the “main terms” of contracts are to be published, without making clear whether addendums will remain confidential. In **Timor-Leste**, civil society representatives explained that so far only summaries of the contracts entered into under the Interim Petroleum Mining Code prior to 2003 had been published, as required by law, but that they wanted the full terms of these contracts to be disclosed.

Confidentiality clauses: Validation has highlighted a need to interrogate the confidentiality of the contracts in further detail, including the extent to which confidentiality clauses encompass the contract itself or mainly information and data flowing from the execution of the contract. In **Albania**, stakeholders questioned whether governments could use their sovereignty to unilaterally publish contracts that were signed despite containing confidentiality clauses. Certain lawyers considered that the government could use its sovereign prerogative to break confidentiality clauses of a contract. However, a major issue was the technical capacity of the government to successfully engage multinational companies on issues linked to contract transparency. A senior government official highlighted a number of cases where the government had lost cases brought by companies at international arbitration and explained that the government had to proceed cautiously with such matters. In **Cote d’Ivoire**, company representatives argued that the contract transparency provision so of the 2012 Oil Code did not have retroactive effect and did therefore not supersede the confidentiality clauses in the contracts. In **Madagascar**, government representatives noted that confidentiality clauses covering all aspects of PSCs last as long as the contract is active, and that companies insist on these clauses. In **Ukraine**, MSG members maintained that contracts are not accessible due to confidentiality provisions preventing the publication of the agreements themselves.

There appears to be some difference in perceptions regarding confidentiality provisions in model contracts. In **Honduras**, the contract between the government and the BG group explicitly mandates that any information considered confidential can be disclosed and published without prior consent of the parties for EITI purposes. In **Iraq**, the confidentiality provisions of the Technical Sharing Contract could be waved upon consent from the two parties to the contract. In **Mozambique**, contracts signed prior to the coming into effect of Public-Private Partnership Law 15/2011 are disclosed where companies have agreed to waive confidentiality provisions.

Commercial sensitivity: The question of commercially sensitive information in contracts was not frequently cited by EITI Stakeholders as a reason not to disclose contracts. The use of a technology or trade secrets, for example, could be considered sensitive. Trade secrets is information central to a company's business activities and which could cause economic harm or competitive disadvantage if known.¹² In the oil and gas industry, seismic data, samples, well logs, geological structure maps, and certain technologies could likely constitute a trade secret. If a company is planning to use a particular technology that is not common to the industry and this is described in the contract, this could constitute a trade secret that it could be commercially harmful to disclose. The **Philippines** 2012 EITI Report listed the information that could be deemed confidential in contracts by mutual agreement in mining and routinely in oil and gas. In **Nigeria**, none of the mining industry representatives consulted had any objection to the publication of the full-text of their licenses, stating that these did not contain any commercially-sensitive information nor any confidentiality clauses. However, they noted that for the oil and gas sector, the split in Profit Oil between the operator and NNPC from the PSC and details of work programme obligations were more commercially sensitive. Civil society in **Kazakhstan** noted that there had been heated debates over contract transparency during the last year, and they lamented that the National Steering Committee had not yet reached a more nuanced level of discussion about what terms could be considered sensitive and what terms could be publicly released.

Fear of instability: In some countries, governments officials seem to fear public criticism or instability if contracts were to become public. In **Cote d'Ivoire**, government representatives feared that the public will be unable to understand the companies' contribution to the Government. In the **Kyrgyz Republic**, companies also feared that people did not have sufficient capacity to understand the financial terms of the agreement and this could create further misunderstandings and conflicts. In **Iraq** for example, an official from the Ministry of Oil explained that some of the terms of the contracts, including for crude oil specifications, appeared so general that they could expose the government to public outcry if published.

6. VALIDATION OF CONTRACT TRANSPARENCY

As noted above, **Validation of Requirement 2.4 is first and foremost a measure of how transparent a government's policy and practice is with regards to contract transparency, and not a measure of how transparent the contracts in the country are.** Of the 27 countries for which a Validation decision had been made, two countries were assessed as going beyond the EITI Requirement, 19 countries were assessed as having made satisfactory progress, eight countries were assessed as making meaningful progress, four as making inadequate progress and one country was assessed as making no progress¹³. Annex 1 provides further details on progress in contract transparency during Validation.

Peru and the Philippines were evaluated as going beyond the EITI Requirements on contract transparency, meaning that they have taken on additional work on contract transparency than the EITI requires. In **Peru**, contract transparency is provided through the Law on Transparency and

¹² Cathey, B (2014) Trade Secret Protections, Oil and Gas financial journal, <http://www.ogfj.com/articles/print/volume-11/issue-1/features/trade-secret-protections.html>

¹³ Performance during Validation: https://eiti.org/sites/default/files/inline/validation_comparison_table_0.png

Access to Public Information. This law requires that public entities disclose contract information. Peru's 2014 EITI Report includes a list of hydrocarbon contracts with the links to where full text of the contracts are publicly accessible. It also provides an overview of the mining projects that have signed 'Contracts of Guarantees and Investments Promotion' also known as Mining Stability Contracts. These contracts aim to reduce uncertainty concerning tax policy for investors and were signed at a time when Peru required private capital to recover from the 1980s crisis and sought to attract foreign direct investment¹⁴. In the **Philippines**, the 2014 EITI Report includes in-depth discussion of the government's policy on contract transparency. The full text of standard contracts is included in Annex L-N of the PH-EITI Report. In 2015 PH-EITI launched an open database where the contracts of most companies participating in the EITI reporting process are disclosed¹⁵. Using the open source ResourceContracts platform¹⁶, the Philippines and NRGi worked together to assign unique IDs, which followed the Open Contracting Data Standard (OCDS)¹⁷. The OCDS enables data to be disclosed in a way that is interoperable at all stages of the contracting process and was created to increase contracting transparency, and allow deeper analysis of contracting data by a wide range of users. It involves step-by-step disclosure, creation of summary records for an overall contracting process and common open data publication patterns.

The EITI Standard requires that the EITI Report documents the government's policy on contract disclosure, including referencing relevant legal provisions, actual disclosure practices and any reforms. At least seven countries had a clear policy on contract transparency in their EITI Report¹⁸.

There is also a wide variety in what is considered a government policy. For example, this included statements by high-level officials in **Afghanistan** and **Albania**, sector-specific legislation in **Burkina Faso** and **Cameroon**, Freedom of Information Acts such as in **Liberia**, a public-private partnership laws in **Mozambique** and the national constitution in **Niger**. In these cases, the EITI Reports reference relevant legal provisions and provides clarification on the mandate to publish or keep contracts confidential. Nine of these countries had a clear policy for the publication of contracts whilst three had a clear policy against the publication of contracts. Most of the countries that had a clear policy enabling contract publication referenced legal provisions in the petroleum or mining laws.

Government policy provides for full contract transparency in seven countries: **Burkina Faso (mining)**, the **Republic of Congo (oil and gas)**, **Côte d'Ivoire (oil and gas)**, the **Democratic Republic of Congo (oil, gas and mining)**, **Mauritania (mining)**, **Niger (oil, gas and mining)** and **Zambia (mining)**. However, in practice, with the exception of **Zambia**, the remaining six countries have either no or partial disclosure for a variety of reasons including non-functioning national gazettes (**Niger**) or ongoing consultations with companies (**Cote d'Ivoire**). In other instances, countries published contracts although the government's policy was unclear such as **Afghanistan (oil and gas)** and **Mali (mining)**.

At least 18 countries included information on actual practice on contract publication. Where countries publish contracts, the EITI Report should provide an overview of the contracts and licenses

¹⁴ Overview of EITI Validation reports and initial assessments: <https://eiti.org/document/validation-schedule-decisions#underway>

¹⁵ Philippines EITI Report: <https://eiti.org/document/philippines-2015-eiti-report-fy-2013>
NRGi contracts portal: <http://contracts.ph-eiti.org/>

¹⁶ Resource Contracts Platform: <http://www.resourcecontracts.org>

¹⁷ Information on Open Contracting Data Standard: <http://standard.open-contracting.org/latest/en/>

¹⁸ Countries with legal commitments but limited contract/license disclosure: Burkina Faso, Central African Republic, Cote d'Ivoire, Mauritania, Niger, Republic of Congo and Tanzania.

that are publicly available, and include a reference or link to the location where these are published. The challenge observed is that some EITI Reports lack a comprehensive list of all contracts and amendments. Some EITI Reports do not explicitly state how contracts can be accessed by the public. In some instances, the links provided in the EITI Report are broken or no longer valid.

Few countries included information on ongoing reforms related to contract transparency, with the exception of **Afghanistan, Togo** and **Ukraine**. Documentation of ongoing and planned reforms were frequently omitted in the EITI Reports. This may present missed opportunities to further the contract transparency debate in these countries.

Implementation of the EITI's requirements on contract transparency have highlighted some potential confusion. Firstly, it has been argued that the way the requirement is assessed is potentially sending the wrong signal, rewarding countries that are not necessarily practicing contract transparency, but that are simply transparent about their decision not to do so. For example, in **Kazakhstan**, the 2015 EITI Report notes that Kazakhstan does not practice contract transparency¹⁹. According to stakeholders, contracts have confidentiality provisions which indicate that the signed contract could not be disclosed. However, the country is transparent about its policy and practice being zero public disclosure, and has therefore achieved satisfactory progress by stating so. In contrast, **Niger** has a clear policy on contract transparency set out in the constitution, and actual publication of contracts is to take place through the Official Gazette, according to the EITI Report. Despite this policy, Niger only achieved inadequate progress on the EITI Requirement because the implementation of the contract transparency policy through the gazette was not confirmed by the EITI Report. This seem contrary to the intent of the EITI Requirement which encourages implementing countries to disclose any contracts and licenses that provide the terms attached to the exploitation of oil, gas and minerals.

Secondly, this analysis also sheds light on the challenge of what to do to address the gap between policy and practice on contract transparency. The EITI Standard does not assess practice. **Cote d'Ivoire** has been assessed as having made satisfactory progress since the government policy on contract transparency is clear in the 2012 amendments to the Oil Code. It is also clear on the actual practice, which is that no contracts have been published in Cote d'Ivoire including those which were signed after the law was adopted. This case highlights a clear discrepancy between government policy and practice, that does not have bearing on the level of progress achieved on Requirement 2.4, given that this requirement is only a measure of the level of transparency. Similar concerns were raised by civil society representatives in Mozambique during the Validation consultations.

7. CONCLUSION

Contract transparency has come a long way. The EITI has played a major role in changing the language on contract transparency. More countries are publishing contracts and facing common challenges. 29 EITI implementing governments—well over half—have disclosed at least some of these agreements. The review of lessons learned from EITI Validation related to contract disclosure demonstrates that EITI implementation is a useful tool in documenting reforms on contract transparency and countries where partners can support contract transparency. Validation has identified several opportunities for EITI stakeholders to engage in the national debate on contract transparency and to improve disclosures:

- **EITI Reports could more clearly describe the types of contracts and agreements used in the oil, gas and mining sector and distinguish between the contract transparency policy and practice in the two sectors.** In most instances, EITI Reports do not distinguish clearly between government’s policy on the oil and gas and mining sectors. In Albania and Cote d’Ivoire, although the government policy is clear for the oil and gas sector, it is unclear for the mining sector. In the mining sector, it was unclear if the policy applied to both exploration and production contracts, such as in Mali.
- **EITI Reports could increase public understanding of what terms and conditions are negotiated in the contract/agreement, and which terms and conditions are set out in law.** This would help highlight the need for contract transparency in cases where terms are mainly negotiated. Validation has shown that for countries where most of the terms are in the legislation, there were few objections to the publication of contracts. This was documented in **Burkina Faso**, the **Kyrgyz Republic** and **Norway**. The latter publishes information on the work program, progress against work programmes, license group, operator, shares and other relevant information. Special environmental conditions are announced in the press-release that accompanies the publication of a granted license. This is important as countries move towards including more information in the legal and regulatory framework versus contracts. In **Zambia**, the report states that contracts are no longer executed. The 2015 Mines and Development Act “ruled that no special agreements should be entered into by the government for the development of large scale mining licenses and annulled the development agreements concluded under the previous act. Mining companies now operate under a common legislative framework regulated primarily by the Mines and Minerals Development Act 2008”. This has led to slight confusion on what changes to disclosure this will bring and what should be disclosed under such regimes.
- **EITI and its partners could help governments bridge gaps in between policy and practice.** Validation has shown that in some countries where contract transparency is a legal requirement, there is a discrepancy between the government policy and practices, and retroactive effects of legal amendments are not always clear. In countries like **Burkina Faso** and **Cote d’Ivoire**. Stakeholders often required clarification on whether legal provisions cover previously allocated contracts such as. Where contract transparency is a legal requirement, there has not always been a comprehensive review to ensure that all contracts are published. In **Liberia** for example, Validation found that no comprehensive review had been undertaken of contracts disclosed on the LEITI website and that it was unclear which contracts were missing. This may also be due to poor record-keeping on the part of the

government. Secretariat staff in Liberia explained that the reason some contracts had not yet been disclosed was likely that there were challenges in locating the contract, rather than a decision not to publish it. In **Niger**, article 150 of the Constitution requires the publication of all contracts concerning production and exploration of natural resource, as well as the revenues paid to the State, in the Government's official journal but contracts are not published in practice. A senior government official explained that while the Constitution required publication of extractives contracts, it did not specify the timeframe for publication, which explained why contracts were published according to priority and depending on space constraints in the official gazette.

- **EITI countries could consider provisions enabling contract transparency when reforming oil, gas and mining legislation.** Validation has shown that many EITI countries are undertaking legal reforms which could be used as an opportunity to consider embedding contract transparency provisions in sector legislation or make transparency rather than confidentiality the default in model contracts, with provisions for redactions if necessary. In **Kazakhstan**, stakeholders viewed the development of new subsoil code as an opportunity to lobby for contract transparency. In **Ukraine**, contract transparency is covered in a Draft Law of Ukraine #6229 on disclosure of information in extractive industries. The draft law was expected to go to the parliament (Verkhovna Rada of Ukraine), before the end of 2017.
- Some countries such as **Afghanistan** are revising their model contracts. Several government officials highlighted the Ministry of Mines and Petroleum's plans to review and standardise royalty rates, which differ per contract, and to develop a model mining contract. There may be opportunities to include contract transparency provisions in the model mining contract. In **Timor-Leste**, the government has added provisions to the model contracts confirming the public nature of the contract.
- **EITI and its supporters could help countries establish more accessible disclosure frameworks, helping countries to achieve contract transparency in a timely manner with data available in open data formats.** Validation has highlighted ongoing reforms to disclosure frameworks. In **Togo**, the 2014 EITI Report recommendations state that the General Directorate for Mines and Geology, DGMG, will publish the contracts without confidentiality clauses on the site of the Ministry of Energy and Mines. The Minister of Mines and Energy noted that some licenses were disclosed on the site Togomines.com and confirmed that the publication of contracts was in progress.
- **The EITI could continue to consider ways of acknowledging countries that practice contract transparency in Validation and to provide more clarity on how the EITI Requirement on contract transparency is assessed.**

Annexes 1 – Summary table on progress with the EITI Standard

	Country	Validation completion date	EITI report year	Overall performance	Progress on contract transparency	Link to initial assessment
1	Afghanistan*	-	2014-2015	-		Ongoing at the time of the review.
2	Albania	13.02.2017	2015			https://eiti.org/sites/default/files/documents/albania_report_on_initial_data_collection_and_stakeholder_consultations_en.pdf
3	Azerbaijan	26.10.2016	2014			https://eiti.org/sites/default/files/documents/eng_azerbaijan_draft_report_on_initial_data_collection_and_stakeholder_consultations.pdf
4	Burkina Faso	13.02.2018	2015			https://eiti.org/sites/default/files/documents/burkina_faso_initial_assessment_en.pdf
5	Cameroon*	-	2014	-		Ongoing at the time of the review.
6	Cote d'Ivoire	-	2015	-		https://eiti.org/sites/default/files/documents/en_draft_report_on_initial_data_collection_and_stakeholder_consultations.pdf
7	Ghana	08.03.2017	2014			https://eiti.org/sites/default/files/documents/ghana_-_initial_data_collection_and_stakeholder_consultations_0.pdf
8	Honduras	25.10.2017	2014			https://eiti.org/sites/default/files/documents/honduras_2017_eiti_validation_report_on_initial_data_collection_and_stakeholder_consultations.pdf
9	Iraq	26.10.2017	2015	-		https://eiti.org/sites/default/files/documents/iraq_-_2017_validation_initial_assessment_final_draft_asf_comments.pdf
10	Kazakhstan	13.02.2018	2015			https://eiti.org/sites/default/files/documents/eng_kazakhstan_draft_report_on_initial_data_collection_and_stakeholder_consultations_final.pdf
11	Kyrgyz Republic	08.03.2017	2013-2014			https://eiti.org/sites/default/files/documents/eng_kyrgyz_republic_draft_report_on_initial_data_collection_and_stakeholder_consultations.pdf
12	Liberia	24.05.2017	2013-2014			https://eiti.org/sites/default/files/documents/liberia_report_on_initial_data_collection_and_stakeholder_consultations.pdf
13	Madagascar*	-	2014	-		Ongoing at the time of the review.
14	Mali	24.05.2017	2013			https://eiti.org/sites/default/files/documents/mali_validation_initial_assessment.pdf
15	Mauritania	08.03.2017	2014			https://eiti.org/sites/default/files/documents/mauritania_draft_report_on_initial_data_collection_and_stakeholder_consultations.pdf
16	Mongolia	11.01.2017	2014			https://eiti.org/sites/default/files/documents/mongolia_validation_initial_assessment_september_2016.pdf
17	Mozambique	25.10.2017	2013-2014			https://eiti.org/sites/default/files/documents/validation_of_mozambique_-_report_on_initial_data_collection_and_stakeholder_consultation.pdf
18	Niger	26.10.2017	2014			https://eiti.org/sites/default/files/documents/niger_validation_initial_assessment_final_clean.pdf
19	Nigeria	11.01.2017	2013			
20	Norway	04.12.2017	2014			https://eiti.org/sites/default/files/documents/15-01-2017_-_norway_-_validation_initial_assessment.pdf
21	Peru	11.01.2017	2014			https://eiti.org/sites/default/files/documents/peru_international_secretariat_initial_assessment_final_as_of_15_sept_2016_1.pdf
22	Philippines	05.10.2017	2014			https://eiti.org/sites/default/files/documents/philippines_eiti_2017_validation_initial_assessment_on_data_collection_and_stakeholder_consultation.pdf
23	Republic of Congo*	-	2014	-		Ongoing at the time of the review.
24	Sao Tome e Principe	08.03.2017	2014			https://eiti.org/sites/default/files/documents/sao_tome_initial_assessment_for_validation_final.pdf
25	Senegal	-	2014	-		https://eiti.org/sites/default/files/documents/senegal_validation_draft_report_on_initial_data_collection_and_stakeholder_consultations_english.pdf
26	Solomon Islands	08.03.2017	2014			https://eiti.org/sites/default/files/documents/secretariats_initial_assessment_of_the_solomon_islands.pdf
27	Tajikistan	08.03.2017	2014			https://eiti.org/sites/default/files/documents/eng_tajikistan_draft_report_on_initial_data_collection_and_stakeholder_consultations.pdf
28	Tanzania	25.10.2017	2013-2014			https://eiti.org/sites/default/files/documents/eiti_validation_of_tanzania_-_report_on_initial_data_collection_and_stak.pdf
29	Timor Leste	11.01.2017	2013			https://eiti.org/sites/default/files/documents/timor_leste_-_international_secretariats_report_on_data_collection_and_consultation.pdf
30	Togo	-	2014	-		https://eiti.org/sites/default/files/documents/togo_validation_initial_assessment_fr.pdf
31	Ukraine*	-	2014-2015	-		Ongoing at the time of the review.
32	Zambia	25.10.2017	2015			https://eiti.org/sites/default/files/documents/zambia_2017_eiti_validation_report_on_initial_data_collection_and_stakeholder_consultations.pdf