Briefing: Why should Uganda publish extractive contracts?

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There is a growing international campaign for oil, gas and mining contracts to be made public. This paper sets out the public interest case for contract transparency in Uganda and its benefits.

The secrecy surrounding extractive industry contracts presents a huge obstacle to good governance in resource-producing countries and makes it less likely natural resources will benefit the host nation. All too often, citizens are denied the right to see contracts agreed on their behalf. Although governments and companies often cite concerns of commercial confidentiality, in reality this has little grounding and may conceal political, or even corrupt, motives for keeping contracts out of the public eye.[A]

Natural resources are the property of all citizens, and governments are only the custodians of those assets. The contracts that govern them should be available to the public. Making contracts publicly available not only builds trust in government but, more importantly, it empowers citizens to check how their interests are safeguarded and governed.

Oil, gas and mining contracts, such as production sharing agreements (PSAs), set out the terms which govern the relationship between host governments and extractive companies. They dictate the amount of money the government will get, any special dispensations like tax breaks, the key obligations for companies and government, the protections for people and environment and what information will be kept secret. PSAs can even contain "stabilisation" clauses which prevent the government implementing new laws and taxes in future.

These documents are fundamental to any meaningful understanding of the deal between a state and big international oil companies trying to profit from countries' natural resources. If citizens are to truly understand whether their government is getting a good financial deal for their natural resources or whether the resources should be extracted at all then they need to be able to examine these documents. And yet they are often kept secret. Citizens are kept in the dark and unable to assess the protection measures for them and their environment and the asymmetry of information between powerful international companies and resource rich countries some of which will have little experience in negotiating oil and mining deals continues.

But things are changing rapidly. There is now a wide recognition that greater transparency in the extractive sector is key to good resource management and that publishing revenue information would be enhanced by an understanding of the contracts that underpin those revenues. Contract transparency is a crucial next step. The Extractive Industries Transparency Initiative now "encourages" public disclosure of extractives contracts and licences in its 2013 Standard.[1] The International Monetary Fund[2] and the World Bank[3] also endorse contract transparency as does the Open Government Partnership, a multilateral initiative that aims to secure concrete commitments from governments to promote transparency, empower citizens, fight corruption, and harness new technologies to strengthen governance.

Many countries around the world, including: Afghanistan, Australia, Azerbaijan, Bolivia, Burkina Faso, Democratic Republic of Congo (DRC), Republic of Congo, Ghana, Guinea, Kurdistan, Liberia,

[A] Global Witness does not allege any of these motives in the Ugandan case however, maintaining secrecy in Ugandan contracts increases the risks.

Mauritania, Mexico, Niger, Peru, Sierra Leone and Timor-Leste, now publish extractive industry contracts.[4] It is worth noting that Tullow Oil has disclosed its contracts in Ghana where it is legally mandated to do so and has signalled its willingness to publish in Uganda should the government consent.[5]

Why contract transparency matters

These agreements lay out the terms on which companies are permitted to explore for, develop and extract natural resources. They often supplement natural resource and tax laws and sometimes override them. PSAs typically have a duration of 20-25 years or more. They often set out many key conditions such as;

- the taxes and royalties which will be paid to the government, and the share of revenues the government will receive;
- Other key financial terms like what taxes the companies are subject to, or exempt from, and what costs the companies can claim from oil revenues before they are shared with government;
- Where a company can explore for oil or minerals, including national parks and other protected areas, or how close to people's homes and environmentally sensitive areas;
- Whether the government will be able to apply changes in environmental and social protection regulations or tax laws to companies operating under the contracts;
- Whether disputes will be resolved in national courts or in international arbitration, under what rules and in which country;
- What information, such as environmental impact assessments and mitigation plans, will be kept secret and what can be made public.
- Key environmental terms, such as whether companies are allowed to flare excess gas, how they will manage hazardous waste and what action they will take in the event of a spill or pollution damage;
- Whether and how companies will consult local communities and compensate them for any loss;
- What steps companies will take to employ local people;
- How companies will protect people's human rights and avoid sparking conflict.

What are the dangers of secret contracts?

Restricting or preventing access to these contracts prevents the public from knowing how much money the government should be receiving and whether it is properly accounting for it. It also means people cannot know if the contract is a good deal for their country. In the worst cases, contract secrecy can hide extremely poor or corrupt deals which do not benefit citizens.

Without access to the contracts it is impossible to monitor and evaluate any social or environmental undertakings given by the company or ensure that these are fulfilled. Citizens are unable to know their rights as they cannot know what protections have been contractually agreed for them by their representatives.

Putting contracts in the open will stop governments and companies hiding dodgy deals which do not maximise the benefit of resources for the state. Publishing them allows citizens to monitor companies' activities on the ground and their compliance with their contractual obligations. This is a crucial part of corporate accountability. Publication empowers citizens to demand more from companies and assist their government to negotiate more favourable terms.

The global move towards transparency

The US, EU and Norway have recently introduced new laws which will require companies registered or listed within their jurisdictions to publish all material payments to foreign governments.[6] This includes the three major companies operating in Uganda as well as many of the other major international oil companies.[B] These payments will be disaggregated by payment type and disclosed on a project by project basis. Alongside the increasing number of countries signing up to the Extractive Industries Transparency Initiative (EITI)[C] and its voluntary disclosures, revenue transparency is becoming the global norm.[7] For the first time citizens will be able to see how much money their government is receiving for its oil, and trace payments into their national budget.

However, people will not be able to understand why revenues from one area are so much greater than from another similar area, why one company is paying higher royalties than another or why tax rates appear to vary. That is because this information is contained in the contracts. To truly understand the revenue information which will become available, citizens will need access to oil, gas and mining contracts.

Contract transparency in Uganda

In Uganda access to government contracts has been fraught with difficulties. In 2010, Platform, a UK-based NGO, along with a number of local NGOs, published a series of PSAs signed before 2008. NGOs and journalists have made numerous calls for access to the contracts and in 2011 a fierce debate took place in the Ugandan Parliament regarding the management of the oil sector. MPs demanded that the contracts signed between the Government of Uganda and the international oil companies be presented to Parliament with MPs saying that the provisions of the contracts were going to affect Ugandans and needed to be scrutinised. As a result the contracts have been placed in the parliamentary library, however they are still not publicly available. In August 2014, Global Witness published two further PSAs, signed in February 2012, available on our website along with a thorough analysis.

All three companies currently operating in Uganda have told Global Witness that they are willing for the contracts to be published if the other companies and the Government also agree. Both Total and Tullow have publicly stated this position. It appears that the decision to publish now rests solely with the Ugandan government.

The new Petroleum (Exploration, Development and Production) Act 2013 does provide for a new Model contract on which others will be based. This model contract is expected to be presented to Parliament in late 2014 or early 2015, which is a welcome step. However, unless all contracts are made publicly available it will not be possible to assess the terms of the individual deals or compare them against this model.

With a new licensing round widely anticipated in 2015, any new PSAs are likely to be heavily negotiated as both government and companies seek to maximise the value they will obtain while mitigating potential costs and risks, mindful that economic conditions and oil prices may fluctuate significantly over the life of the contracts. The Government is in a stronger bargaining position now that oil reserves are proven and companies are already moving towards the production phase. The greater the competition for new exploration blocks, the more flexibility there is to negotiate

[B] Tullow oil has begun to publish this information already in its annual reports.
[C] At time of writing, 23 countries were fully EITI compliant, in addition to which 16 had obtained candidate status and a further 34 had produced EITI reports: http://eiti.org/countries

favourable terms. Public disclosure of all permits, licences and production sharing agreements would open up the terms to public scrutiny, incentivising government officials and companies to include the best possible terms for the people of Uganda. It would also help enhance public confidence in the government's handling of the sector.

Publication would allow citizens to identify any unusual terms in the agreements and question any deviations from the model agreements approved by Parliament.[8] It would also allow them to monitor company and government compliance with their contractual obligations and hold them to account.

The advantages of transparency for national governments

Governments of resource rich countries often face an asymmetry of information: international oil companies have many years of experience and huge resources. Notwithstanding confidentiality clauses in oil agreements, in practice, companies may have significant knowledge of the agreements entered into by their competitors. Key documents, including agreements such as PSAs and licences, will be shared among joint venture partners in a project and when a joint venture partner wishes to sell its interest, shortlisted bidders will be given access to the key documentation. Companies will also have access to competitors terms through other channels as set out below under Myth 1.

As such, companies are likely to have a superior understanding of market trends and precedent agreements in neighbouring countries,[9] potentially amounting to a significant advantage at the negotiation table. This puts governments at a distinct disadvantage.

Contract transparency would enable the governments of resource rich countries to tip the balance more in their own favour. Rather than being in the dark, they too could be armed with the same amount of knowledge and information as the companies they face over the negotiating table.

Debunking the industry myths

Despite the benefits of contract transparency and the fact that a number of countries have elected to publish extractives contracts,[10] confidentiality provisions remain common. These confidentiality provisions are regularly cited by both governments and industry to resist calls for contract disclosure.

But when the arguments in favour of secrecy are examined closely they do not stand up to scrutiny.

MYTH 1: **Confidentiality in oil, gas and mining contracts is in line with commercial practice**
Reality: While oil contracts often include confidentiality provisions, in practice their terms are unlikely to remain secret. A production sharing agreement will be accessed by a range of organisations over its life, such as legal advisors, professional consultants and other extractive company bidders if and when a partner in the relevant project wishes to sell its share. If an extractive company's shares are traded on a stock exchange, high-value contracts may have to be publicly disclosed due to stock exchange rules (the principal markets of both the London Stock Exchange and the New York Stock Exchange include rules to this effect). [11] In any event, confidentiality clauses are not an absolute barrier to disclosure. Confidentiality clauses are remarkably consistent across the industry, commonly permitting disclosure when required by law or by the parties' consent.[12]

Extractive companies also routinely discuss operational and negotiating experiences with other companies active in the sector through industry forums such as the Association of International

Petroleum Negotiators.[13] Professional advisers (such as corporate law firms) will draw on extensive databases of precedent agreements to ensure their advice on a transaction reflects current market conditions; indeed, certain consultancy organisations specialise in providing extractive companies with transactional advice, drawing on deals recently signed by industry competitors, or even access to the competitor's contracts themselves.[14]

MYTH 2: **Information in oil, gas and mining contracts is commercially sensitive and therefore the contracts should not be disclosed**

Reality:

(a) Oil, gas and mining contracts are not likely to contain information about a project which is commercially sensitive. They may contain, for example, work obligations, payment terms, local content undertakings and obligations as to employment and training but, once the contract has been agreed, none of these are likely to cause substantial harm to the competitive position of the companies if disclosed. Given that the PSAs contain details of payment terms, participating companies and other information they are fundamental to assessing the balance of benefit and risks agreed to by government officials on the country's behalf. As such, there is a very strong public interest in contract disclosure to the fullest extent possible.

(b) The information contained in these contracts has often been disclosed anyway. Genuinely sensitive information, such as trade secrets or references to future transactions, are very unlikely to be included in the PSAs. [15] This stands to reason: many PSAs are signed by a consortium of industry companies meaning that each company will go into the agreement knowing its competitors will have access. None would risk disclosing any commercial secrets in the text. In addition, companies whose shares are listed on a major exchange may have been required to disclose details of potential environmental risks, projected tax liabilities, reserve value and other financial information for their projects when their shares were admitted to trading, which casts doubt upon how commercially sensitive such information really is.[D]

MYTH 3: **Contract transparency leads to contract instability**

Reality: Oil, gas and mining contracts can be unstable: with durations which may span over a change of government and often generating highly charged public sentiment. National leaders may come under significant political pressure to renegotiate a better deal for the country as the economic environment changes. Increasingly, investors recognise that the root of such instability is often the existence of improperly negotiated or otherwise unsustainable contract terms, such as discounted payment terms or stabilisation clauses.[16] Far from increasing such incidents, transparent contract negotiation from the outset improves the quality of the agreement and maximises public trust in the negotiation process. Rather than create instability, contract transparency should contribute to more stable contracts in the long term.[17]

MYTH 4: **Contract transparency undermines the competitive position of a country and will discourage investment**

Reality: Several countries that have elected to publish extractives contracts, in some cases mandating disclosure via primary legislation, have not suffered a decline in investment.[18] A country benefitting from its natural resource wealth that has also put in place transparency measures to minimise corruption is actually a more attractive investment opportunity, particularly in light of increasing legislation holding corporations and their management accountable for their actions abroad. A transparent and competently administrated licensing process will engender a more

[D] See for example, Chapter 18 of the Hong Kong Stock Exchange Listing rules, which set out the information which must be publicly disclosed in a listing document by minerals companies: http://www.hkex.com.hk/eng/rulesreg/listrules/mbrules/documents/chapter_18.pdf

favourable investment climate in the long run.[19] Contract secrecy benefits only those seeking to profit unjustly from the proposed deals.

Conclusions

Secrecy has no place in oil, gas and mining contracts. Confidentiality clauses are common in extractives contracts between commercial counterparties (and are remarkably consistent industry-wide)[20] but in contracts between extractive companies and public bodies such as governments, national oil companies or state agencies, the relationship between the parties is fundamentally different. Most jurisdictions regard natural resources as the property of the nation; national governments should therefore be treated merely as custodians of assets owned collectively by the citizens they represent.[21] Oil, gas and mining contracts should always be made publicly available, unless the information contained in them falls within specific and tightly defined exemptions which are vetted by an independent party such as the Ugandan Parliament or, as a minimum, a Parliamentary Committee. Access to information contained in contracts involving governments is a matter of civic entitlement, not a question of the contracting parties' mutual consent.

Globally, there is increasing recognition of the benefits of transparency in public data and ever-greater momentum towards reform. This is particularly true of the extractive sector, with civil society groups, governments and parliamentarians contributing to a growing movement against opacity and towards improved governance.[22] Transparency of information empowers citizens and civil society groups to hold their governments accountable for responsible stewardship of national resources and reduces opportunities for corruption among public officials. It is essential that citizens are able to access and understand extractives contracts agreed by their governments in their names, in order to ensure that the public obtains the fullest benefit possible from exploitation of their nation's natural resource wealth.

Recommendations

It is time to end the damaging and misguided assumption that natural resource contracts should be confidential. The Government of Uganda should:

1. Facilitate public consultation on and parliamentary scrutiny of a draft form of the new model production sharing agreement, with parliamentary committees afforded sufficient time, resources and independence to properly evaluate the proposed text. The final text of the model contract should be widely publicly available.
2. Negotiate with companies and publish all existing extractives contracts and licences along with appendices and supplementary material including Environmental Impact Assessments and Development Plans, in hard and soft copy, with local translations where appropriate. With the three principal operators in Uganda having already indicated their willingness to disclose the production sharing agreements, the Government of Uganda should make these publicly available without delay.
3. Legislate to mandate the Minister responsible for petroleum to undertake full stakeholder consultation including engagement with communities affected by the proposed extractive activities before exploration or production licences are granted and ensuring that details of the deal are conveyed in a manner and format in which they are accessible to the population.
4. All future contracts should also be published immediately upon signature, including details of the ultimate beneficial ownership of contracting companies or shareholders.
5. Ensure that current requirements on politicians and public officials to declare any business interests are met and agree process to investigate and address potential conflicts of interest.

[1] The Extractive Industries Transparency Standard, 2013 revision, section 3.12 [online]. Available from: http://eiti.org/files/EITI%20STANDARD-screen-version.pdf (Accessed 1 August 2014)

[2] IMF Guide on Resource Revenue Transparency 2007, p.12-13 paragraph 24: "disclosure of individual agreements and contracts regarding production from a license or contract area" [online]. Available from: http://www.imf.org/external/np/pp/2007/eng/101907g.pdf (Accessed 1 August 2014)

[3] The World Bank Institute, Open Contracting: A Growing Global Movement[online]. Available from: http://wbi.worldbank.org/wbi/stories/open-contracting-growing-global-movement (Accessed 1 August 2014)

[4] Resource Contracts, *Countries*, [online]. Available from: http://www.resourcecontracts.org/about/countries.html (Accessed 16 May 2014).

Revenue Watch Institute, *The Future Global Norm: License and Contract Disclosure in Resource Extraction*, 5 February 2013 [online]. Available from: http://www.revenuewatch.org/news/blog/future-global-norm-license-and-contract-disclosure-resource-extraction (Accessed 16 May 2014).

Revenue Watch Institute, *Resource Governance Index: Reporting Practices* 5 May 2013 [online]. Available from: http://www.revenuewatch.org/rgi/reporting (Accessed 16 May 2014).

[5] Tullow Oil Plc, *Petroleum Agreements* [online], 19 May 2011. Available at: http://www.tullowoil.com/ghana/index.asp?pageid=62. (Accessed 16 May 2014).

Business News, *Ghana's Oil Contracts Made Public,* 28 April 2011 [online]. Available from: *http://www.ghanaweb.com/GhanaHomePage/NewsArchive/artikel.php?ID=207648.* (Accessed 16 May 2014).

[6] In the US, *Dodd-Frank Wall Street Reform and Consumer Protection Act, art, 1504;*

In the EU, *EU Accountancy and Transparency Directives,* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:182:0019:0076:EN:PDF and http://ec.europa.eu/internal_market/securities/docs/transparency/modifying-proposal/20111025-provisional-proposal_en.pdf (Accessed 1 August 2014)

[7] The Extractive Industries Transparency Initiative: Implementing EITI for Impact: a Handbook for Policy Makers and Stakeholders [online]. Available from: http://eiti.org/files/Implementing%20EITI%20for%20Impact_Handbook%20for%20Policy%20Makers%20and%20Stakeholders.pdf (Accessed 1 August 2014).

At the time of writing, 23 natural resource-rich countries comply with the EITI standard and implementation is underway in a further 16.

Global Witness Briefing: The benefits for Uganda of joining the emerging global transparency standard for extractive industry revenues, [online]. Available from: http://www.globalwitness.org/library/briefing-benefits-uganda-joining-emerging-global-transparency-standard-extractive-industry (Accessed 1 August 2014)

[8] Section6(3) of the Petroleum (Exploration, Development and Production) Act 2013 provides for the Minister responsible for petroleum activities to lay the model production sharing agreement before the Ugandan Parliament.

[9] Revenue Watch Institute, *"Contracts Confidential? Ending Secret Deals in the Extractive Industries"*, 2009, p.56 [online]. Available from: http://www.resourcegovernance.org/publications/contracts-confidential-ending-secret-deals-extractive-industries (Accessed 1 August 2014)

IMF Guide on Resource Revenue Transparency 2007, p12-13 paragraph 30 [online]. Available from: https://www.imf.org/external/np/fad/trans/guide.htm (Accessed 1 August 2014)

[10] Revenue Watch Institute, *"Contracts Confidential? Ending Secret Deals in the Extractive Industries"*, 2009, page 56 [online]. This report identified contract transparency legislation or practice in the following jurisdictions: Guinea; Niger; DRC; Congo-Brazzaville; Timor-Leste; Sao Tome and Principe; Liberia; USA; Iraq; Ghana; Denmark; Colombia; Bolivia; Peru; and Sierra Leone. Available from: http://www.resourcegovernance.org/publications/contracts-confidential-ending-secret-deals-extractive-industries (Accessed 1 August 2014)

Global Witness, *"Copper Bottomed? Bolstering the Aynak contract, Afghanistan's first major mining deal"*, p20, 2012 [online]. Available from: http://www.globalwitness.org/library/copper-bottomed-bolstering-aynak-contract-afghanistan%E2%80%99s-first-major-mining-deal (Accessed 1 August 2014)

[11] Under UK Listing Rule 10, for example, where a company whose shares are listed and are traded on the Main Market of the London Stock Exchange proposes a transaction of sufficient value to constitute a "Class 1" transaction, details of the proposed transaction must be disclosed via a regulated information service and the principal contracts made available for public inspection.

[12] Revenue Watch Institute, *"Contracts Confidential? Ending Secret Deals in the Extractive Industries"*, 2009, [online]. Available from: http://www.resourcegovernance.org/publications/contracts-confidential-ending-secret-deals-extractive-industries (Accessed 1 August 2014)

[13] Association of International Petroleum Negotiators [online]. Available from: https://www.aipn.org/mcvisitors.aspx (Accessed 1 August 2014)
[14] The Upstream consulting services provided by Wood Mackenzie, offers "advice with negotiations, finance raising and portfolio development, considering the current market and your competitors' positions" [online]. Available from: http://www.woodmacresearch.com/cgi-bin/wmprod/portal/energy/consultingMicrosite.jsp?title=Transaction+Support. (Accessed 1 August 2014) The Barrows Company website makes production sharing agreements from many jurisdictions available for purchase [online]. Available from: http://www.barrowscompany.com/PriceList/Price.do (Accessed 1 August 2014)
[15] Revenue Watch Institute, *"Contracts Confidential? Ending Secret Deals in the Extractive Industries"*, 2009, [online]. Available from: http://www.resourcegovernance.org/publications/contracts-confidential-ending-secret-deals-extractive-industries (Accessed 1 August 2014)
[16] For example, see response from F&C Asset Management Plc to the 2009 consultation by the Hong Kong Stock Exchange on new Listing Rule requirements for extractive companies [online]. *"Contractual arrangements that seek to, e.g., stabilize taxes or other charges at notably low levels relatively to comparable assets would serve as an indicator of heightened risk, insofar as these are increasingly understood to increase the possibility of renegotiation, particularly if underlying economic conditions change. Transparency regarding such terms will lessen the risk that unsustainable terms will be agreed in the first place, as well as deter improper, i.e. corrupt, behaviour in securing such agreements."* Available from: http://www.hkex.com.hk/eng/newsconsul/mktconsul/responses/documents/cp200909mr_in6.pdf (Accessed 1 August 2014)
[17] Revenue Watch Institute, *"Contracts Confidential? Ending Secret Deals in the Extractive Industries"*, 2009, p.42 [online]. Available from: http://www.resourcegovernance.org/publications/contracts-confidential-ending-secret-deals-extractive-industries (Accessed 1 August 2014)
[18] Revenue Watch Institute, *"Contracts Confidential? Ending Secret Deals in the Extractive Industries"*, 2009, [online]. Examples include Guinea; Niger; DRC; Congo-Brazzaville; Timor-Leste; Sao Tome and Principe; Liberia; USA; Iraq; Ghana; Denmark; Colombia; Bolivia; Peru; and Sierra Leone. Available from: http://www.resourcegovernance.org/publications/contracts-confidential-ending-secret-deals-extractive-industries (Accessed 1 August 2014).
[19] The disclosure by a consortium led by BP of contracts relating to the Baku-Tblisi-Ceyhan pipeline in 2003 provides an example of contract transparency positively informing the public debate as to the benefits and risks of a major infrastructure project.
[20] Revenue Watch Institute, *"Contracts Confidential? Ending Secret Deals in the Extractive Industries"*, 2009, [online]. Available from: http://www.resourcegovernance.org/publications/contracts-confidential-ending-secret-deals-extractive-industries (Accessed 1 August 2014)
[21] In Uganda: The Petroleum (Exploration, Development and Production) Act 2013 section 4.
[22] In addition, upon the entry into force of new transparency rules in the USA, pursuant to Rule 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act 2010 and the forthcoming EU Accounting and Transparency Directives, major extractive companies with listed securities will be required to publish details of royalty and other payments to governments for natural resources, putting much of the payments information in the relevant contracts into the public domain. It is estimated that, together, the EU and US rules will cover around 70% of the value of extractive industry companies that are listed on the world's most important stock exchanges. Global Witness' "*Summary of the new EU Accounting and Transparency Directives*" 29 April 2013, [online]. Available from: http://www.globalwitness.org/library/summary-new-eu-accounting-and-transparency-directives (Accessed 1 August 2014)