



global witness

A CITIZENS' CHECKLIST

Preventing corruption in the award of oil, gas and mining licenses

January 2012

Citizens and their representative community organisations need to be able to hold their governments accountable at the point at which natural resource licences and contracts are issued.

Based on the investigative findings in the Global Witness report *Rigged? The scramble for Africa's oil, gas and minerals*, and in discussion with civil society activists, academics, industry and international financial experts and others concerned with corruption issues, Global Witness has compiled a Citizens' Checklist which makes recommendations as to how citizens can hold their governments to account at the crucially important point when extractive companies negotiate for access to rights for natural resources.

The Checklist also forms a blueprint for the policies of governments in resource-rich countries and the international financial institutions that provide them with aid and technical assistance. It also sets out benchmarks that civil society groups in resource-rich countries can use to assess whether their own governments are doing all that they can to ensure transparency in the natural resource licencing process.

The key feature of the Checklist is a need for clear rules and effective institutions, openness and full public disclosure throughout the allocation of licences, combined with continuous oversight by independent third parties. The aim is to ensure that companies that win licences are qualified to do so, have done so honestly and fairly, do not represent the interests of corrupt officials and will actually meet the terms of their licences, rather than simply squatting on them with the aim of selling on the licences for an easy profit.

We recommend that citizens in countries rich in resources follow the principles of the Citizens' Checklist to push for the disclosure of the beneficial ownership of companies and to encourage governments to regulate for transparency in the licencing process.¹

What needs to happen before oil, gas and mineral licences are awarded to companies:

1. A country needs to have a long-term fiscal, contractual and regulatory strategy for managing its potential or available natural resource base to secure the greatest social and economic benefit for its current and future citizens, rather than handing out licences ad-hoc in response to short-term political pressures. To have public legitimacy, this strategy needs to be prepared openly and after public consultations.

¹ The aim is to incorporate international best practice and draw upon principles outlined in the Natural Resource Charter, a guide written by international experts on how governments and companies can ensure natural resources benefit a country's people.

The aims of the strategy should be to:

- a. gain full information on the country's potential or available resource base, so that the government can negotiate with companies from a well-informed position;
- b. evaluate when and if to develop a country's potential or available resource base;
- c. develop strategies so that the extractive sector is used as a catalyst for the economy to produce, for example, in-country processing and industries in related services;
- d. maximise the longer-term benefits to the country and its citizens, rather than placing undue weight on getting upfront payments by companies (such as signature bonuses) which usually amount to a small fraction of the value of an oil or mineral deposit; and
- e. apply the highest standards of social, environmental, health, safety and human rights protections and identify regions where extraction should not take place, so as to minimise the damage of resource extraction on local communities and public goods such as the environment.

2. The laws and public institutions to regulate manage and oversee the natural resource sector need to be in place before companies are granted access to the sector. These institutions need to be strong and independent enough to resist corruption and protect the public interest, so they should:

- a. have political support for adherence to the rule of law;
- b. have distinct roles that are clearly defined in law;
- c. have sufficient funds, expertise and regulatory power to fulfil their mandates; and
- d. be managed and independently audited in a transparent fashion.

3. The laws governing these public institutions should prevent conflicts of interest and forbid corruption. State-controlled extractive companies should not act as regulators because this concentration of power creates conflicts of interest and invites corruption.

4. The strategy, laws, institutions and policies on the extractive sector should be crafted through open debate and discussed and approved by the country's legislature. All resulting documentation should be easily available to the public in an accessible form.

5. Laws should have a strong bias in favour of promoting openness, preventing public officials from favouring companies in which they or their relatives and proxies may have a financial interest, and against confidentiality and secrecy.

The awarding of oil or mineral rights:

6. Open and competitive bidding, based on equal treatment of bidders and observable or verified bid variables, should be the norm for awarding oil, gas and mining rights. This rule should also be applied in cases where bidders offer investments in downstream industries, or in public infrastructure, as part of their bids. There should be dispensation for sole source contracts for legally pre-defined reasons, including proprietary skills. It should be acknowledged however, that competitive bidding might not work for small scale or artisanal mining.

7. In exceptional cases like small scale or artisanal mining where open bidding may not be feasible, the public agency responsible for the award of rights should be required by law to justify the exception to both the legislature and the public.

8. Countries should make survey work and geological conditions on oil, gas and mining rights available to bidders.

9. The same terms should be offered to all companies. No prospective bidder for the same licence should be offered preferential rights, access to information or other preferential treatment.

10. The terms governing contracts to be awarded should be as clear and simple as possible to ensure that the public can oversee and monitor the awarding of licences.

The terms should be set out in law or regulation to the greatest extent possible, because more complex contracts are harder to oversee and monitor. For example, model contracts that have been subject to a detailed legal review could be used as a template for negotiating bids during the allocation process.

11. Where negotiation is allowed for particular contract terms, the parameters for what can be negotiated should be published beforehand.

12. The public agency responsible for awarding oil, gas or mining rights should not allow any company to pre-qualify to bid for such rights, whether as a sole operator or a member of a consortium, until this agency has confirmed that the company has:

- a. published its ultimate beneficial ownership and audited accounts;
- b. proved its technical competence and financial capability to fulfil the terms of the contract;
- c. proved that it can obtain sufficient funds, from legitimate sources, to meet the terms of the contract;
- d. not previously been responsible for corruption, human rights abuses or the illegal destruction of the natural environment or any other criminal activities;
- e. identified the key personnel who will oversee its work under the contract; and
- f. identified the terms of negotiation for any foreseeable subcontract that is needed.

Any companies found to be involved in collusion with public officials to obtain a licence should be disqualified from the process.

13. The same rules should apply to all companies seeking to acquire oil, gas or mining rights, including domestic companies that take part in bidding under “local content” rules.

14. The public agency responsible for awarding oil, gas and mining rights should keep companies informed as to the physical security in the licence area.

15. The right to exploit, post-exploration phase, should be dependent on the completion and review of social and environmental impact assessments by an appropriately skilled and independent third party.

16. Companies that buy into oil, gas or mining rights that have already been acquired by other companies, for example via “farm-ins” or corporate mergers, should also be required to provide the information in points 12 a-f above.

17. The pre-qualification of bidders should be cross-checked by an independent third party to confirm that the above requirements are fully met.

18. Bidding should take place against a reasonable timetable which is disclosed to the public, and bidding outside such a timetable should not be allowed. In cases where unforeseen external

factors mean that an extension is reasonably necessary, the government should publicise this, and explain why such an extension is needed.

19. The fullest possible information should be published through broadcast and open media. The following information should be published:

- a. tender documents;
- b. lists of pre-qualified companies, accompanied by evidence of 12 a-f above;
- c. successful and unsuccessful bids;
- d. contracts, subcontracts, other agreements signed with extractive companies and their associated data;
- e. independent audit reports of financial transactions related to licencing and sales; and
- f. confirmation from the agency overseeing the award of rights (see Continuous Oversight, below) that all pre-qualified companies have complied with all the rules.

20. Companies should publish their payments to governments in an accessible database on a project-by-project basis, in each country where they have any oil, gas or mineral exploration, development, production, transport, refining, or marketing activity. A project is defined as one that originates at the level of the licence, production-sharing agreement, lease or other such agreement. Payments that originate at the country or entity level such as corporate income tax should be reported at that level.

21. Companies must make the above payments for oil and mining rights into bona-fide government accounts, which are linked to the national budget.

22. Countries' receipts of such payments should be independently audited and disclosed in an accessible database to the public in full, for example through the Extractive Industries Transparency Initiative (EITI).

23. To reduce the risk of bidders paying bribes to corrupt officials via third parties such as subcontractors, companies should be required to publicly disclose their relationships with any agents, consultants, local partners or other third parties that help them to win access to oil or mining rights. Disclosures should include:

- a. the identities of the ultimate beneficial owners of the third party and the nature of its expertise;
- b. the reasons why the company chose to work with the third party and the nature of the help that the company is receiving from it; and
- c. full details of any payments or other benefits provided to the third party by the company.

24. Contracts, licences and other agreements signed between companies and governments and between companies and third parties should be published in full, so the public can see that they are fair and have been honestly obtained. Redactions should only be allowed for specific information, for time-limited periods, in cases where companies or the government can demonstrate to the public that the need for confidentiality genuinely outweighs the public interest in disclosure.

25. There should be a comprehensive and regularly updated list, easily accessible to the public, of which companies hold which rights in each project, as defined in 20, in each country. This list should name all the partners in a licence and note any changes of ownership.

Continuous oversight:

26. There needs to be continuous oversight by an independent public agency of the award of rights and the implementation of contracts and subcontracts by companies. This is to ensure that bidding has been honest and fair and that companies are meeting the highest standards of transparency, public accountability, and social and environmental protection. This agency needs sufficient authority, resources and expertise to carry out its task and should make regular and timely public reports.

27. Independent civil society groups should be actively involved in the oversight of the oil, gas or mining sectors at all stages of the resource value chain, for example by working with public oversight agencies, or through their role in the multi-stakeholder groups of the EITI.

28. Countries, whether through the host government, extractive companies or local not-for-profit organisations, should also build capacity for independent civil society groups through offering training and workshops.

29. Countries rich in oil, gas or minerals should implement the EITI and their multi-stakeholder groups should agree to extend its remit to the allocation of exploration and exploitation rights, as has already happened in Nigeria and Liberia.

30. A country's legislature, oversight and law enforcement agencies should have a right of access to all information on the award of oil, gas and mining rights.

31. Credible allegations of corruption should automatically lead to independent investigation. Proven corruption should bring serious civil and criminal penalties for any companies, company employees and government officials who are implicated, including the cancellation of contracts and publication of findings. If local laws allow the ownership by a government official of a company participating in the bidding of oil, gas or mineral licencing, any government official found to be the ultimate beneficial owner of such a company must provide evidence that he or she is not using his or her position to benefit from the allocation of such licences.

32. All contracts and other agreements governing oil, gas and mining rights should explicitly forbid corrupt acts, human rights violations and environmental offences as defined in national and international law.

33. The shareholders of multinational extractive companies should insist that these companies adopt the highest ethical standards in their bidding for oil, gas and mining rights and ensure that their affiliates and local partners in resource-rich countries do the same.

Actions for home governments of extractive companies:

34. The home governments of multinational companies that seek access to oil, gas or mining rights should work to combat corruption by:

- a. using their fiscal and regulatory powers to ensure that such companies disclose their revenue payments to governments around the world, on a country-by-country and a project-by-project basis;
- b. implementing and consistently and proactively enforcing bribery laws that cover bribing another person or entity, being bribed (as the recipient of the bribe), bribing a foreign public official and failure to prevent bribery;
- c. implementing and consistently and proactively enforcing laws against the laundering of the proceeds of foreign corruption;
- d. establishing laws to protect whistleblowers;

- e. working with the international community to end secrecy over the ultimate beneficial ownership of extractive companies, especially in offshore jurisdictions, to prevent shell companies being used by corrupt officials;
- f. working to coordinate policy efforts, particularly through the G-20, to tighten regulation of illicit financial flows through international banks;
- g. refraining from actions that undermine transparency and accountability, such as pressuring resource-rich countries to give undue preference to “our” companies or blocking the renegotiation of contracts, in cases where there is evidence that the contracts were not legal under local law, for instance if they were obtained corruptly or included abnormally low market prices;
- h. providing independent civil society with a formal forum in which to express their findings, concerns, and recommendations related to the extractive sector; and
- i. endorsing and implementing the EITI and supporting extending the remit of the EITI to cover the allocation of oil, gas and mineral rights.

International actions to curb corruption:

35. International donors (governmental and private sector) should jointly evaluate whether development assistance is still needed, and for what timeframe, in light of the findings of point 1a.

36. International financial institutions and bilateral donors that work with resource rich countries should use their aid, loans and technical assistance to ensure that the practices listed in this Checklist are in place before these countries grant access to their oil, gas or mineral reserves.