

## INTERNATIONAL CONFERENCE ON EXTRACTIVE INDUSTRIES CONTRACTS

Oxfam America • Oxfam Novib • Revenue Watch Institute  
International Institute for Environment and Development • Global Witness  
Bank Information Center • Publish What You Pay – USA

### CONFERENCE REPORT

September 23, 2009

#### I. Introduction and Opening Remarks

**Ian Gary**, Senior Policy Advisor – Extractive Industries, Oxfam America

Oxfam America takes a rights-based approach on issues pertaining to extractive industry (EI) contracts, emphasizing access to information and government accountability. To date, much attention has been focused on revenue streams, and less on the underlying agreements. Oxfam America's "Right to Know, Right to Decide" campaign is focused on both payment and contract transparency.

At present, some countries disclose their contracts as a matter of course, like Peru. This year the President of Ghana also declared an intention to disclose extractive industry contracts, and the International Monetary Fund (IMF) has in some cases made contract disclosure a condition of debt relief. However, the current standard for contract disclosure at the International Finance Corporation (IFC) is quite weak, and not one contract has been disclosed as a result. Further, country validation under the Extractive Industry Transparency Initiative (EITI) does not require contract disclosure.

#### II. Framing Panel

**Moderator: Ian Gary**, Senior Policy Advisor – Extractive Industries, Oxfam America

##### **The Political, Social and Legal Context of Company-Host Government EI Agreements – Historical Trends, External Constraints and Latest Developments**

**Lou Wells**, Herbert F. Johnson Professor of International Management, Harvard Business School

Mr. Wells published *Negotiating Third World Mineral Agreements* in 1976 and many of the issues he raised then remain prevalent today. For example, then most governments were willing to trade off future earnings for large upfront payments, and this remains true today. Key challenges then include:

- Making efficient determinations about royalty vs. income tax questions (royalties are easier, but income taxes more likely to generate money over the long run),
- Addressing debt/equity questions,
- Transfer pricing (particularly difficult without open markets or reference prices),
- Equity ownership,
- Working provisions (tendency of companies to hold onto resources and not work them),
- Most favored company provisions,
- Negotiations (challenge of getting government agencies to agree prior to negotiation), and
- Lack of information on terms negotiated elsewhere.

While many of these problems remain, new challenges have also emerged. It has become much riskier to consider contracts 'living documents' due to the use of arbitration, which is very expensive and may

tie up resources for several years. Also, today more countries use bidding processes, technology has improved financial modeling, progressive taxation has moved a bit, and public pressure has increased.

### **Environmental, Social and Human Rights Implications of EI contracts**

**Peter Rosenblum**, Lieff, Cabraser, Heimann & Bernstein Clinical Professor in Human Rights, Columbia Law School

Many people in the NGO world began their work on contract transparency with the Chad-Cameroon pipeline project 10 years ago, but surprisingly no one ever asked for a copy of the oil contract. While this contract was available to Parliament and ostensibly public, it was impossible to access through Parliament and Exxon refused to release it. As a result, NGOs did not see a copy until much later, and when they did they were shocked at the broadness of the stabilization clauses in the agreement.

Two key issues pertaining to EI agreements include 1) governance arrangements in the country, and 2) fiscal details in the contract. The Democratic Republic of Congo has 60 different regulatory regimes, yet no functional ministries and a state enterprise with an uncertain future. In Liberia, the Mittal Steel contract has transfer pricing problems and is governed by laws that do not exist. In many cases, contracts Mr. Rosenblum has reviewed in Africa have not benefitted from an independent evaluation of minerals or the use of financial models by host governments. Huge gaps in access to information and competencies exist.

### **Commonalities and differences between the oil, gas and mineral sectors**

**John Gara**, Legal Advisor, Commonwealth Secretariat

Both large scale mining and petroleum operations are capital intensive, high risk, and require investors to wait substantial amounts of time to recover their costs. In both cases, companies expect that governments will grant licenses if they make a discovery. At the same time, the sectors differ in that:

- Governments generally allocate mining licenses on a first-come, first-served basis, while using a more competitive allocation methodology for petroleum contracts;
- Petroleum contracts tend to cover many more issues than mining contracts;
- Closure and rehabilitation provisions are especially critical in mining contracts (in the case of petroleum, decommissioning provisions must be put in place);
- For mining, the fiscal regime is often set on a national basis and for petroleum contracts often include almost all elements of the regime (with more variety in terms of the regime); and
- Mining sector fiscal regimes tend to mix income and profit taxes, license payments, and royalties, while petroleum contracts often entail production sharing.

On both sides, progressive tax regimes are important, even though simpler regimes may be easier to administer (although governments may have trouble calculating taxes if the regime is too complicated).

### **Contract Disclosure and Fiscal Transparency**

**Marco Cangiolo**, Division Chief, Public Financial Management Division, Fiscal Affairs Department, IMF

In 1998, the IMF produced a Fiscal Transparency Manual, and since then has encouraged EI transparency for all of its recipient countries. Transparency clearly matters for macrofiscal stabilization. The IMF provides capacity building support to a number of countries, but chooses to use conditionality sparingly, with much more emphasis on ex-ante conditionality. Ownership is critical, without it reforms will not survive. The IMF advises that contractual arrangements between government and public or private entities be made clearly and publicly accessible.

Challenges and limitations include government lack of capacity to analyze contracts. While contract disclosure is clearly the best practice, once disclosed with unfavorable terms it can be very difficult to renegotiate, so capacity building for government negotiations is key. Governments should think about funds which set aside resources for common benefit, as exist in Norway. EITI is a voluntary initiative, and as such can be short-lived if government changes and the effort dissipates.

#### **Questions/Comments from the Audience**

1. What are the panelists' reactions to claims that countries will diminish their bargaining power if they reveal their hands by publishing contracts?

Mr. Cangiana responded that contract disclosure can be useful for good contracts as a way to demonstrate best practice, and not all commercial terms need to be disclosed all the time. According to Mr. Wells, the argument against contract disclosure is "pure nonsense", since companies have access to these documents even if the public does not. Companies draw their draft terms from other agreements. Mr. Rosenblum responded that there are no real explanations for secrecy of contracts except for habit. In some cases corruption is an issue, but often governments are just embarrassed to reveal their incompetence. All confidentiality requirements should have an expiration date. Mr. Gara stated that governments may choose not to disclose not because contracts are bad, but because while the fiscal terms they got at the time may have been the best available, several years later their contracts may look bad. Also, companies sometimes convince governments not to disclose.

2. Are there any particular best practices in contracts on the hydrocarbon side that might translate to mining or vice versa?

Mr. Gara responded that there have been lessons learned on the kinds of terms that should be included in a contract. The problem with mining is that there are often briefcase mining companies that do not care much about public pressure. Countries need to have information about the viability of a company.

3. Do the panelists have suggestions on institutional ways that countries can increase their leverage in negotiations?

Mr. Cangiana responded that international conventions and mechanisms are difficult to enforce. Mr. Wells noted that governments almost never have copies of contracts negotiated by companies elsewhere, and an increased exchange of information among neighboring countries could be useful. NGOs also play a useful role in increasing government leverage. When Presidents know the issues and are willing to draw a line and reject a company proposal, this is also helpful.

4. It is important to remember that there are often numerous EI agreements, and it does not make sense to reveal all aspects of them. What specifically do we mean by contract disclosure?

Mr. Rosenblum responded that the grant of rights/taxing agreements are key. In addition, any kind of public financing, joint venture agreements, or primary agreements granting rights should be public.

### **III. Before the Contract – Bidding, Licensing and Negotiation**

**Moderator: Kyla Tienhaara**, Postdoctoral Researcher, Regulatory Institutions Network, Australian National University

**Raja Kaul**, Chief Technical Advisor, Negotiating and Regulating Investment Contracts, Africa Regional Bureau, UNDP

UNDP is collaborating with Revenue Watch Institute (RWI) and the International Senior Lawyers Project (ISLP) to provide technical assistance for large-scale investment projects. The project aims to enhance capacity to negotiate contracts, particularly EI contracts, in Liberia, Mozambique, Rwanda, Tanzania, and Sierra Leone. There are significant knowledge differences between companies and governments, and a lack of adequate human and financial resources when entering into negotiations. Access to financial modeling tools is particularly critical. This problem is most acute in post-conflict situations and one often finds that right below the highest levels you “fall off the cliff” and there is almost no capacity to handle these contracts. Further, while companies are able to rotate experts as needs arise, governments are not able to compete; even the technical people tend to be generalists.

Governments need better policy and legal frameworks, mechanisms for enhanced regional coordination, and increased local capacity. Managing risk is a growing focus in the governments of developing countries, as they work to build consensus, manage political realities like corruption, and develop mechanisms to address potential threats (such as conflict of interest laws). Moving forward, the focus must be on first-rate regulatory reform, providing governments with tools like standard contracts, and thinking about how we engage governments and companies to find solutions to challenges.

**Corinna Gilfillan**, Head of U.S. Office, Global Witness

Global Witness research has looked mostly at major oil producers in the Gulf of Guinea, though some findings apply to mining as well. They have noted an increase in competitive bidding, but have noted four major unresolved issues nonetheless:

- Lack of clear and simple rules – big companies like complicated contracts because it is easier to hide corrupt payments, and in some cases rules are not enforced;
- Lack of transparency in bidding processes – law enforcement authorities need to make sure officials or their cronies do not have a stake in bidding companies;
- Bribery by oil companies – Energy and Security Through Transparency bill just introduced in Senate is key, and Justice Department should take the broadest possible view of the expression ‘something of value’ in the Corrupt Foreign Practices Act; and
- Lack of third party oversight – there should be independent public agencies to oversee awards of oil, gas, and mining rights, and civil society should have access to information and be able to operate freely and without harassment.

In terms of what can be done, the industry should learn to live with simpler contracts, and the U.S. can be an important standard setter in this respect. International Financial Institutions can promote good practices, such as contract transparency. Countries should hold open, competitive bidding processes with third party oversight. Global Witness developed a draft Citizen’s Checklist and is seeking comment.

**Joe Bell**, Partner, Hogan and Hartson / International Senior Lawyers Project

“Contracts are politics, policy, and problems.” They are very political, and there are immediate benefits to governments if they can accelerate the process. The problem is that over the long run governments could end up with bad partners and/or poor fiscal results. One key question is how much should be put into contracts and how much into law – countries are generally better off with more legislation. Truly competitive bidding can reduce the information deficits that lead to unfair contracts, as can government control of contract drafting.

Countries are better off when working with companies with financial and technical capacity, as well as a reputation to protect. Companies are often in countries for the long-term, and therefore have an interest in stability and local development. For this reason, worthwhile social obligations in contracts may be easier to get than we would imagine. These social obligations should be incorporated into growth models, not just in individual contracts.

#### **Questions/Comments from the Audience**

1. Issues like accessibility, nondiscrimination and participation are critical, and there is a serious gender imbalance regarding risks and benefits distribution in the extractive industries. What is the gender perspective from the point of contract negotiation monitoring and benefit distribution?

Mr. Kaul responded that the best way to reduce discrimination (both gender and other types of discrimination) would be to write into Requests for Proposal some policy requirements (gender or community related). It is important that government links economic and policy goals with contracting as early as the bidding process, as well as later in the negotiation. Mr. Bell noted that social impact statements should also take into account gender impacts.

2. Corruption can be a major challenge to legislative reform. Is there a global framework to ensure CSO participation in these processes?

Ms. Gilfillan responded that monitoring payments is a key CSO role, and that Global Witness would like to see a global standard for this.

3. Chinese investment in Cambodia has increased, and many governments find this investment appealing as they prefer lack of conditionality, which Chinese companies are willing to accommodate. Is the multinational company argument that they fear competition with Chinese companies a fair argument or merely an excuse?

Mr. Bell noted that there is a benefit to having a new source of competitive capital and resources, although the entry of Chinese companies into the market has also brought its own set of problems. Chinese companies do not often incorporate morality into their economic ventures, and citizens will have to continue pressuring their governments on this issue.

#### **IV. Update on US Congressional Action on Extractive Industries Transparency**

**Nilmini Rubin**, Senior Professional Staff Member, Senate Foreign Relations Committee

Ms. Rubin announced the introduction of the Energy Security Through Transparency Bill by Senators Lugar, Cardin, Schumer, Wicker, and Feingold this morning.

#### **V. Confidentiality and Transparency of Contracts**

**Moderator:** Sarah Pray, Coordinator, Publish What You Pay USA

**Susan Maples**, Revenue Watch Fellow, Columbia Law School Human Rights Institute

There is a strong rights-based argument for contract transparency in any agreement where a government is a party, and a growing amount of domestic law and freedom of information law support this. Transparency makes gross irregularities apparent, responds to information asymmetries, and increases stability – a particular concern for companies given that the natural resource sector sees Foreign Direct Investment contracts renegotiated more than any other sector.

The two arguments generally raised against contract transparency are 1) that contracts often have confidentiality clauses, and 2) that the information in the contract is commercially sensitive. However, Ms. Maple's report "[Contracts Confidential: Ending Secret Deals in the Extractive Industries](#)" finds that confidentiality clauses tend to be very broad in reach and the exceptions often allow for disclosure if both parties involved agree or if required by law. The 'commercial sensitivity' argument has no weight. Ms. Maple's research illustrates that very little information could actually be considered commercially sensitive, and this information is not generally included in the kinds of contracts that need to be disclosed. It is important to weigh the public benefit of disclosure against potential harm that governments or companies claim would result if they made agreements public.

**Curtis Frasier**, General Counsel, Upstream Americas, Shell

People tend to believe that companies like Shell have more power than they actually do – Shell accounts for just 2% of world oil production. Not all countries are democratic, and Shell tries to respect the way countries run their governments. Because mineral extraction is high-risk, the companies that stay in business are the ones that do the best risk analysis. Taking corruption and stability into account is very important for Shell. If government can change tax rates down the road, then you have to price that risk into your analysis. Stabilization clauses can be an affront to human rights, but not all are. Countries get advantages in terms of stability in choosing certain companies over others. EITI is a good example of multilateral action. Ultimately, "everyone wins with transparency."

**Jacqueline Weaver**, Prof. of Law, Univ. of Houston Law Center

Secrecy is a habit in the industry. The Association of International Petroleum Negotiators (AIPN) compiles numerous model contracts, and the most popular model contract is on confidentiality. There should be more examination into why information is kept confidential.

Governments should be doing their homework prior to negotiations, there is a vast amount of information out there and a limited world of what you can request. Ms. Weaver discussed a case she had worked on in Uganda where she was able to make a correct guess at the government take based just on the characteristics of the country (such as political risk, industry experience, etc.).

There are certain issues that will only subtly enter contracts which are very relevant to environmental and social rights. It is extremely unlikely that details of corporate social responsibility projects would be available to the public or even outlined in the contract. Interestingly, Shell proposed a provision to AIPN that governments and contractors acknowledge the mutual benefit of early engagement with stakeholders and social assessment plans, but it did not pass. A big issue in Uganda is whether social expenses can be included in cost recovery, and companies there operate with little government support.

#### **Questions/Comments from the Audience**

1. Rosalind Kainyah (Vice President for External Affairs and Corporate Social Responsibility, Tullow Oil) – Yes, they are concerned about the costs of the projects they are working on in certain areas of Africa. The demands are high, but as long as they are there they will respond to social demands, and worry about cost recovery later. They respect the decision of the host government regarding whether their contract is made public.

2. Academics should cooperate on monetizing corporate social responsibility initiatives. The IFC has done some work on this, but it would be good to have figures to bring to political risk insurers, and have premiums be adjusted as a result of certain programs.

Ms. Maples agrees and believes this would make contract transparency less scary for companies.

3. A fundamental approach has been to emphasize the law and discourage emphasis on contracts. The focus on agreements has been to encourage government to use them for benefit sharing (managing benefits and risks). In Papua New Guinea, a certain portion of revenues goes back to the local community to support women's projects.

Mr. Frasier agreed that laws are better, but warned that laws can also be changed (and for this reason companies use stabilization clauses). Ms. Weaver suggested that the Papua New Guinea contract mentioned be reviewed as a possible best practice example.

4. Would it be possible to sue a U.S. company in U.S. courts to get access to their contracts?

Ms. Maples responded that you generally have to go to the host government to get the contracts, and it is rare for companies to pressure governments to release the contract. Ms. Weaver suggested that this is an excellent topic for future research, and that she will pass it on to her students.

5. What reforms would panelists like to see in the U.S.?

Ms. Maples noted that the U.S. should stop pushing for special deals for our companies abroad. Mr. Frasier finds it problematic that in the U.S. the courts sometimes intervene to halt production late in the process as a result of a flaw caused not by the company, but by an agency. Ms. Weaver does not feel that the U.S. system needs much change.

6. At what phase of project development should communities become engaged and get consent?

Ms. Maples stated that community consultation should happen well before contract negotiation

7. Is Corporate Social Responsibility (CSR) a contractual requirement?

Ms. Maples explained that contracts sometimes include a dollar commitment to CSR activities, but do not contain specific content.

8. How would you envision contract transparency occurring?

Ms. Maples suggested that individual countries increasingly put contract transparency in their EITI bills, following the example of Liberia. We should educate civil society, reduce paranoia about transparency, and work together to promote transparency.

## VI. Country Cases 1 – Liberia / Ghana

**Moderator: Lorenzo Cotula**, Senior Researcher - Law and Sustainable Development, Natural Resources, International Institute for Environment and Development

### Ghana

**Dominic Ayine**, Executive Director, Center for Public Interest Law (CEPIL) / Faculty Member, University of Ghana Law School

Negotiations are a crucial part of the contracts process, and Ghana tends to underutilize its expertise in the sector. The problem is that the public sector is unable to attract needed skills and expertise to

facilitate beneficial negotiations. Decisions about who represents the government in a negotiation may be politically motivated, and talented individuals are often drawn to the private sector.

Another challenge facing Ghana pertains to monitoring and enforcement. Some agencies responsible for monitoring are not even at the negotiation table, such as the Environmental Protection Agency (EPA). Environmental Impact Assessments are extremely complex, making it difficult for communities to act as monitors. Third party access to information is problematic, and unconventional means are required to obtain contracts. The International Financial Institutions assist countries but sometimes make welfare reducing prescriptions, such as unreasonably low corporate taxes. There is an opportunity for change in Ghana, thanks to its Constitution and a vibrant democracy.

**Bishop Akolgo**, Executive Director, Integrated Social Development Centre – ISODEC - Ghana

The government aims to extract as much as possible, create livelihoods, and reconcile health, safety and environmental concerns; while EI companies want to secure the best possible investment with the lowest risk. CSOs have oversight responsibility, and want to ensure that both agents fulfill their mandates. Ghana would like to build competencies and skills in EI that can later be translated to other sectors, and so must create the correct framework to attract and maintain proper expertise. During recent contract negotiations, CSOs faced more opposition from government than companies. CSOs worked closely with the legislature to underscore the need to think about interests beyond immediate revenue. Civil society needs superior information to exercise their oversight role.

## **Liberia**

**Franklin Siakor**, Senator for Bong County, National Legislature, Liberia

Not all concession agreements are politically neutral, some have political and security implications. Often, communities are not involved in the negotiation process and are only engaged when contracts have already been finalized. Contracts in Liberia are very complex, and the legislature is inadequately trained and staffed (they use students to meet their research needs). At the same time, legislators receive considerable pressure from jobless citizens to sign agreements.

In the case of the Mittal agreement signed with the transitional government, the government received technical assistance and they are happy with the results, although there are a few areas that might be improved. The Firestone agreement, on the other hand, did not take into account environmental issues, and one community now cannot drink the water due to the pollution caused by Firestone waste (Firestone claims they are not responsible but it was never like that before). With regard to the American Liberian Mineral Development agreement, originally signed by Charles Taylor, one of the President's closest allies and brother are both on the board and the CEO is a former U.S. State Department official, and as a result the legislature has been unable to complete a full contract review.

**Elfrieda Tamba**, Deputy Minister of Finance, Liberia

There have been no challenges to the bidding processes in the oil and mining sectors; they have both been competitive. The new petroleum fiscal regime will be a challenge in the future, as will harmonizing the new revenue code with the mining law. Additional challenges include a lack of technical capacity to assist with financial modeling prior to contracts, lack of comparative data, and lack of effective monitoring. EITI is helping with monitoring but much more can be done.



They have a model agreement developed with international assistance, and the IMF has offered support for the formulation of the new fiscal regime for petroleum and mining. The new law features a resource rent tax. Further, they just concluded an agreement with the World Bank aimed at strengthening negotiation capacity, and are working with ECOWAS to harmonize fiscal regimes across the region. There is a need to go beyond Publish What You Pay, to Publish What You *Should Have* Paid.

### **Questions/Comments from the Audience**

1. What specifically was in the new concession agreement with Firestone? Was there a realistic fear that Firestone would leave the country if the government held out?

Mr. Siakor explained that the new agreement did bring several benefits, including improved working conditions and child labor considerations, but issues pertaining to protection forces and environmental pollution were not pinned down in the contract. Politicians are afraid of Firestone since the former President was a lawyer for the company and Firestone is the second largest company in the country. According to Ms. Tamba, under the new Firestone contract, Firestone must comply with all regulations and the EPA will enforce this. Also, there are improvements in the new contract with respect to health and housing considerations.

2. Would like to hear more about the victory of taking a government to court.

Mr. Ayine explained that a Canadian mining subsidiary that had been operating for 10 years in the Ashanti regime decided it was generating a loss, and convinced a court judge to issue a winding up order. The international directors left within 2 weeks without restoring the site. CEPIL successfully took the company and EPA to court because the government has an obligation to protect the environment.

3. What did countries do last year when mineral prices dropped if they did not receive an adequate number of bids?

Mr. Akolgo responded that if you issue a tender and the market changes such that you then do not get the right number of companies to compete, the best option is to cancel the bid.

4. For the panelists from Liberia, now that the government has begun gathering contracts, do you intend to publish these contracts?

Ms. Tamba responded that the contracts have not been published, although she believes the Mittal contract has been at one time. As a government, they do not object to the publication of contracts.

5. Do the panelists have any ideas on how to insulate civil servants from institutional capture? In Ghana, President Mills said earlier this year he will disclose all agreements, do the panelists have an update on where that stands now?

With regard to reducing institutional capture, Ms. Tamba said that in Liberia they stipulated that the sector ministry could not chair the negotiation process. However, she believes they could go further by requiring that the sector ministry not play an active role in the technical committee. Mr. Akolgo noted that those doing regulation should be secured of tenure and not salaried by the Ministry of Energy.

With regard to the question of contract transparency in Ghana, Mr. Ayine noted that the Ghana National Petroleum Corporation did post non-confidential summaries of agreements on their website as a result of the President's commitment, but that they may not be that useful in terms of transparency. Mr. Akolgo noted that his government contacts have assured him that they are scanning the contracts and they will all go online, with commercially sensitive information removed if companies object.

6. What are the opinions of the panelists on stabilization clauses?

Ms. Tamba replied that in Liberia the new mining law enables the government to stabilize taxes for a limited period of time (15 years). Mr. Ayine replied that in Ghana the Petroleum Production & Exploration Law does not provide for entry into stabilization clauses, but the mining law does include a provision that allows for stability agreements, and most companies have entered into these agreements. In Ghana, stability clauses do not violate human rights because rights are protected by the Constitution.

7. The ECOWAS regional mining directive included contract disclosure clauses; what is the current status of this code?

Ms. Tamba replied that the ECOWAS process is ongoing but not consummated; they continue to receive World Bank support for this process. The objective is to ensure that all countries receive similar royalties and are not taken advantage of by companies. Mr. Akolgo noted that in Ghana they are lobbying for the adoption of ECOWAS, but it is important to keep in mind that fiscal regimes will vary. It will be important to share information on the behavior of companies among countries.

## VII. Country Cases 2 – Peru

**Moderator: Carlos Monge**, Regional Coordinator for Latin America, Revenue Watch Institute

This issue is particularly relevant in Peru as this year one cabinet collapsed due to an oil contract corruption scandal, and another resigned as a result of an indigenous Amazonian strike fueled in part by EI growth in the Amazon. Currently, the contracts from the Camisea gas project are being debated.

**Juan Aristi**, Graduate Associate, RWI/Columbia Business School MBA 2009

Mr. Aristi participated in a review of Peru's hydrocarbon contracts since 2003, Hydrocarbon Law, new model contract, and Perupetro agency. He found that Peru has a fast, efficient, and flexible framework for contract preparation. However, Perupetro maintains responsibility both for promoting and for negotiating contracts, which represents a conflict of interest. In general, Peru's system is very pro-investor, but also with a high degree of transparency. Peru generally uses a 20% royalty with a 50% income tax system, and companies bid on additional royalties. Prior to 2007, contracts were negotiated without a bidding process. Once the government began using bidding processes, additional royalties of 5-10% began to emerge. Contracts signed with no additional royalties have only a 30-40% government take at today's prices, which is on the low end as compared to international standards.

**Cesar Gamboa**, President, DAR Derecho, Ambiente y Recursos Naturales

Many of Peru's 55 million hectares of oil and gas concessions overlap with indigenous lands, and 16 overlap with natural protected areas. Resource use decisions pertaining to these lands have been made without public debate or consultation with affected populations. The government should evaluate the compatibility of hydrocarbon production and natural protected areas prior to contract approval, and promote community based monitoring of extractive activities.

With the growth of the national economy and increased energy consumption, there is a pressing need to satisfy the national energy demand. Peru LNG (a large gas project) affects Peruvian energy security as it calls for the exportation of large quantities of gas, and the government is promoting increased exploration in previously deemed no-go zones as a result. Peru lacks an energy policy to guide natural resource use over the long-term. Further, the legislature has no control over contracts signed by the executive power. To remedy this, contracts should be submitted to Congress before approval.

**Humberto Campodonico**, Engineer/Economist, Associate Researcher, Centro de Estudios y Promoción del Desarrollo, DESCO, Columnist, *La Republica*

The President has made it a priority to ensure that Peru has sufficient natural gas to meet internal demand. In light of energy shortages in Peru, the government is renegotiating the Camisea contracts (Blocks 88 and 56). The government originally negotiated Block 88 in 2000 (considered a good contract) and Block 56 in 2004 (calling for gas export and considered a bad contract). After the negotiation of these contracts, the government changed the law requiring a 20 year “permanent” horizon guarantee of gas to the national market (meaning the 20 years keep running with each additional year) to a “flat” horizon. Also, the government renegotiated the Block 88 contract in order to allow gas export from the block. Peru lacks contract stability and a long-term energy plan. Contracts should be pre-published and responsibilities for negotiating contracts clarified.

### **Questions/Comments from Audience**

1. In some countries gas prices are much lower in-country, so smugglers smuggle the gas out to earn additional funds. Is this the case in Peru?

Mr. Campodonico responded that natural gas does not get smuggled. Also, there is no unified international market for natural gas in Latin America, prices vary by country and are relatively low within Peru. At present, Peru is not conducting long-term planning.

2. Is there a role for affected communities in ongoing negotiations and the shaping of contracts?

Mr. Aristi responded that community issues are mentioned in contracts, but with very vague language. As long as Perupetro is responsible for policing this issue, changes is unlikely. According to Mr. Gamboa, affected communities have no role in the contract or monitoring processes. Further, the government does not provide them assistance in developing compensation schemes.

3. How beneficial has contract transparency been in Peru?

Mr. Aristi responded that although contract transparency is not a silver bullet, without it the type of comparative study he conducted would be impossible.

4. What are the sorts of actions being taken by government at present? Is the government making promises related to institutional reforms, negotiations of Camisea contracts, and/or improving rights of communities?

According to Mr. Aristi, nothing has changed in terms of the statute of Perupetro. Strengthening the Ministry of Environment would be very useful. Mr. Gamboa noted that the new Ministry of Environment should have the power to give environmental licenses for oil, gas, and mining activities, which it does not currently.

5. How do panelists envision a healthy process in which all parties come together to create consensus building?

Mr. Gamboa noted that following the violence earlier this year there is now a space for dialogue between government and indigenous organizations. Key issues that need to be resolved include 1) how to implement consultation and planning in the Amazon and Andes, and 2) how to protect some areas key to biodiversity conservation.

## VIII. Wrap Up – Developing an Agenda for Reform

**Ian Gary**, Senior Policy Advisor – Extractive Industries, Oxfam America

Thanks to everyone for their participation in the event. Some major issues requiring continued examination include: how much regulation to include in legal frameworks versus contracts, improving technical capacity and reducing corruption, what exactly is being stabilized in contracts clauses, and what information needs to be kept secret.

### Final Comments from the Audience

- Renewable natural resources like marine fisheries and biofuel plantations should also be considered, drawing EI lessons learned on how agreements are made.
- We must work on defending what has already been achieved, especially in Peru.
- Many issues NGOs are identifying in the discussion of mining contracts (such as closure provisions and environmental protection efforts) are not actually decided during the negotiations of a contract, but rather once a mine has been explored and companies are obtaining their mining license. These later decisions should also be disclosed.
- A key issue not yet addressed is that of examining contracts along the full supply chain.
- A gap exists when we talk about transparency and access of information issues, as often CSOs working on extractive industries are more interested in environmental issues. It is important to think about building tools to increase understanding along the full value chain.
- It is important to consider what we want as the ultimate objective of transparency – that natural resources are used for the benefit of the people.
- The case of Bolivia is a special situation, as companies give information to the national oil company, but it remains difficult for CSOs to access information.
- The report should cover the issue of a scientific consensus on environmental impacts and the involvement of communities, as discussed in *Street Science* by Jason Coburn. Communities are very adept at recognizing impacts.
- Access to environmental impact assessments online has been very helpful in Ghana.
- Even when there is no stability clause in a contract, there are regulatory requirements that there be legal and regulatory stability. Depending on the context, we might be better off defining and refining stability clauses than rejecting them.
- In Cambodia, it is very important that contracts be disclosed, and that the government sees that transparency can in fact increase competitiveness in the international market. It would be wonderful if this kind of event could be replicated in Cambodia (which is beginning in the oil and mining sectors), where the government sees a weak legal framework as an incentive for foreign investors.
- In many African countries, the law has provisions protecting community rights, but in the contracts there are no provisions forcing companies to comply with these. Regarding environmental and social impact assessments, they can be laid out in the original contracts but there should be specific provisions on their continuation once the project is underway. Access to justice is another key issue because often victims are unable to bring cases forward in any real way (national vs. international courts).

**Susan Maples**, Revenue Watch Fellow, Columbia Law School Human Rights Institute

We clearly need a second international conference to discuss these issues further. Thanks again to all those who have participated today, and a special thanks to all of the cosponsors.

## Participant List

<b>Participant</b>	<b>Organization</b>	<b>Title</b>
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