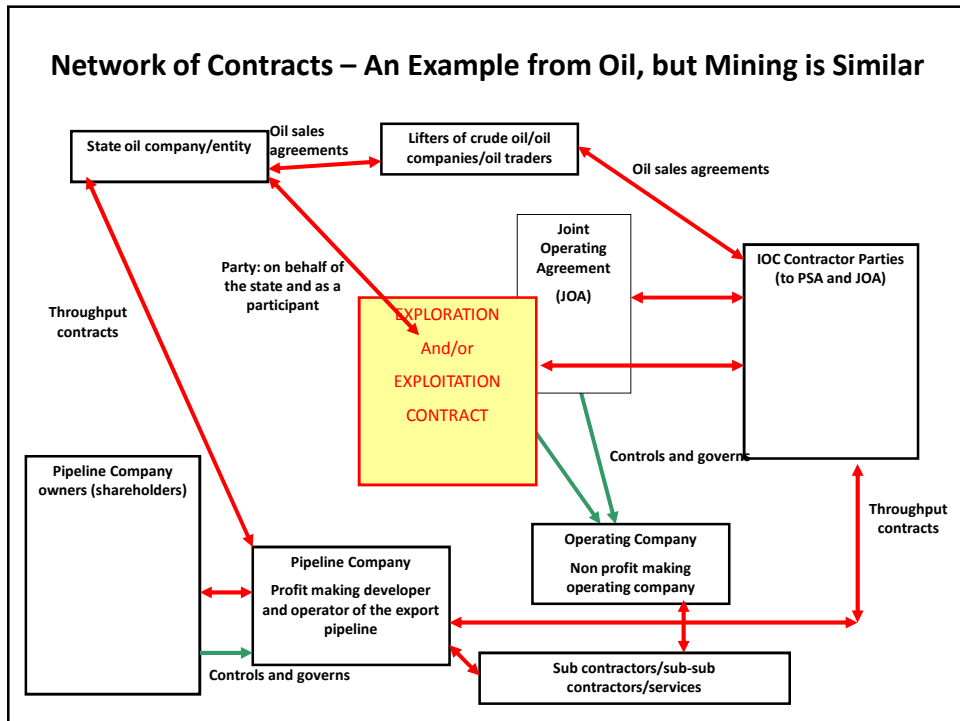


Accessing and Scrutinizing Contracts

Susan Maples

Regional Conference on Oil, Gas and Mining
May 13, 2010
Dar es Salaam



Discussion

- Why are contracts important for you?
- What is your country's policy on contract disclosure?
- If you have tried to secure release of contracts, why have you done so?
- Were you successful in gaining access to contracts? Was it through official legal mechanisms? What barriers did you encounter?

Agenda

- **Part One:** Legal Framework Review on Laws, Regulations, and Contracts
- **Part Two:** Essential Contracts Basics
- **Part Three:** Presentation of Preliminary Findings on Parliamentary Access to Contracts

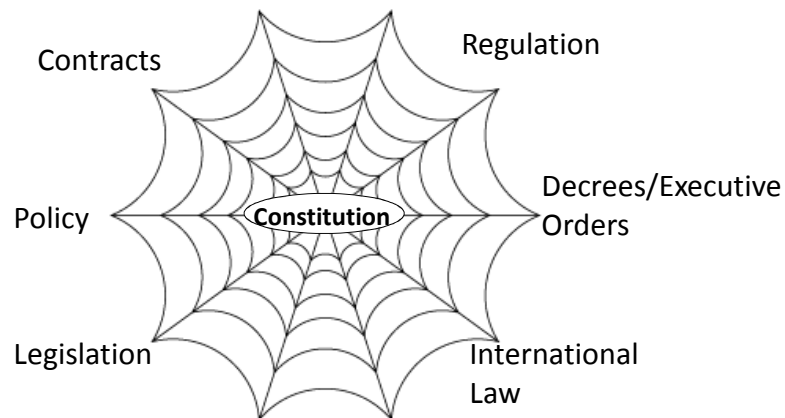
PART ONE
**Legal Framework: Laws, Regulations,
Contracts**

The Structure of Law, and Why it
Matters for Lawmakers

Key Objectives

- Understanding the “Web” of Legal Instruments and Legal Theory about How they should work
- Dispelling Myths – how legal instruments often function in the real world

“The Web”



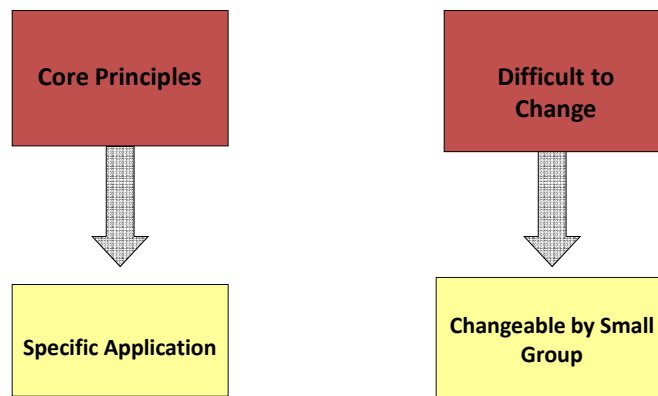
Legal Instruments: A Briefing

- **CONSTITUTION**
 - Establishes Basic Structures of Government
 - Rights of citizens
 - Durable & Reigns Supreme
- **LEGISLATION/STATUTES**
 - Lays out a set of rights and/or obligations on a particular subject matter, and tells parties what they must, can, can't do
- **REGULATIONS**
 - Establish Systems and Procedures that Operationalize Statutory Requirements
 - Typically Established by Executive Bodies (*e.g.*, Ministries, Regulatory Agencies)

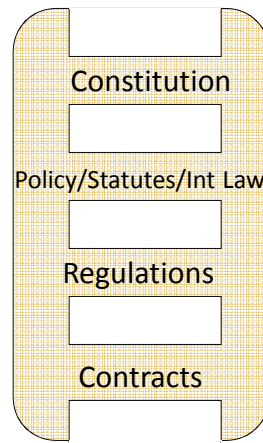
Contracts

- Private Law – Agreement between two Parties, Exercising Free Will, to Bind One Another
- Governments Can Be Parties
- More Specific than Laws – Binding on Named Parties Only, though Thirds Party Rights are Implicated
- Contain Provisions that Say How Obligations will End

In an Ideal World....

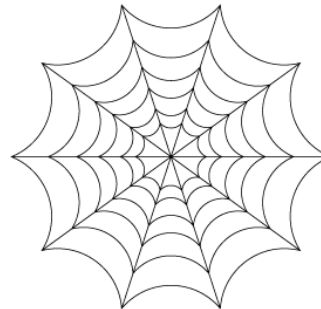


Ideal World, Continued: The Ladder



Reality

- Ideal World is Not the One We Live In, so Sometimes Key Rights and Obligations are Put Into Contracts that May Not Track with What is Prescribed by Law
- Some Reasons:
 - Law is Outdated or Inappropriate for Current Economic Realities
 - Special Circumstances of a Particular Situation or Contract Require Deviation from Standard Legal Regime
 - Corruption



Statutes and Contracts: A Complex Dance



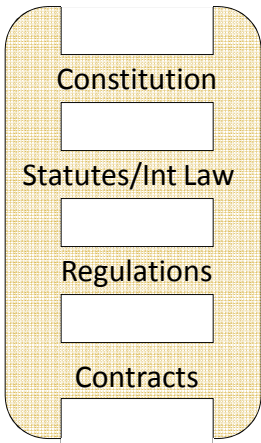
Statutes and Contracts

- Theory: Statute is Law of the Land, Trumps Contracts
- Practice (Sometimes): Contracts will Try to Opt out of Statutes, or Exempt Themselves from Legislative Changes
- Contract Language Often Refers to Statutes, and Vice Versa
- Balancing Act: Where More is Established in Law, Less is Left to Contracts

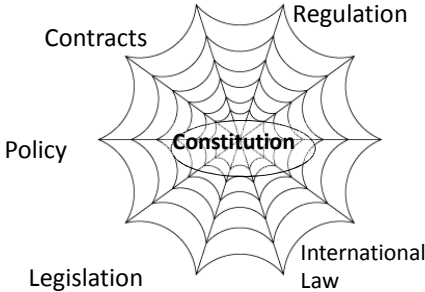
Statutes and Contracts: Examples

Law Explicitly Controls Contract	"Licences granted under this section shall be in the prescribed form and shall be subject to the prescribed terms and conditions ..."	Nigeria Petroleum Act, 3(2)
Law Explicitly Allows Contract Variability	"...or, where no form is prescribed or no terms or conditions are prescribed, in such form or subject to such terms and conditions as may be decided or imposed by the Minister."	Nigeria Petroleum Act, 3(2)
Contract Explicitly Acquiesces to Law	"The chargeable income of Contractor is determined under section 2 of the Petroleum Income Tax Law ..."	Ghana Model Petroleum Agreement, 10.2
Contract Explicitly Deviates from Law	"The Concessionaire shall during the first 25 Years be exempt from the Surtax on high yield projects imposed by [new Income Tax Law]."	Liberia-China Union Contract, 14.3(b)

Conclusion: the world is not ideal



Vs.



Fiscal Provisions: The Example of Oil In Ghana

Fiscal Provision	Where Located
Income Tax Rate	Petroleum Income Tax Law, Contract
Rules on Deduction of Costs	Petroleum Income Tax Law, Contract
Procedure for Accounting and Filing Taxes	Petroleum Income Tax Law, Internal Revenue Act, Contract, Regulations
Royalty Rate	Contract
Royalty Base and Procedures	Contract, Petroleum Exploration and Production Law, Regulations
Additional Oil Entitlement	Contract (also implicates Petroleum Income Tax Law)
Withholding Tax	Petroleum Income Tax Law, Contract, Revenue Act, International Treaties
Government Equity	Contract, Petroleum Exploration and Production Law, GNPC Law

Operation of the Mine/Oil Field: Example of Sierra Rutile

Provision	Where Located
Work Programme/Feasibility Studies	Mines & Minerals Decree, Mines & Minerals Regulations, Contract
Prospecting/Exploration/Mining Licenses	Decree, Regulations, Contract
Rights to Additional Minerals	Decree, Regulations, Contract
Use of Water on or Adjacent to Concession Area	Decree, Regulations (dredging), Contract
Construction of Infrastructure	Decree, Regulations, Contract
Training of Local Workers	Decree, Regulations, Contract
Reporting Requirements	Decree, Regulations, Contract
Surrender of Lands at End of License	Decree, Contract

Environmental Rules: Example of Petroleum in Tanzania

Environmental Provision	Where Located
Environmental Impact Assessments	National Energy Policy, Contract, Regulations
Requirement to Minimize Waste	National Energy Policy, Petroleum Act, Contract, Regulations
Submission of Plans to Limit Environmental Risk	Petroleum Act, Contract, Regulations
Clean-Up	Petroleum Act, Contract, Regulations
Compensation for Environmental Harms	Petroleum Act, Contract, Regulations

Where are we? Agenda Reminder

- **Part One:** Legal Framework Review on Laws, Regulations, and Contracts
- **MAIN MESSAGE: in theory legal instruments interact in a clear way but the reality is a bit messier, so keep an eye on contracts because they can actually contain crucial information for monitoring that you might expect to see in other legal instruments.**
- *Part Two: Essential Contracts Basics*
- **Part Three:** Presentation of Preliminary Findings on Parliamentary Access to Contracts

PART TWO

Essential Contracts Basics

An exceedingly brief introduction to the purpose, scope, and common issues addressed in contracts...and why they deserve your attention

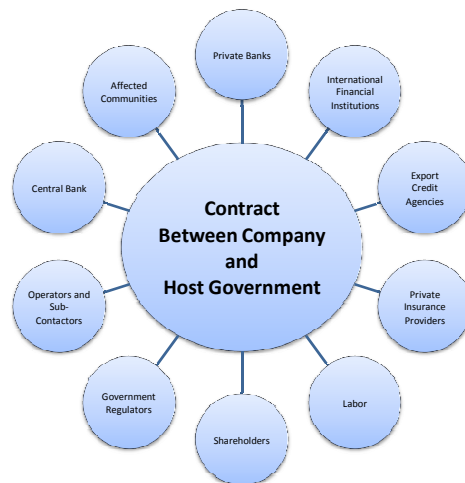
Key Objectives

- Explain the different types of contracts...and whether the type of contract matters
- Gain familiarity with the structure of contracts and contract language
- Why contracts are important for parliamentarians: spotting key issues in contracts that you may want to raise

Primary Contracts...and do they matter?

- Concession Agreement
- Production Sharing Agreement (PSA/PSC)
- Joint Venture (JV)
- Service Agreement

*The Primary Contract is
“The Heart of the Deal”*



What is generally in a host government agreement or “primary contract”?

(a) Recitals/Preamble

The beginning of the contract typically describes the parties involved, the effective date, and the general purpose of the contract. It summarizes, generally in slightly less legalistic language, the main reasons for entering into the contract.

(b) Definitions

(c) Grant of formal legal title

(d) Oversight

e) Rights, Duties, and Obligations

f) Confidentiality

(g) Termination

(h) Dispute Resolution

(i) Assignment

Information not generally in “Primary Contracts”

- All information that must **necessarily** come *after* the contract has been signed. Such as:
 - Costs incurred by the company
 - Actual payments to the state
 - Much environmental and social planning
 - An “obvious” amount the contract is worth!

KEY ISSUE: How does the contract relate to the law?

- Recall our earlier discussion about the web of legal instruments versus the ladder:
 - A key issue to ask is whether the contract allows for deviations from the law, and if so, how, when, and why.
- *Why is this important?*
 - As legislators, you will likely want to know when the laws that you have made are being subverted—it may be for good reason, but you should know that too.

Where to find such clauses?

- They can be any where:
 - Tax law, environment, etc
- Also commonly in portions of the contract titled:
 - Stabilization
 - Applicable Law
 - Choice of Law

Examples

“The Concessionaire shall during the first 25 Years be exempt from the Surtax on high yield projects imposed by [new Income Tax Law].” – China Union & Liberia Contract

Corporate Governance

The Operating Company shall be a wholly owned subsidiary of the CONCESSIONAIRE, to be incorporated in Liberia.

The Board of Directors of the Operating Company shall consist of eleven (11) members. The Chairman and five (5) other Board members shall be nominated by the CONCESSIONAIRE, and five (5) Board members shall be nominated by the GOVERNMENT.

All decisions of the Board shall be taken at the simple majority of its members.

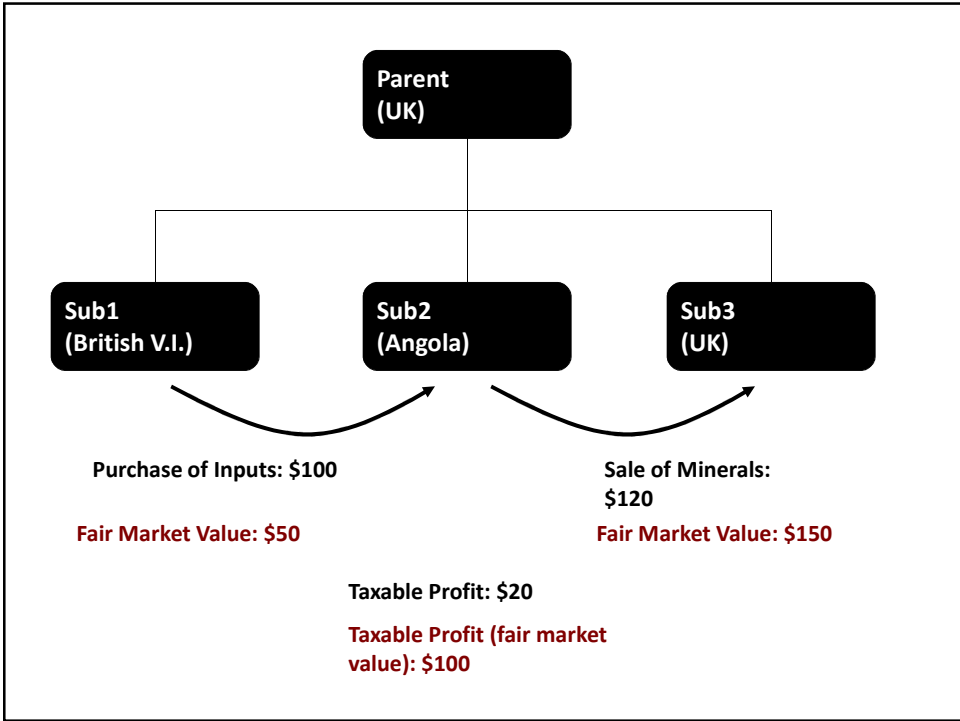
Transfer-pricing potential (1)

- A significant way that seemingly secure revenues to the state just might not end up there! And it might not be in the contract!



Transfer Pricing

- What is transfer pricing?
 - When an internationally integrated company uses sales to related parties in order to shift income to low tax jurisdictions.
 - Transfer pricing is a major issue in tax administration generally ... not just for minerals, oil and gas.
 - Transfer pricing is an issue on both the cost and revenue side of the equation



Transfer Pricing

ARTICLE XXIII ROYALTY

Section 1 Royalty Rate

The CONCESSIONAIRE shall pay to GOVERNMENT in Dollars a royalty at the rate of four point five (4.5%) percent of the invoiced sales of iron Ore FOB Yekepa.

Now that you know a few reasons why contracts are important...

Do you have access to them?

One Barrier: Confidentiality Clauses

- **Section 1 Confidential Information**

All information exchanged between the Parties hereto in the context of this Agreement shall be considered and treated as confidential information, subject to Article VII, Section 2 of the MDA. The Parties hereto hereby agree not to divulge such information to any other Person without the prior written consent of the other party, which consent shall not be unreasonably withheld and/or delayed. However, the foregoing shall not be applicable to CONCESSIONAIRE's or the GOVERNMENT's bankers, advisors and all those who are, in a special way, connected with the Operations.

Do you have access to them?
One Barrier: Confidentiality Clauses (contd)

- **Section 2 Public Information**

The obligation of confidentiality set forth in Article VII, Section 1 above **shall not apply either to information exchanged between the Parties hereto which is in the public domain or to information exchanged by the Parties which the CONCESSIONAIRE is required to reveal to any other Person by law applicable to it.**

Agenda

- **Part One:** Legal Framework Review on Laws, Regulations, and Contracts
- **Part Two:** Essential Contracts Basics
- **→ *Part Three: Presentation of Preliminary Findings on Parliamentary Access to Contracts Research***

Part Three: Preliminary Findings on Parliamentary Access to Contracts around the World

Presentation and Discussion of 30
Country Survey of Parliament's Role
in Oil, Gas, and Mining Contracting

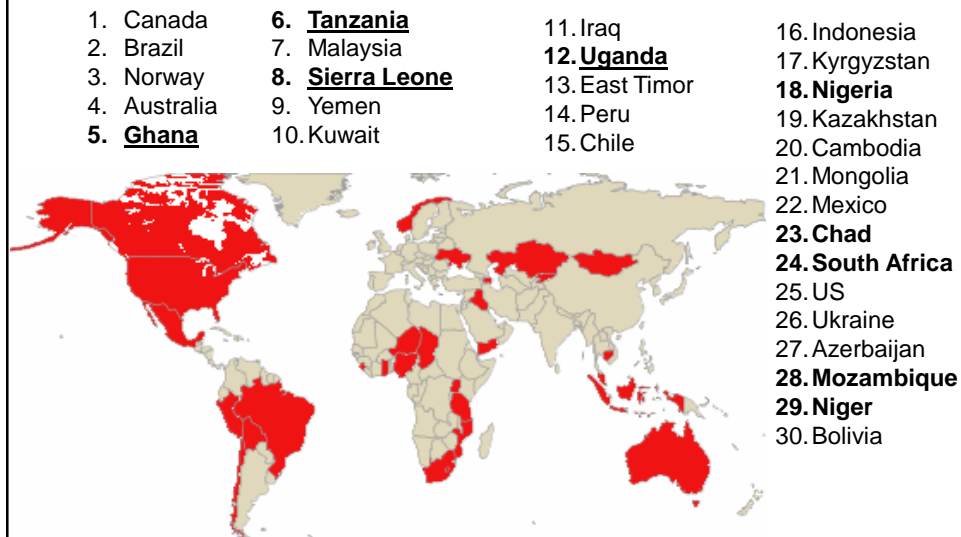
The Research Questions

- How prevalent is parliamentary approval of contracts?
- Do parliaments generally have access to contracts?
- What other ways might parliamentarians influence the contracting process?

Research Sample

- 30 Countries
- Every region represented (Asia, Africa, MENA etc)
- Developed, Developing, and Low Income
- Oil, Gas, and Mining Countries

Map of Countries & List

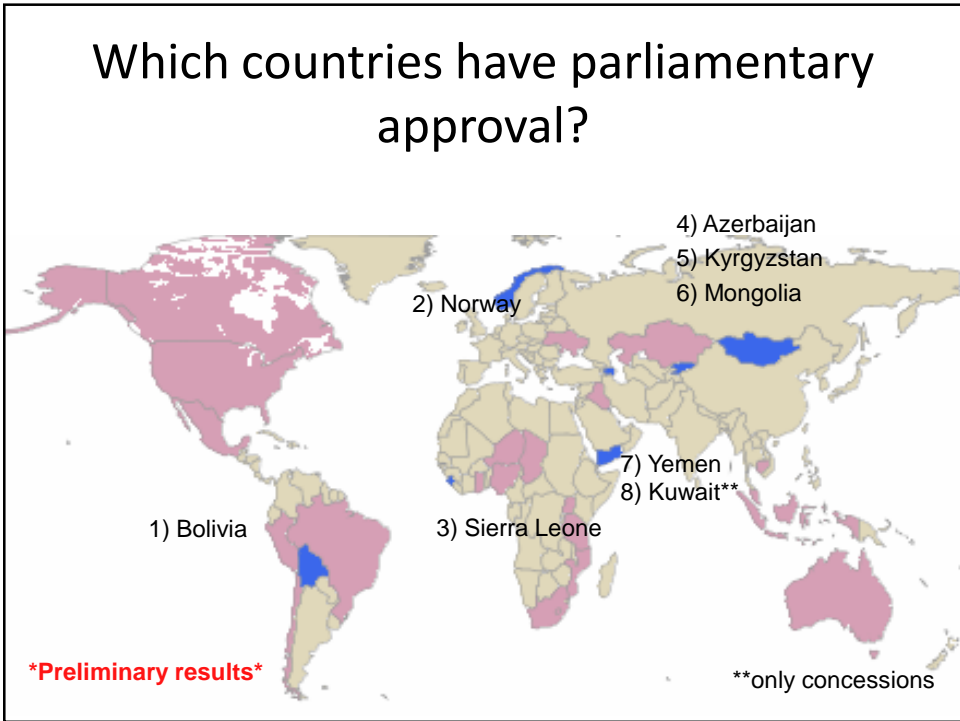
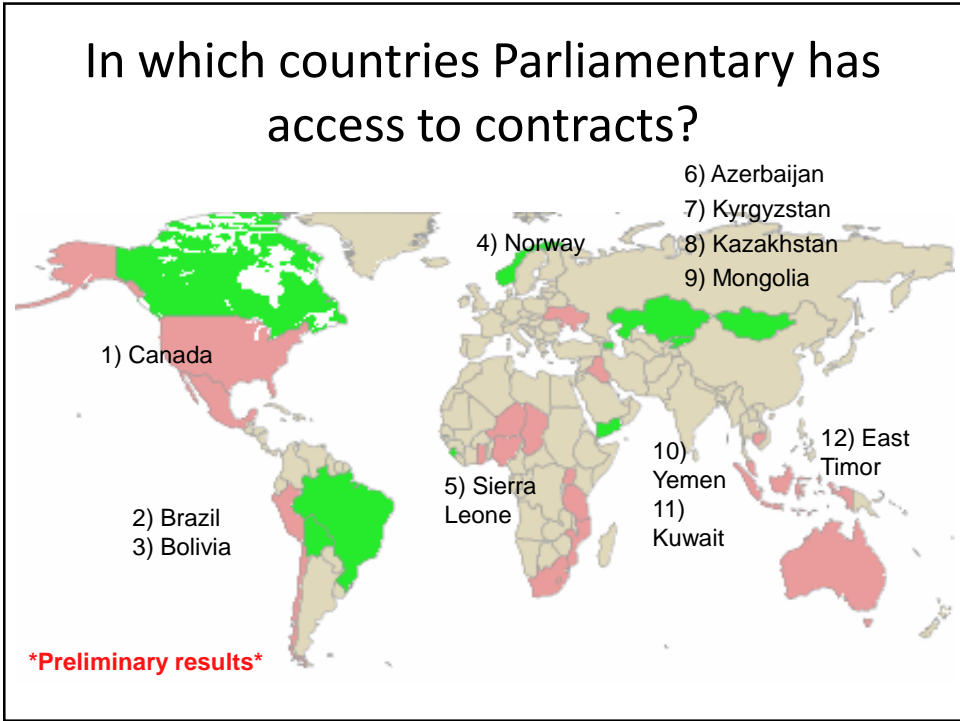


Limitations of the Research

- Only about what the law *says* not how it *actually functions*
- Laws and policies change – may not be totally up-to-date
- Difficult to find the rules governing whether parliament has access to or approval of contracts – it is different for every country
- Has not been peer reviewed – still a work in progress

Discussion: Research Chart

- What trends do you notice?
- Why do you think some countries have parliamentary approval of contracts?
- Is there a noticeable group of countries that tend to have it versus those that do not?
- Are there other ways parliaments can influence contracting?
- What does the research say about your country? Is it accurate as far as what the law *says*? And separately, does your country *function* as the law says it should?



Where do parliaments get this power?

- Constitution
 - Ghana, Section 268, Subsection 1
 - “any transaction, contract or undertaking involving the grant of a right or concession by or on behalf of any person including the Government of Ghana, to any person or body of persons howsoever described, for the exploitation of any mineral, water or other natural resource of Ghana, made or entered into after the coming into force of the Constitution shall be subject to the ratification of Parliament.
- BUT! See next slide

Where do parliaments get this power CONSTITUTION

- The Constitution also provides an “exit” – parliament can vote to take away this power.
 - Ghana Constitution, Section 268, Subsection 2
 - Parliament may by resolution supported by the votes of not less than two-thirds of all the members of Parliament exempt any particular class of transactions, contracts or undertakings from the above requirement.

Where do parliaments get this power?

LAW

- Law
 - Kyrgyzstan Law on Production Sharing Agreements in Subsoil Use requires Parliament to ratify an agreement if a foreign legal entity or individual is party thereto.
- BUT!
 - The **Constitution** requires international agreements to be ratified by the Parliament, so really this is just an *implementing law*.

Where do parliaments get this power?

CONTRACT

- Liberia & China Union Agreement, 2009:
- “This section provides that the agreement will not be valid until there has been (i) attestation by the Minister of Justice, (ii) ratification by the National Legislature, (iii) approval by the President and (iv) publication in handbills.”

And what about State Owned Companies?

- More or Less access?
- We are still trying to decide what the research indicates, but our preliminary conclusion is that there is generally *less* access by parliaments when there is a State Owned Company

Model Contracts

- If they are passed into law, this is an alternative way to influence contracting
- Your thoughts and experiences?

Finally...other methods

- General law making power – can put much into law and limit what can be done in contracts
- Use parliamentary powers of budgeting for example to gain access (Uganda)
- Others?

CONCLUSIONS, BIG MESSAGES

1. Do not forget the law-making power!
Carefully written laws should trump contracts.
2. Always ask if the contracts are trumping the law...in what way, why, and how.
3. Ask for confidentiality clauses if you cannot get contracts and see what they say.
4. Creative ways to gain access to contracts exist even where there is not official access.