



Technical Assistance to the Government of Malawi to support the implementation of Public Finance Management Reforms

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**TECHNICAL ASSISTANCE TO CONDUCT MWEITI CONTRACT TRANSPARENCY FEASIBILITY STUDY**

**FINAL STUDY REPORT ON CONTRACT TRANSPARENCY AND IMPLEMENTATION ROADMAP**

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## List of Acronyms

CCD	Chuma Cha Dziko
DAI	Development Alternatives Incorporated
DoF	Department of Forestry
EITI	Extractive Industry Transparency Initiative
EU	European Union
GCU	Government Contracts Unit
GoM	Government of Malawi
MDA	Ministry, Department or Agency
MMRA	Minerals and Mines Regulatory Authority
MRA	Malawi Revenue Authority
MoFEA	Ministry of Finance and Economic Affairs
MSG	Multi-Stakeholder Group
MWEITI	Malawi Extractive Industry Transparency Initiative
MEJN	Malawi Economic Justice Network
NAO	National Authorization Office
NRJN	Natural Resources Justice Network
CEPA	Centre for Environment and Policy Advocacy
RPD	Revenue Policy Division
TOR	Terms of Reference

# **STUDY REPORT ON CONTRACT TRANSPARENCY AND IMPLEMENTATION ROADMAP**

## **EXECUTIVE SUMMARY**

This feasibility study evaluates the potential for implementing contract transparency in the extractive industry under the Malawi Extractive Industries Transparency Initiative (MWEITI). The study examines the current state of the extractive sector, the regulatory and institutional framework, stakeholder perspectives, and potential challenges and benefits of contract transparency. The findings suggest that while there are significant benefits to be gained, several challenges need to be addressed to achieve effective implementation.

The study presents a review analysis of all relevant policies, legislation and administrative practices towards extractive industries contract transparency. On the challenges that may impede contract transparency, the report found the lack of legal framework to compel the disclosure as currently the policy framework may not suffice to compel a non-compliant company or Government of Malawi Ministries, Departments or Agencies (GoM MDAs). There is a need to expedite the enactment of the MWEITI Bill into a law. In addition, others cited failure to fully implement the existing legal framework such as the Mines and Minerals Act, Access to Information Act the uncertainty surrounding the commencement of the Mines and Minerals Act 2023 (MMA 2023), delay in finalizing the Mines and Minerals Regulations, financial capacity in operating websites for ensuring public access to the information on contracts in extractive industry (EI) sector. In addition, the study found that there is lack of awareness to the stakeholders on the need to disclose and what to disclose. Furthermore, the report revealed that contract transparency hindrance provisions do exist notably section 41(5) of the Mines and Minerals Acts, 2023, which states that, unless otherwise provided in the MMA 2023, any information submitted by a holder of a mineral tenement shall remain confidential during the validity of the licence and two years after expiry or termination of the licence.

The report recommends legal amendment, capacity building and contract transparency awareness encouraging amendment of existing sector laws to include contract disclosure in the mining, oil and gas and forestry sectors, suggesting the substantive legal framework explicitly recognize the existence of MWEITI since legal acts are all silent on MWEITI. This includes amending the Mines and Minerals Act 2023, Petroleum (Exploration and Production) Act, Liquid Fuels and Gas (Production and Supply) Act and the Forestry Act. The report further recommends the amendment of existing non-sector law which will require lobbying the specific users such as the Registrar of Companies, Ministry of Finance and Economic Affairs, and Auditor General. In addition, the report advocates for clear guidelines and protections for sensitive information, the strengthening of the technical and administrative capacity of relevant institutions to manage contract transparency effectively and the provision of information on contract transparency to the public through a neutral accessible and proactive portal. The study further prefers MWEITI website as a suitable platform to maintain a contract disclosure portal in addition to the EI MDAs. It recommends enhanced stakeholder engagement by deepening awareness of the requirement to disclose and the scope of the disclosure, the benefits of disclosure and debunk the fears and myths of loss of competitiveness and breach of confidentiality clauses. In addition, let there be dialogue and collaboration among Government, the EI sector, and civil society to address concerns collectively and not in silos.

## 1. INTRODUCTION

- 1.1 Contract transparency in the extractive industries involves the public disclosure of contracts and agreements between governments and extractive companies. This practice aims to enhance accountability, reduce corruption, and ensure that citizens benefit from the country's natural resources. Globally, the Extractive Industry Transparency Initiative (EITI) International Secretariat, sets standards and criteria for determination of EITI compliance by member countries. The EITI compliance is determined by a set of criteria and standards designed to promote transparency and accountability in the extractive sector. Key parameters that determine EITI compliance include adoption of transparent institutional arrangements for the management of natural resources. In addition, the EITI requires establishment of Multi-Stakeholder Group (MSG) which includes representatives from government, companies and civil society. The MSG oversees the implementation of the EITI Standard and ensures broad and inclusive participation.
- 1.2 Malawi established the first MSG and MWEITI Secretariat in February 2014 and joined EITI International in 2015. MWEITI seeks to promote transparency and accountability in the management of revenues from the extractive sector in Malawi. In order to realize this goal, the Government of Malawi, with financial support from the European Union, is implementing the Chuma Cha Dziko (CCD) Programme (Public Finance Management Reforms Project). One component of this Programme is the project titled “Technical Assistance to Public Finance Management Reforms in Malawi” (the “Project”), which is being implemented through a service contract between the Government of Malawi’s National Authorizing Office (NAO) and the Development Alternatives Incorporated (DAI) Brussels.
- 1.3 Key Result Area 3 of the Project aims to improve the effectiveness and efficiency of revenue policy implementation and support MWEITI. This improvement is eventually aimed at strengthening domestic resource mobilization, which is one of the strategic priorities for Malawi and a main driver for achieving the aspirations under Malawi 2063, the national long-term development vision of Malawi Government. One of the main activities for achieving the

strategic priorities is the creation of an enabling environment for smooth investment and governance of natural resources under the extractive sector.

1.4 The consultant was hired to conduct a feasibility study on contract transparency in the Malawi's extractive industry/sector in order to facilitate MWEITI's adherence to EITI International contract transparency requirements stipulated in the EITI Standards. The 2023 EITI International Standard requires that member countries should systematically disclose contracts, licences and concessions in the extractive sector so that all stakeholders have access to these documents. The contract transparency requirements under 2023 EITI Standard are stipulated in the following requirements:

1.4.1 requirements 2.4 (strengthening contract transparency),

1.4.2 requirement 4.2 (encourages member countries to disclose agreements stating the terms of the state's share of production and other in-kind revenues),

1.4.3 requirement 4.3 (member countries are encouraged to disclose any contract with infrastructure and barter provision, including resource-backed loan agreements, and

1.4.4 requirement 6.1 (member countries are expected to disclose the contracts or other documents that mandate social and environmental payments).

1.5 This feasibility study report has conducted an administrative and legal assessment through various approaches and presented the key findings, recommendations and the implementation road map to address the barriers for MWEITI to be able to fully comply on contract transparency requirements under 2023 EITI standard.

## **2. OBJECTIVES OF THE CCD PROJECT**

2.1. The objective of the Project is to assist the Government of Malawi in achieving efficient and effective use of public resources to contribute towards the growth of the economy and development of Malawi.

2.2. The purpose of the Project is to promote good economic governance and accountability, contribute to efficient use of public funds and effective resource mobilization. These areas address key constraints to an enabling environment conducive to growth and development of the extractive sector.



### **3. OBJECTIVES AND SCOPE OF THE STUDY**

3.1 The overall objective of this Study is to support the MSG and the MWEITI National Secretariat in the Ministry of Finance and Economic Affairs (MoFEA), to conduct the contract transparency feasibility study in order to assess the readiness of the implementation of the contract transparency as required by EITI International Standard Requirement Number 2 (Legal and Institutional Framework, Contracts and Licences). The Standard advocates for adoption of legal, regulatory and contractual framework for public to access all licences and contracts underpinning the extractive industry for the public to know the contractual basis of extractive industry activities. This access/disclosure will enable stakeholders identify possible weaknesses in the licensing allocation process and the management of extractive industry, including those that make these processes vulnerable to corruption and abuse. The findings and recommendations of the Study will help the MSG to publish a plan for disclosing contracts with a clear timeframe for implementation and addressing any barriers to comprehensive contract disclosure.

3.2 The Study has covered analysis of legal framework and administrative arrangements facilitating disclosure of contracts, licences and concessions in the mining, oil & gas and forestry sectors.

### **4. METHODOLOGY**

4.1. The study involved conducting a preliminary desk review to inform the development of questionnaires and reaffirming and identification of stakeholders.

4.2. The study also involved literature review of relevant policies and laws (both domestic and international), EITI International Standards, contract transparency frameworks in extractive industry and other important reference material. These were:

- 4.2.1. The Constitution of the Republic of Malawi;
- 4.2.2. Mines and Minerals Act 2019 and the Mines and Minerals Act 2023;
- 4.2.3. Petroleum (Exploration and Production) Act;
- 4.2.4. Liquid Fuels and Gas (Production and Supply) Act;
- 4.2.5. Companies Act;
- 4.2.6. Companies (Model Articles and Memorandum of Association) Regulations and the Companies Regulations;

- 4.2.7. Public Finance Management Act 2022;
- 4.2.8. Public Audit Act;
- 4.2.9. Corrupt Practices Act;
- 4.2.10. Financial Crimes Act 2017;
- 4.2.11. Access to Information Act;
- 4.2.12. The draft Malawi Extractive Industry Transparency Initiative Bill, 2023;
- 4.2.13. Malawi 2063;
- 4.2.14. The Malawi Open Government Partnership National Action Plan (OGPNAP) 2023-2025;
- 4.2.15. the UN Global Roundtable on Extractive Industries as an engine for Sustainable Development (2021);
- 4.2.16. World Bank Reports on Extractive Industries Transparency;
- 4.2.17. EITI Standard 2023;
- 4.2.18. The African Mining Vision 2009;
- 4.2.19. Malawi 6<sup>th</sup> EITI Report 2021.

4.3. In addition, the consultant conducted stakeholders/ consultation meetings with key informants and relevant Government of Malawi's Ministries, Departments and Agencies (MDAs) who are custodians of documents, processes and key players in, extractive industry contract management and negotiation. These MDAs were:

- 4.3.1. the Ministry of Mining (MoM);
- 4.3.2. the Department of Forestry;
- 4.3.3. the Ministry of Finance and Economic Affairs;
- 4.3.4. the Malawi Revenue Authority (MRA);
- 4.3.5. MWEITI Secretariat and
- 4.3.6. the Government Contracts Unit (GCU) in the Office of President and Cabinet.

4.4. In addition, the study also involved engaging non-state actors such as civil societies operating in the extractive industry governance. These were:

- 4.4.1. the Centre for Environment and Policy Advocacy (CEPA);
- 4.4.2. the Natural Resource Justice Network (NRJN);
- 4.4.3. the Chambers of Mines and Energy.

4.5. The Consultant also engaged local and international consultants in the area of extractive industry, such as EMJ Advisory Services' (who served as the Independent Administrator) through Mr. Chisale, Mr. Samuel Bekoe (Consultant who is an expert in extractive industry beneficial ownership (EIBO)), Dr. Grain Malunga who is also a consultant on extractive industry.

4.6. Lastly, the study focused on private companies such as Shayona, Raiply, Mkango Resources (also known as Lancaster Limited) and Sovereign Services Limited.

## **5. LIMITATIONS OF THE STUDY**

5.1. The expert faced the following challenges when conducting the assignment:

- 5.1.1. unavailability of information: the consultant made requests to the Ministry of Mines and the Department of Forestry for a list and status of contracts, licences and concessions for minerals, oils, gas and forestry products respectively. Only the Department of Mines was able to share the information pertaining to the mines development agreements, oils and gas as illustrated in Table 2 of this Report. However as of the date of this report, they had not yet submitted the list of licences in mineral products such as exploration licence, reconnaissance licence, mining licences and retention licences. For Forestry Department, they neither confirmed the list of forestry concessions that the MWEITI Secretariat nor submitted the list of licences or permit holders and statuses. While the report has identified the agreements to be disclosed and made key findings and recommendations, the absence of such information is a dent to contract transparency since the report is the first step towards achieving openness in the management of extractive industry resources, renders the report incomplete as some critical information is missing, and justifies the need for a robust contract transparency law in extractive industry to compel disclosure of extractive industry contract terms; and
- 5.1.2. limited scope of consultations: due to limited logistical support that the CCD Project availed towards the assignment, the expert was unable to reach out to other critical stakeholders such the citizens on whose behalf the authority to rule derives as per

section 12 of the Malawi Constitution. Of course, one may argue that the CSOs in the extractive industry sector do represent the voice of the citizens. However, in the absence of affirmative evidence of consultation, we can hardly conclude that the CSOs were speaking on behalf of the citizens. This development, therefore, renders the direct involvement of the citizens vital to the enrichment of the processes accompanying the study.

## **6. KEY FINDINGS AND CORRECTIVE ACTIONS**

This section interrogates the Malawi's policy, legal & regulatory framework, institutional framework, stakeholder perspective and status of contract transparency and institutional support and determines the extent to which they support or impede contract transparency in EI. Based on the findings, the study has made recommendations for corrective action. The following are the findings and recommendations-

### **6.1. Policy framework**

#### **6.1.1. EITI Standards**

Malawi joined the EITI on 22<sup>nd</sup> October, 2015<sup>1</sup>. Since its joining, Malawi has prepared and submitted 6 EITI reports the latest being the one covering the period from 2020-2021 (ibid). EITI prescribes requirements for disclosures on how the extractive sector is managed, enabling stakeholders to understand the laws and procedures for the award of exploration and production rights; the legal, regulatory and contractual frameworks that apply to the extractive sector; and the institutional responsibilities of the state in managing the sector. Insofar as contract transparency is concerned, four requirements are relevant as follows:

- (a) Requirements 2.4 (strengthening contract transparency);
- (b) Requirement 4.2 (encourages member countries to disclose agreements stating the terms of the state's share of production and other in-kind revenues);

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<sup>1</sup> MWEITI, 6<sup>th</sup> Malawi EITI Report 2020-2021 at page 8, available online at <https://eiti.org/sites/default/files/2023-07/6TH%20MALAWI%20EITI%20FINAL%20%20REPORT%20-%20PERIOD%20JULY%202020%20TO%20JUNE%202021.pdf>.

- (c) Requirement 4.3 (encourages member countries to disclose any contract with infrastructure and barter provision, including resource-backed loan agreements; and
- (d) Requirement 6.1 (member countries are expected to disclose the contracts or other documents that mandate social and environmental payments).

Malawi went through its first validation process from September 2018 with the outcome report published in February 2019 and the country was rated to have made meaningful progress in implementing EITI. The second validation process took place between January and March 2022 and the country was also rated to have made meaningful progress in EITI implementation (EITI *ibid*). The EITI International Secretariat conducts the assessment on the extent of EITI compliance based on adherence to the requirements prescribed in the EITI Standards. Much as Malawi has been making meaningful progress in attaining the EITI compliance status, evidenced by the October 2022 validation report by EITI International Secretariat which awarded Malawi a moderate score of 80 points for tremendous improvement in transparency on licensing, revenue management and social expenditures in its nascent mining sector and expanded EITI implementation to improve oversight of its forestry sector, contract transparency (Requirement 2.4.) is assessed as ‘mostly met’ as there were licences issued post January 2021 which were not published.

The fact that the EITI Standard<sup>2</sup> is not binding, entails that there is no compelling force to mandate member countries to adhere to contract transparency. Perhaps, that is why requirement 2 of the 2019 EITI Standard<sup>3</sup> required member countries to adopt legal and regulatory framework for supporting transparency in extractive sector and, to this end, one of the 2019 EITI recommendations to Malawi in the 5<sup>th</sup> Malawi’s EITI Report<sup>4</sup> covering the period 2018 to 2020, required Malawi to adopt EITI legislation.

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<sup>2</sup> MWEITI, 2023 validation report, available at <https://eiti.org/news/malawi-achieves-moderate-score-eiti-implementation>

<sup>3</sup> 2019 EITI Standard, available online at <https://eiti.org/collections/eiti-standard-2019>

<sup>4</sup> Available online at [https://eiti.org/sites/default/files/attachments/5th\\_mweiti\\_report\\_-\\_fy\\_2018-19\\_and\\_2019-20\\_1.pdf](https://eiti.org/sites/default/files/attachments/5th_mweiti_report_-_fy_2018-19_and_2019-20_1.pdf)

### **6.1.2. MWEITI Open Data Policy, 2022-2027 (June 2022)<sup>5</sup>**

Every EITI country must agree and publish a clear policy on the access, release and re-use of EITI data (requirement 7.1.b of the EITI Standard). Pursuant to this requirement, Malawi Government, through MWEITI, adopted the Open Data Policy<sup>6</sup> in June 2022 which replaced the 2016 Open Data Policy. The Open Data Policy aims at and intends to address how MWEITI will manage natural resource data in Malawi. The policy has been developed with the intention of ensuring that data relating to natural resources revenue, expenditure and other information are easily accessible, user friendly, understood and raises public debate regarding the management of the oil, gas, mining and forestry industries (Page 3 of the Policy). The Policy encourages readily accessible and readable formats of data related to extractive industry. The Policy can be used to force Government MDAs to comply with the requirement but is limited in the sense that it has no binding force and may not apply to those who are not Government officials.

### **6.1.3. The Draft MWEITI Policy**

The Government of Malawi initiated the development of draft MWEITI Policy in 2023. The Policy was concluded in May 2023, but is yet to be adopted by the Government. It has been affected by the recent changes of the Minister of Finance and Economic Affairs, who is the MWEITI Champion. Among other statements, the proposed Policy is aimed at enhancing transparency and good governance and to inform public debate, publication of information on fiscal (revenue collection and distribution), legal, commodity sales data, licences, etc. The draft Policy is further requiring both the government and companies to systematically disclose data/information online in open data format, thus making data timely available, cost effective, enabling users and citizens to focus on analysis and responding to information rather than on collecting and verifying it. Through systematic disclosure, the government and companies will be able to show that they have

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<sup>5</sup> Available online at <https://eiti.org/documents/malawi-open-data-policy>

<sup>6</sup> Available online at <https://mweiti.gov.mw/index.php/downloads/category/10-policy>

nothing to hide, thus contributing to building trust between stakeholders. (Page 4 of the draft Policy).

Despite its propositions on improvement of transparency in extractive contracts, the Policy is yet to be launched by the Government. Even if it is launched, a policy is devoid of legal bindingness and it still needs to be complemented by a law.

#### **6.1.4. Open Government Partnership National Action Plan (OGP-NAP) 2023-2025**

The Malawi Open Government Partnership National Action Plan (OGP-NAP) 2023-2025<sup>7</sup> is a partnership of the civil society advocates and Government leaders to promote transparent, participatory, inclusive and accountable governance (Malawi Government “Malawi National Action Plan (NAP) for the Open Government Partnership-2023-2025” at page 1). The NAP under the Natural Resources thematic pillar has committed to enhance transparency in the natural resources governance. This includes the status of existing known resources, contracting and licensing processes and agreements, production, exports, employment, revenue and expenditure, and social and environmental governance. It covers openness on extractive sector including contracts Governance and generally supports adoption of transparency in the resources governance chain. Further, the National Action Plan has attached specific timeframes for particular sectors for attaining transparency in this governance endeavours (on page 31 to 33 of the OGP-National Action Plan 2023-2025). However, as mere Action Plan, it has no legal compulsion to force players to make disclosures. Suffice to note that this supports and complements MWEITI efforts for contract transparency.

#### **6.1.5. Malawi Vision 2063<sup>8</sup>**

This Vision is the national long-term development vision for Malawi Government. Under its enabler 2 (effective governance systems and institutions), the Vision advocates the promotion of openness and transparency by ensuring that Malawians

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<sup>7</sup> Accessed online on 22/06/24 at [https://www.opengovpartnership.org/wp-content/uploads/2023/01/Malawi\\_Action-Plan\\_2023-2025.pdf](https://www.opengovpartnership.org/wp-content/uploads/2023/01/Malawi_Action-Plan_2023-2025.pdf)

<sup>8</sup> Available online at <https://npc.mw/wp-content/uploads/2021/02/MW2063-VISION-FINAL.pdf>

have access to information and clarity in relation to decisions and decision-making processes as well as the implementation of public policies and results. It envisages harnessing new technologies, including use of digital platforms to ensure information is readily available and costs for accessing the information are reduced (Malawi Government (2020) “Malawi 2063” at p.27). As an overarching policy guideline, the Malawi 2063 is capable of inspiring legal and structural reforms to promote transparency in contract management in the extractive industry. However, the fact that it is a mere policy means no binding force and only relies on complementary measures that may be put in place legally and structurally.

## **6.2. Legal and regulatory framework**

This section presents the legal and regulatory framework findings from the analysis of the major legal instruments governing the extractive sector and the complementary ones. The main ones being-

### **6.2.1. Mines and Minerals Act 2023**

The Act replaced the 2019 Mines and Minerals Act (an Act, which had comprehensive provisions on disclosure of information pertaining to mining contracts). The 2023 Act has included the establishment of the Minerals and Mining Regulatory Authority (MMRA). The Act entered into force on 28 June 2024 as per the Notice of Commencement of the Act which is Government Notice number 42 of 2024. The Act has the following clauses which promote contract transparency:

- 6.2.1.1. Section 32 of the Act requires that the register for mineral tenement applications and mineral tenements be accessible to the public;
- 6.2.1.2. Section 56(5) requires the publication on the MMRA’s website of terms and conditions of a competitive tendering process for a mineral tenement area;
- 6.2.1.3. Section 164 (10) requires publication on the website of the MMRA and availing to the public (through MMRA office and the local government authority of the area) a copy of any community development agreement being implemented by a holder of a large-scale mining licence;
- 6.2.1.4. Beneficial ownership disclosures for applicants who are companies: Section 179 requires an applicant for small-scale mining licence to submit



information on, among other details, beneficial ownership of any person who holds more than 5% of issued share capital of the applicant company. A similar requirement is stipulated under section 146(1)(c) in respect of medium and large-scale mining applicants and under 115(1) (c) in respect of applicants for exploration licence, and section 90(2) (iii) in relation to applicants for a prospecting licence. This is a good provision to promote transparency but the restriction to holders of more than 5% risks excluding those below 5% which may be substantial in number and thereby occasioning incomplete disclosure to Malawi Government in the case of non-disclosure or lack of frank disclosure.

- 6.2.1.5. Section 259 (1) empowers the MMRA to issue guidelines for keeping records on fiscal payments and fiscal payments reporting by mineral tenement holders that may be useful for attaining fiscal transparency in extractive industry. The guidelines may be voluntary or mandatory. It is a criminal offence not to comply with mandatory guidelines;
- 6.2.1.6. Section 289 (8) requires the MMRA to publish on its website the community engagement plan that it has registered for a holder of exploration licence, retention licence, medium scale mining licence or large-scale mining licence;
- 6.2.1.7. Section 289(13) requires the same persons to submit a report on the community engagement plan to the MMRA and subsection (13) requires MMRA to make the report accessible to the public together with the plan. No manner of such accessibility has been prescribed unlike the other provisions which specified electronic format;
- 6.2.1.8. Section 296(4)(a) requires the Authority to register any permit granted for export minerals and (b) requires submission of the permit to Government MDAs responsible for administration of mineral royalties, customs and tax revenues;
- 6.2.1.9. Section 300 requires quarterly reporting by the Authority to the Minister on the general conduct of the Authority which shall lay before Parliament. The report shall include audited financial statements, audited income and expenditure report and any other information as the Minister may require;

- 6.2.1.10. Section 301 (1) requires strict confidentiality of information regarding registration, licence or permit or holder thereof, if exclusive to a particular person. This may hinder disclosures since exclusivity has not been defined or elaborated in the proper context. However, court may order the release of such information but the Authority has to inform the data subject;
- 6.2.1.11. Section 302 requires taking of an oath of secrecy by employees and members of MMRA. Oath of secrecy may be abused by compromised Government officials. However, the duty of sharing information in the corporate set up is assigned officially to a particular person. Therefore, the oath is an exception to ensure integrity of information.
- 6.2.1.12. However, despite all these provisions promoting transparency in the Act, section 41(5) has the potential to derail the transparency advancement. The said section states that, *unless otherwise provided in the Act*, any information submitted by a holder of a mineral tenement shall remain confidential during the validity of the licence and two years after expiry or termination of the licence [my emphasis]. On the face of it, the clause may appear to promote non-disclosure. But considering the italicized text (unless otherwise provided in the Act), one can logically conclude that the clause is subservient to any contrary provision which provides for the contrary. This means that all the clauses that promote disclosures on mineral tenement holder information, do prevail over the said section 41(5). Therefore, the clause, if read together with the preceding sections, is not capable of impeding contract transparency in mining.
- 6.2.1.13. However, despite these numerous EITI compliant provisions, the Mines and Minerals Act does not mention MWEITI or EITI explicitly. Recognizing the role of MWEITI or EITI would have strengthened the coherence of the contract transparency. The study suggests that the Mines and Minerals Act be amended to incorporate the role of MWEITI in implementing contract transparency including adding a ground for licence revocation if a company fails to comply with MWEITI directives or laws.

## **6.2.2. Petroleum (Exploration and Production) Act:**

The Act governs the exploration and production of petroleum and does not provide for disclosures of information related to contracts in extractive sector. The Act is therefore a hindrance to contract transparency and it needs to be amended to align with EITI requirements.

**6.2.3. Liquid Fuels and Gas (Production and Supply) Act:**

The Act governs the production and supply of liquid fuel and gas. It may be relevant on handling of the fuel and gas such as transportation. However, despite section 10 requiring licensing for one to engage in production and supply thereof, the Act has not required any disclosure of information. The Act needs to be amended to include such disclosures.

**6.2.4. Forestry Act:**

The Act governs the management and protection of forest produce such as trees, timber, firewood, branch, wood, poles, etc. There are no comprehensive clauses on licensing process save for s. 46 which requires prior obtaining of a licensing before cutting, taking, felling, destroying, collecting, and removing forest produce from a forest reserve, public land, customary land or a protected forest area dealing in forest produce. The said section needs to be amended to include the need to submit information on applicants, nationality and, where appropriate, the beneficial ownership.

**6.2.5. Companies (Beneficial Ownership) Regulations, 2022:**

The Regulations apply to companies only but the holders of licences in minerals, oil and gas, and forestry are not restricted to companies. This means that the requirement for disclosure is limited to those entities who are companies. In addition, the Regulations stipulate a 25% threshold as the starting point for disclosures. This discrepancy may cause implementation challenges where a company is a mining company. However, the High Court of Malawi in the case of **Dairy Farming Limited v Billy Jonathan Chiotha t/a Innobuild Limited**- High Court Commercial Case No. 6 of 2023 (unreported), held that where a provision in an Act of Parliament is in conflict with a provision in a subsidiary legislation, the

former prevails over the latter. In the present illustration, the thresholds of 5% minimum for beneficial ownership disclosure will prevail. This calls for engagement with the Registrar of Companies to consider aligning the Regulations with the Mines and Minerals Act on the thresholds. The issue of extending beyond companies may not work for the Registrar General as the said Regulations were promulgated under the Companies Act, hence expanding beyond that would be exceeding the scope of the Act. I therefore suggest that the issue be dealt with in a standalone Regulations on beneficial ownership in extractive industry.

#### **6.2.6. The Constitution of Malawi**

The Constitution is the supreme law in Malawi such that any act or law which is inconsistent with the Constitution is rendered invalid (see section 5 of the Constitution). The following provisions of the Constitution have a bearing on the mandatory disclosure under extractive industry contract transparency:

6.2.6.1. Section 21 on the right to privacy: prohibits searches to one's person, home or property; seizure of private possession; or interference with private communication including mail and all forms of communications. The interference with private communication is the only element that nears the right to privacy under s. 21. However, it may be arguable to stretch the elements of the right that far considering the difference of the subject matter. Even if the disclosure were colliding with the right, the right is limitable under section 44 of the Constitution to the extent that it is prescribed by law. In the present circumstances, apart from the Mines and Minerals Act, none of the sector specific laws provide the need to disclose. This calls for the fast tracking of the MWEITI Bill, which has proposed mandatory legal obligations for the disclosure of information pertaining to requirement on holders of licences in the extractive industry to make declarations of their revenue realised from their licensed operations, payments made from their operations and beneficial ownership of their businesses. The proposed law will also require Government to disclose the licences, concessions, permits, authorizations, and payments received from the extractive industry. This

disclosure is not only aligned to Malawi's international obligations under the Extractive Industry Transparency Initiative (EITI) but also in sync with the principles of accountability and transparency as enshrined in section 12 and 13 of the Constitution; and

6.2.6.2. Section 13(o) on the principles of national policy which requires the state to introduce measures that will enhance public trust and good governance. The measures include those that guarantee accountability, transparency and eventually enhance public trust in Government institutions. Considering the status of the supremacy of the Constitution, it may form a valid basis for aligning sector-specific statutes with the Constitution. However, there is still a need for that broadly pronounced principle to be complemented by a statute.

#### **6.2.7. Access to Information Act:**

The purpose of the Act is to provide the right to access to information in the custody of public bodies and relevant private bodies, the processes and procedures related to obtaining that information (long title of the Act). Public body means Government, statutory body or any other body appointed by Government to carry out public functions. The MDAs that deal in extractive industry are obviously falling under the scope of application of the Act, hence can be compelled by the Act to disclose the information in their custody pertaining to extractive industry contract: provided they show that they need the information for the purpose of exercising their right as required under s. 5(1) of the Act. The limit of the right lies in the need to justify the disclosure by the exercise of rights. Not all who demand information on contracts for EI do so in contemplation of exercise of a right. This may hinder the exercise of the mandate to demand disclosure. The study proposes amendment of the ATI and section 37 of the Constitution to exclude the qualifier of showing the right to be exercised where the sought information is to do with EI contract transparency.

### **6.2.8. Corrupt Practices Act**

The Act is aimed at making comprehensive provisions for prevention of corruption. There is no direct clause on transparency or openness. However, when we consider that contract transparency is being used by EITI as a tool for combating corruption in the governance of EI resources and for reducing conflict of interests in managing EI products, then the goal of the Act squarely tallies with the objectives of contract transparency in EI. In the 2023 EITI Standard (at page 4) the Chairperson of EITI Board, Rt Hon. Helen Clark emphasized that the 2023 Standard has integrated important and explicit anti-corruption objectives into reporting. Disclosures which are important for identifying conflicts of interest and the participation of politically engaged persons in the extractive sector have been strengthened. The new EITI Standard introduces the expectation that all companies participating in EITI reporting, including state-owned enterprises, should publicly disclose their anticorruption policies. To this end, requirement 2.6 of the 2023 Standard provides that, in line with Expectation 7.1 of the Standard, EITI supporting companies and SOEs to publish their anti-corruption policies and are encouraged to engage in rigorous due diligence processes. To the extent that the Act criminalizes the conflict of interests (section 25D-disclosure of interests by public officers where the contract involves immediate family or close associate of the public officer. Such conflict may compromise the quality of negotiations and harm Government/public interests.

### **6.2.9. Financial Crimes Act**

It established the Financial Intelligence Authority which implements a framework of investigating and combating financial and related or consequential crimes and enable tracing, identification, tracking, freezing seizure and confiscation of proceeds of crimes. The Act under section 16 requires reporting institutions (financial institution or a designated non-financial institution) to verify the identity of a customer or beneficial owner through a reliable source document, data or information when opening an account, transacting or doing a domestic or international wire transfer of prescribed monetary amounts. demand disclosure of

source of funds from those making payments. The Act may help the reporting institutions to have records of sources of funds deposited into their institutions bank accounts. In the event that the funds are proceeds of EI resources, the record of the detail can be handy information for knowing the percentage of revenue from the EI sector. The Act is, to that extent, promoted contract transparency in EI.

#### **6.2.10. Public Finance Management Act, 2022**

The Act makes provision for the legal and institutional framework for public finance management within economic and fiscal policy framework, the preparation and implementation of the national budget and strengthening transparency and accountability and responsible management of public resources (the long title to the Act). Under section 11 of the Act, the Secretary to the Treasury is empowered to have full access to all accounts and records of controlling officers relating to collection, receipt, expenditure issues or use of public money. Under section 15, the Minister shall lay before the National Assembly a written national budget policy statement which shall include the estimated revenue of the Government and details of estimated expenditure of the Government. Section 21 requires the Minister to submit to Cabinet anticipated budgetary appropriation then thereafter lay the estimates before the National Assembly. The Appropriation Bill and Loan Authorization Bill are publicly published in the Gazette and circulated before Parliament for approval under section 26 of the Act. All these processes involving the fiscal instruments are transparently done hence the Act promotes contract transparency since the estimates may contain projections from proceeds from the EI sector. However, the Act is not comprehensive since it does not cover mine developments agreements, contracts, licences, etc. Loans Authorization Bills are publicly published and not easily accessible.

#### **6.2.11. Public Audit Act**

The purpose of the Act is to give effect to the principle of accountability of the Government to the public through the National Assembly in respect of public expenditure revenue, assets and liabilities and promote accountability of Minister in

relation to public expenditure, revenue, assets and liabilities (section 3 of the Act). Section 6 empowers the Auditor General to conduct audits in Government MDAs accounts. The Auditor General audits the usage of public funds and revenue flows hence able to contribute towards contract transparency through financial and transactional audits; audit findings are public, subjected to Parliamentary scrutiny. But has limits in terms of accessibility as not everyone can access them. There are no specific audits for mine development agreements hence focus on revenue and expenditure in EI may not be deep.

#### **6.2.12. Draft MWEITI Bill**

As highlighted above, the Bill proposes the codification of the mandatory requirement for contract transparency in EI. Enacting the Bill will fill the gap that has been created in being at the mercy of the EI companies in making the disclosures. There is evidence that some companies do refuse to disclose their BO, revenues, expenditure and other payments made from the proceeds of EI resources. The action required is to expedite the finalization of the Bill that was drafted in 2023.

### **6.3. Institutional framework and administrative arrangement**

#### **6.3.1. Establishment of the MSG/MWEITI**

The MSG was set up in February 2015 so was the establishment of MWEITI. The Director of Revenue Policy under the Ministry of Finance and Economic Affairs is the designated chairperson of the MSG under ST delegated authority. Temporally due to termination of the contract of the Director of Revenue, the MSG is currently chaired by a nominated MSG member by the MSG meeting. The National Coordinator is the acting Chairperson for other related administration requirements. As required by EITI Standard 2.1, the MSG is supposed to be chaired by as senior government official as possible, to this end the leadership requirement has been fulfilled because the level of Director is regarded as senior for the Malawi



government. However, there is need to enhance the human resource capacity at MWEITI.

### 6.3.2. Status of contract transparency and institutional support

The study has revealed that Malawi has no institution that systematically discloses and publishes contracts or licences for the purpose of transparency. This is despite the fact that the Government MDAs have websites. There are a number of signed contracts in the EI, such as mining. However, there is no institution or company website that has published the same. On the contrary, the Resources Contract website, which is an independent international organization that operates an online repository of publicly available oil, gas and mining contracts, publishes EI contracts for countries including Malawi (available online at <https://resourcecontract.org>). The following are available contracts published on the Resources Contract website:

Table 1: Available contracts published on Resource Contract.org

<b>Document</b>	<b>Country</b>	<b>Year</b>	<b>Resource</b>	<b>Contract Type</b>
Globe Metals and (Africa) Limited, Concession, 2023	Malawi	2023	Niobium	Concession Agreement
RAK Gas MB45 Limited, Block 4, PSA, 2014	Malawi	2014	Hydrocarbons	Production or Profit-sharing Agreement
RAK Gas MB45 Limited, Block 5, PSA, 2014	Malawi	2014	Hydrocarbons	Production or Profit-sharing Agreement
Pacific Oil Limited, Block 6, PSA. 2014	Malawi	2014	Hydrocarbons	Production or Profit-sharing Agreement
Nyala Mines Limited, Concession, 2008	Malawi	2008	Corundum	Concession Agreement

Paladin (Africa) Limited Energy Minerals NL, Kayelekera Concession, 2007	Malawi	2007	Uranium (U308)	Concession Agreement

Source: [www.resourcecontracts.org](http://www.resourcecontracts.org)

The study has identified the following contracts which are due for disclosure for the purpose of this report in Malawi:

Table 2: Status of Identified contracts for disclosure

No.	Extractive Contract/License /Concession	Type of Contract/License/concession	Year of Signing	Resource	Active or Inactive	Extractive Sector
1	Lotus (Africa) Limited, Kayelekera mine Karonga	Mining Agreement Development	2024	Uranium	Active	Mining
2	Mkango Resources Limited, Songwe Hill Phalombe	Mining Agreement Development	2024	Rare Earths	Active	Mining
3	Globe Metals and (Africa) Limited, Concession, 2023, Kanyika Mzimba/Kasungu	Mining Agreement Development	2023	Niobium	Active	Mining
4	Raiply Ltd, Chikangawa, Mzimba	Concession Agreement	2021	Timbers/Logs	Active	Forestry
5	Total Land Care, Mzimba	Concession Agreement		Timber/Logs	Active	Forestry

6	AKL Timbers	Concession Agreement		Timber/Logs	Active	Forestry
7	RAK Gas MB45 Limited, Block 4, PSA, 2014	Production or Profit-sharing Agreement	2014	Hydrocarbons	Terminated /Relinquished the licences	Oil and Gas
8	RAK Gas MB45 Limited, Block 5, PSA, 2014	Production or Profit-sharing Agreement	2014	Hydrocarbons	Terminated /Relinquished the licences	Oil and Gas
9	Pacific Oil Limited, Block 6, PSA, 2014	Production or Profit-sharing Agreement	2014	Hydrocarbons	Terminated /Relinquished the licences	Oil and Gas
10	Nyala Mines Limited, Concession, 2008	Concession Agreement	2008	Corundum	Terminated	Mining
11	Paladin (Africa) Limited Paladin Energy Minerals NL, Kayelekera Concession, 2007	Concession Agreement	2007	Uranium (U308)	Terminated	Mining

**Note:** The identified contracts, licences and concessions are expected to be uploaded on MWEITI website in accordance with the 2023 EITI Standard requirement. However, the requirement gives provisions for the contracts which were signed from 2021 and after. The Standard extends the requirement to upload the contracts, licences and concessions to those signed prior to 2021 if the same are active. In the above Table, the green colour coded are recommended for disclosure on the website while those in red may be disregarded as they are either dormant or expired and irrelevant for the purpose of contract transparency.

#### 6.4. Stakeholder Perspectives

**6.4.1.** All the respondents to the questionnaires and the physical interface generally supported the idea of contract transparency leveraging on their existing policy, legal and institutional frameworks. They highlighted the following potential benefits:

6.4.1.1.enhanced accountability: increased oversight and accountability of Government and companies over EI resources management;

6.4.1.2.public trust: improved public trust and legitimacy of the extractive sector;

6.4.1.3.revenue management: better management and allocation of revenues from EI resources;

6.4.1.4.prevents corruption, abuse of office and political influence on managing the EI resources; and

6.4.1.5.investment climate: potentially improved investment climate through enhanced governance of EI resources.

**6.4.2.** All the respondents demonstrated knowledge of Malawi's EITI obligations. The respondents explained that they were already involved in the EITI compliance processes as follows:

6.4.2.1.The Ministry of Mining: Making information on EI contracts such as licence applications public through district council's notice boards and the mineral tenements register is publicly available at a fee. The 2019 Mines and Minerals Act required the Commissioner of Mines to publish the licensing information on the Commissioner's official website. However, the implementation of the system was delayed due to uncertainty in the commencement of the Mines and Minerals Act 2023 and lack of enabling Regulations. Lastly MoM already publishes information on such as dates, application, and grant of licence on the mining cadastral system as the 2019 Act required. On the information to be disclosed MoM excluded figures and technical and financial information since the data generated involves huge investment but fiscal issues must be disclosed. The respondent showed evidence of the contract between Malawi Government and Globe Metals on Kanyika Niobium in the Northern Region of Malawi where disclosure of the

terms did not include technical information. It was observed that the form of the disclosure was scanned PDF format, which is not readable. On challenges, MoM cited lack of resources, practicability of the disclosures due to huge volumes of contracts, resistance from local councils, lack of awareness on EITI disclosures, lack of Regulations and the uncertainty surrounding the status of the Mines and Mineral Act 2023. Some provisions in MMA 2023 promote non transparency such as section 41(5) of the Act stipulating that every mining data is confidential. Information can be accessed 2 years after closure. The whole section is not really clear.

6.4.2.2. MoFEA: they are involved in negotiations of mine development agreements.

Apart from the Access to Information Act, MoFEA knows no laws that compels MDAs to provide information regarding the information in its custody. The Mining contracts are published on MoM website. MoFEA is involved in negotiating fiscal terms as guided by the Public Finance Management Act and the Taxation Act since the terms involve public money and fiscal instruments usage. Apart from the Taxation Act 16<sup>th</sup> Schedule, the other revenue laws such as Value Added Tax, Customs and Excise Act, tax Administration Act and the Revenue Appeals Tribunal Act do not contain provisions on disclosure of terms of EI contracts. MoFEA was not clear whether the 2023 MMA included the Secretary to the Treasury in the MMRA. But section 8 of the Act has excluded the ST on the list of the membership of the MMRA. Maybe he can be co-opted under section 14 of the Act. On the impact of confidentiality clauses on the requirement to disclose the terms, MoFEA clarified that there was no conflict as the disclosable information is not technical in nature. On where to publish, MoFEA reiterated the position by MoM to publish the information on the official website of MoM which had developed a portal but the website is not operational. On the possible obstacles to contract transparency, MoFEA cited absence of MWEITI Bill which had stalled due to the need to brief the new Management (Minister and ST) on the Bill. MoFEA added that the Bill,

if enacted, will empower the Ministry to enforce the disclosure requirements legally.

6.4.2.3. Department of Forestry: The Department manages forestry produce. They issue licences for management of forestry resources (such as vesting licences, export licences, import licences) using competitive means involving process vetting by the Public Procurement and Disposal of Assets Authority (PPDA) or Public Private Partnership Commission, the Government Contract Unit (GCU), MoFEA in addition to the evaluation of the licence applications as done at the Department level. Forestry Department has a forest cadastral system which helps in issuing the licences. The information on award of the licences to successful applicants is made known to the public through media adverts. Forestry Department challenge lies in the belief that business information is confidential but there is no law to compel the disclosures, lack of awareness to the stakeholders on the need to disclose and what to disclose. The strength that Forestry noted is the establishment of MWEITI which has forced MDAs to keep reliable data and ensuring the accuracy and reliability of the data disclosed.

6.4.2.4. Government Contracts Unit (GCU): a unit in the Office of the President and Cabinet (OPC) that vets contract of a certain significant value to the economy. The GCU has been involved in contract negotiations by advising GoM on financial modelling and legal analysis of extractive resources contracts to avoid exploitation. As an institution, its main interest in contract transparency is the tracing the beneficial owners of the companies involved in EI since sometimes the directors or shareholders of seemingly different companies may be the same. GCU is also interested in realizing value for money and ensuring that Malawi benefits from the extractive activities. They explained that as part of participation in contract transparency, they disclose the whole contract on EI including budgeting and local participation and that they disclose at the Registrar of Companies. GCU writes a letter and the

Registrar responds (hard copy that is scanned and emailed). Regarding available opportunities, GCU cited development of MWEITI Bill which will promote the revenue base for Malawi. On challenges, they explained political and signature bonus (corruption), absence of law on disclosures, a lack of harmony between MWEITI Bill and the Mines and Minerals Act, 2023 and lack of knowledge in financial modelling. Their challenge lies in the absence of a policy or legal framework for its operations as it was merely established as a July 2012 Circular from OPC. GCU guided that for effective contract transparency, the MSG membership needs to be uncompromised and there has to be trust between the private companies and Government. GCU finally advised that media involvement has to be enhanced in governance of EI.

6.4.2.5. The Malawi Revenue Authority (MRA): This is the GoM agency responsible for collection of tax. MRA participates in contract transparency through disclosures related to the taxes paid by the Companies under the EI contracts. MRA submits to MWEITI Secretariat the information on tax paid by EI companies for production of MWEITI Report for a particular financial year. In terms of scope of the disclosures, MRA is concerned only with taxes paid, period, names, amount, penalties. On the mode of the disclosures, MRA provides data and information for companies by filling the electronic templates /forms and submits to MWEITI. In terms of opportunities, MRA cited the current implementation of BO for EI companies as a great opportunity for Malawi, the MWEITI Bill and MWEITI Policy. MRA, therefore, urged MWEITI to expedite the finalization of the two instruments as they are tools for compelling companies to disclose and will provide guidance respectively. On the reasons for refusal to disclose, MRA cited fear of competition and public reaction to revenues realized by EI companies. However, MRA refused to accept that confidentiality breach is a valid reason for non-disclosure in EI contract transparency since the issue was cleared at the beginning of EITI process. Therefore, non-confidentiality cannot be used as an excuse for the failure to disclose.

6.4.2.6. Centre for Environmental Protection and Advocacy (CEPA): is an NGO that was incorporated as a trust under the Trustees Incorporation Act. It advocates for environmental justice in three thematic areas, bio divest, climate change and natural resources. It is actively involved in contract transparency and revenue transparency and has served in the MSG for two terms. As part of its participation in EI contract transparency, CEPA hosts the Publish What You Pay (PWYP) Global. As regards, the scope of disclosure, CEPA suggested that the whole contract needs to be published and further transparency is through reporting and disclosures should involve obligations of the GoM and EI company, royalties, volumes, scope of the exploitation. CEPA views the establishment of MWEITI as a great opportunity for Malawi, stakeholder activism on EI matters, existence of supportive MDAs such as MoM and Department of Forestry and MMRA enhances the much-needed transparency. As regards areas for improvement, CEPA cited the need to improve the cadastral system tools, resistance from the industry to disclose contract terms citing confidentiality clauses as the basis but was quick to point out that the contract information required to be disclosed is not about their business secrets and business techniques but about revenue involving public money, human and material resources for maintaining the websites for disclosing the information and packaging EITI information, corruption by the gate keepers (politicians) who shield those refusing to make the disclosures.

6.4.2.7. Natural Resources Justice Network (NRJN): It is an NGO that acts as the Voice of the Non-State Actors to lobby for transparency in the governance of EI sector. NRJN believed that as citizens, they own the extractive resources hence have a right to demand transparency to ensure the maximization of benefits to Malawians from the minerals. NRJN advocates for open contracting (open licensing process), BO, disclosure of concessions agreed on Malawians' behalf, whole licences with terms and conditions and nothing excluded since no information in a mining contract is classified. On the mode of disclosure, NRJN suggested a hybrid of modes comprising



online disclosure through a digital portal and physical disclosure through the district commissioner's office.

6.4.2.8. EMJ Advisory: It is a tax and finance advisory which has served as an independent administrator that prepared the last two EITI reports for Malawi. The independent administrator takes part in contract transparency by assisting MWEITI to prepare the reports for submission to EITI for the purposes of assessing the progress of Malawi in implementing EITI. He identifies the gaps and fill the said gaps through stakeholder's consultations. He lamented the loopholes to contract transparency in EI since there is no competitiveness of the process before awarding the successful applicant unlike PPDA which regulates competitive tendering process. He also bemoaned the gaps in the legal framework as being weak and giving the Minister vast powers which may be abused. He acknowledged the absence of law to compel disclosures in EI contracts but pointed out that we can rely on EITI Standard which prescribes the requirements, encouragements and expectations. On what must be disclosed, the EMJ, suggested beneficial ownership information, gender, contribution to the community, production and exports volumes. He emphasized that the whole contract including addendum ought to be published since there is technical information in contracts. In addition, the preparation for the disclosures does not consume much time as two days may suffice. Website is according to EMJ, the best place to do the disclosures since, once the information is uploaded on the website it becomes public information. On the form, he advised that PDF or editable Microsoft Word format would suffice. He highlighted the benefits of contract transparency as it shows legitimacy and instils the spirit of community buy-in. He urged MWEITI to ensure it has the necessary tools on the ground to attain compliance with the disclosure requirements.

6.4.2.9. Mkango Resources Limited (Lancaster Resources Limited): It is a private company that takes part in mining activities. They are linked to contract transparency through taking part in disclosing financial accounts to MWEITI and all activities are announced all the time in the general information.

Mkango indicated that they voluntarily disclose the information because its shareholders require that all information be published. The scope of the disclosures includes financial disclosures, exploration works activities, information on drilling, resources exploited, samples sent to foreign laboratory, any other activities concerning the company. They also disclose the whole contract including annexes. On the mode of disclosures, Mkango Limited publishes information on their website, and any announcement is sent to the Ministries of Mines and MOFEA. The submission is in electronic form, PDF format. The opportunity that Mkango Limited perceived from its situation is to encourage others to emulate its compliant behaviour. According to Mkango Limited, disclosing is good as it evidences compliance with domestic laws. Disclosing enables people follow and know where the resources are located. Transparency also enhances trust between stakeholders in the industry.

6.4.2.10. Malawi Chamber of Mines and Energy: The Chamber of Mines and Energy is a group of companies and individuals operating in the minerals industry for advancement of sustainable exploitation of minerals for the benefit of its members, government and local communities. It was represented in the study by its Coordinator. The Chamber is represented in the MSG and advocates for both disclosures of mining contracts and beneficial ownership. In terms of scope of the disclosures, the Chamber prefers companies to publish information on beneficial ownership and contract agreement transparency to promote transparency, accountability, and avoidance of corrupt practices in the EI. The disclosure has to be done through electronic media and on website. The Chamber believes that currently Malawi can leverage on the Access to Information Act, the Open Government Initiative Action Plan 2023-2025 and the EITI reporting processes as tools that can be used to justify the disclosure of information on EI. Regarding what may impede the implementation of contract transparency, the Chamber was of the view that the absence of MWEITI legislation, the lack of full implementation of the Mines and Minerals Act,

and non-compliance with the Access to Information Act do pose challenges towards the implementation of contract transparency.

#### **6.4.3. Summary of findings:**

This section outlines a summary of finding from stakeholders that were interviewed:

6.4.3.1. All the respondents demonstrated knowledge of contract transparency in EI and each seems to have played a role towards the implementation of contract transparency in EI sector.

6.4.3.2. While the propelling forces for their participation in the contract transparency in EI differed and ranged from active citizenship, being statutorily duty bound to disclose, to the appetite to act as a model for others, among others, it is pleasing to note that some companies, such as Mkango Resources Limited voluntarily disclose the contract information as required by the shareholders.

6.4.3.3. The scope of disclosure also attracted variegated responses. However, it is worth noting that all the respondents, except MRA, agreed that the whole contract with its terms and conditions, including the addenda and annexes, ought to be disclosed. For MRA, its focus was statutorily limited to tax payment related information, hence no need for the other information. All the participants were of the view that no information ought to be excluded from the disclosures. The reasons were diverse: some believed that the information is not classified information to deserve exclusion, others stated that the information does not contain trade secrets or business techniques, will not render the disclosing party uncompetitive, and will not breach the confidentiality obligations, among others.

6.4.3.4. Related to the scope of what to disclose is the myth that contract transparency would render the companies less competitive. In this respect the stakeholders clarified that their understanding is that technical information on processing the EI resources is not part of the information that is disclosable. The technical information is never part of potential administrative burden and the confidentiality of commercially sensitive information has to be respected. Industry representatives are wary of the potential impact on business

competitiveness and contractual negotiations. Civil society organizations strongly advocate for transparency to promote accountability and public trust.

- 6.4.3.5. On the mode of disclosure, all respondents to the questionnaire and oral interviewees agreed with disclosing in electronic format and through the websites, online registers and cadastral systems. However, for Mkango Resources Limited, they suggested that the electronic disclosure via portals should be complemented by hard copy disclosures to be done at the district level (at the office of the District Commissioner) to avoid manipulation of electronic information that has been disclosed through the portal. Others went further to suggest the format such as readable portable document format (PDF) or Microsoft Word format. This complies with the MWEITI Open Data Policy 2022 which advocates for data to be shared in a format that is readily and easily accessible by the public. Except for MoM, all respondents did not attach a fee to their data access.
- 6.4.3.6. On the legal and structural opportunity that the contract transparency may leverage on, almost all respondents cited the establishment of MWEITI processes, the development of draft MWEITI Bill, enactment of the Access to Information Act, development of MWEITI Policy, implementation of the Open Government Partnerships by GoM, stakeholder activism on EI matters, existence of supportive MDAs such as MoM and Department of Forestry and MMRA.
- 6.4.3.7. Challenges and Barriers: On the challenges that may impede contract transparency, the respondents cited the lack of legal framework to compel the disclosure as currently the policy framework may not suffice to compel a non-compliant company or GoM MDA. To this end, they all suggested the enactment of the MWEITI Bill into a law. In addition, others cited failure to fully implement the existing legal framework such as the Mines and Minerals Act, Access to Information Act, the uncertainty surrounding the commencement of the Mines and Minerals Act 2023, delay in finalizing the

Mines and Minerals Regulations, financial capacity in operating websites for ensuring public access to the information on contracts in EI. In addition, others raised the lack of awareness to the stakeholders on the need to disclose and what to disclose. The review and consultations perceived that contract transparency hindrance provisions do exist, notably section 41(5) MMA 2023, which states that every mining data is confidential. Information can be accessed 2 years after closure unless otherwise provided in the Act. Stakeholders cited lack of MWEITI legislation as a barrier and recommended that MWEITI that the enactment of the Bill should be expedited and that MWEITI being a more neutral and more accessible agency should maintain and develop a portal and a repository for all contracts, concessions and licenses for contract transparency for the EI.

6.4.3.8. On the benefits of disclosures, the following were cited:

- 6.4.3.8.1. evidences compliance with domestic laws;
- 6.4.3.8.2. enables people to follow and know the location of the extractive resources;
- 6.4.3.8.3. enhances trust between stakeholders;
- 6.4.3.8.4. prevents or avoids corruption;
- 6.4.3.8.5. prevents abuse of power,
- 6.4.3.8.6. avoids political interference;
- 6.4.3.8.7. helps in the assessment of tax upon knowing every detail for contracts;
- 6.4.3.8.8. helps in value realization of the extractive resources;
- 6.4.3.8.9. assists in understanding the GoM revenue base from the sector;
- 6.4.3.8.10. helps to curb money laundering and illicit trade;
- 6.4.3.8.11. helps tracing the beneficial owners of the companies involved in EI since sometimes the directors or shareholders of seemingly different companies may be the same;
- 6.4.3.8.12. helps in realizing value for money and ensuring that Malawi benefits from the extractive activities.

## **7. RECOMMENDATIONS**

This section outlines various recommendations which the study proposes following the identified areas of policy, legal and institutional impediments and enchantments as far as contract transparency in EI is concerned. The following are the recommendations:

### **7.1. Legal Reforms:**

- 7.1.1. Finalize the MWEITI Bill: it will give legal basis for compelling companies to disclose and GoM MDAs to make necessary declarations;
- 7.1.2. Amend existing sector laws to mandate contract disclosure in oil and gas as well as forestry and align the Acts with the existence of MWEITI since they are all silent on MWEITI. This includes amending the Mines and Minerals Act 2023, Petroleum (Exploration and Production) Act, Liquid Fuels and Gas (Production and Supply) Act and the Forestry Act;
- 7.1.3. Amend existing non-sector law which will require lobbying the specific users such as the Registrar of Companies, Ministry of Finance and Economic Affairs, Auditor General; and
- 7.1.4. Consider harmonizing the threshold for BO information disclosures ensuring clear guidelines and protections for sensitive information. Also consider having a standalone legislation on BO disclosure for extractive industry.

### **7.2. Capacity Building:**

- 7.2.1. Strengthen the technical and administrative capacity of relevant institutions to manage contract transparency effectively since some MDAs complained of lacking financial and human capacity in ensuring that information on contract transparency is made available to the public. This may need to extend to MWEITI Secretariat as the volume of work may not match with one member of staff and the National Coordinator.

### 7.3. Stakeholder Engagement:

7.3.1. Enhance stakeholder engagement by deepening awareness of the requirement to disclose and the scope of the disclosure, the benefits of disclosure can debunk the fears and myths of loss of competitiveness and breach of confidentiality. In addition, let be dialogue and collaboration among Government, the EI sector, and civil society to address concerns collectively and not in silos.

### 7.4. Contract Transparency Portal:

7.4.1. Develop a contract transparency portal where all signed contracts and Licenses shall be uploaded for access by all stakeholders. Consultations indicated that MWEITI website should be reviewed and include a contract transparency depository and then an extensive awareness should be made for stakeholders to be able to know. MWEITI to be central repository for all EI contracts, concessions and licenses for transparency's sake.

## 8. IMPLEMENTATION ROAD MAP

8.1. The following road map will facilitate on how to address the challenges identified during the study and have been rated based on their magnitude: (This has to be validated by the stakeholders through consultation with the GoM, private companies and CSOs during the validation workshop.)

No .	Major Challenge/Barrier	Corrective Action	Timelines	Responsible Institution	Magnitude/ Importance
1	Lack of clear legal mandate to facilitate contract disclosure	1) Speed up enactment of MWEITI Bill	March 2026	MoFEA/MoJ	High
		2) Amend existing sector laws to cover contract disclosure in mining, oils and gas as well as forestry and align the Acts with the existence of MWEITI	March 2026	MoM/MMRA/DOF/MoFEAs/EAD/MRA	

		3) Include contract transparency provisions in Regulations and or other substantive registration contract disclosure provision	March 2026	MoM/MMRA/DOF	High
		4) Amend existing non-sector law which will require lobbying the specific users such as the Registrar of Companies, Ministry of Finance and Economic Affairs, Auditor General	March 2026	MoFEA/RGD/National Audit Office	High
		5) Remove or amend section 41(5) of Mines and Minerals Acts (MMA) 2023 promoting non-transparency. (Every mining data is confidential, information can be accessed 2 years after closure)	March 2026	MoM/MMRA	High
2	Lack of capacity on contract transparency and management	1) Strengthen the technical and administrative capacity of relevant institutions to manage contract transparency effectively	March 2026	MWEITI/MoM/DoF	High
3	Lack of awareness on contract transparency	1) Enhance stakeholder engagement by deepening awareness of the requirement to disclose and the scope of the disclosure, the benefits of disclosure and debunk the fears and myths of loss of competitiveness and breach of confidentiality	March 2025	MWEITI	High



4	Lack of contract and licenses depository portal	1) Develop a contract transparency depository portal where all signed contracts, concessions and Licenses shall be uploaded for access by all stakeholders.	March 2025	MWEITI	High
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## 9. CONCLUSION

9.1. The feasibility study indicates that Malawi has adequate policy, legal and institutional framework for implementing contract transparency and has made tremendous progress in being EITI compliant. The progress can be seen from the assessment that EITI has done on Malawi which has revealed a steady progression trajectory from 2015 to 2022. Malawi has also taken steps towards addressing the recommendations made by EITI such as establishing a legal and regulatory framework by developing the MWEITI Policy and MWEITI Bill.

9.2. Despite these strides, gaps do exist within the legal framework heightened by the absence of a binding legal obligation to compel Government and EI companies to disclose information about revenue, payments, beneficial ownership. While implementing contract transparency in Malawi's extractive industry presents challenges, the potential benefits are significant. Other gaps include laws that are not EITI complaint governing the EI sector. The study has proposed the need to address these gaps if we have to fully implement contract transparency in EI.

By addressing legal, capacity, and stakeholder concerns, Malawi can enhance transparency, accountability, and public trust in its extractive sector. The recommendations provided aim to guide the effective implementation of contract transparency under the MWEITI framework.

## 10. APPENDICES:

- 10.1. List of Stakeholders consulted:
  - 10.1.1. Ministry of Mining
  - 10.1.2. Ministry of Finance and Economic Affairs
  - 10.1.3. MWEITI Secretariat
  - 10.1.4. Department of Forestry
  - 10.1.5. Government Contracts Unit
  - 10.1.6. Malawi Revenue Authority
  - 10.1.7. Centre for Environment Policy and Advocacy
  - 10.1.8. Natural Resources Justice Network
  - 10.1.9. EMJ Advisory Services
  - 10.1.10. Mkango Resources Limited

- 10.1.11. Malawi Chamber of Mines and Energy
- 10.1.12. Mr. Sam Bakoe
- 10.1.13. Dr. Grain Malunga
- 10.1.14. Mr. Emmanuel Chisale