

CHAPTER 4 – www.eisourcebook.org

4.5 Emerging Global Norms and Standards

As is true for good EI sector management in general, the effective introduction, implementation, and maintenance of EI sector transparency will depend on the participation of all affected parties. However, the diversity of approaches to transparency and accountability has been evident in the proliferation of governance-related initiatives in recent years.¹ In the previous section a number of voluntary initiatives were presented; this section will focus on the efforts that states themselves have taken toward clarifying global transparency standards, such as Article 10 of the Convention against Corruption which requires signatory states to enhance transparency in the administration of their obligations². Both individually and collectively, states themselves are instrumental in creating a more transparent EI sector. In summary form, the emerging norms and standards are presented below by reference to the players who drive them or who have a stake in them.

Host Governments. Two kinds of national governments are involved: those in resource-producing states (host governments) and those in investor states (home governments). They are not mutually exclusive. Resource-producing states have a key role in any initiative to require transparency and to foster accountable processes. A significant number of these states have committed themselves to revenue disclosure through the EITI process,³ as was discussed above. Some have considered a further step of contract disclosure. Increasingly transparent proactive host government legislation, regulation and administration across the EI value chain stands to provide instructive examples for other countries seeking to improve their own EI sectors.

Home Governments. Among the second group, some investor states are compelling companies to disclose information and modify behaviour according to particular legislative measures adopted in these states. Among the examples of this are the Canadian Extractive Sector

¹ Examples of these initiatives include: the *UN Global Compact*, the *Organization for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises*, the *Ruggie Guiding Principles*, and the *Global Reporting Initiative*. For more information on these initiatives, see the *Overview on Guiding Principles for Government and Industry* on the Source Book website, available at: <http://www.eisourcebook.org/cms/files/Overview,%20Guiding%20Principles%20for%20Government%20and%20Industry.pdf> (last accessed 6 March 2016).

² United Nations Convention Against Corruption: see United Nations Office on Drugs and Crime (2004) at http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf (last accessed 6 March 2016).

³ 51 countries are EITI-implementing countries, of which 31 have completed validation and have been declared EITI compliant.

Transparency Measures Act 2015, the UK Reports on Payments to Governments Regulations 2014 No 3209, the EU Accounting and Transparency Directives, and the Cardin-Lugar (Section 1504) transparency provision in the US legislation on financial reform of 2010, the Dodd-Frank Act (see **Section 4.3**) (not yet implemented). Norway has also been a leader with respect to transparency, requiring from 2014 that extractives companies disclose payments to governments at the project level.

This supplements existing anti-bribery legislation in some countries, such as the US Foreign Corrupt Practices Act, the UK Bribery Act and other acts specifically prohibiting bribery of foreign public officials in Canada and Australia. Given the large percentage of extractives market share that is represented on international stock exchanges, the collective impact of the above mandatory legal requirements is likely to be significant. Specifically, of the world's 100 largest oil and gas companies, 68 are listed on a US stock exchange, and 40 of the largest 100 mining companies, and therefore captured by Section 1504 of the Dodd-Frank Act; 24 and 28 respectively are listed on an EU-regulated exchange or incorporated in an EU member country and therefore captured by the EU Transparency and Accounting Directives; 14 and 16 respectively are listed on the Toronto Stock Exchange and two and one on the Oslo stock exchange, with similar effects from the national legislation⁴.

The practices of some major stock exchanges underline the limits of these efforts to promote adoption of mandatory rules. For example, the Hong Kong Stock Exchange (HKSE) adopted new Environmental, Social and Governance Reporting guidelines in 2012 that encourage increased transparency though not necessarily in direct relation to EI sector activities.⁵ The guidelines were followed by the escalation of some disclosures from 1 January 2013 and the exchange has decided to move from a "recommended practice" framework toward a "comply or explain" system by 2015;⁶ however, the lack of mandatory rules addressing what is increasingly seen as the international transparency standard (as set forth by the EITI) at the HKSE has been criticized by civil society.⁷ Among the world's top 100 mining companies, 13 are listed on the HKSE, and five of the 100 top oil and gas companies⁸.

⁴ Publish What You Pay, Transparency on the Move: Payment Disclosure by the World's Largest Oil, Gas & Mining Companies, February 2015.

⁵ Hong Kong Stock Exchange (2011). 'HKEx publishes Consultation Paper on Environmental, Social and Governance Reporting Guide', 9 December 2011, available at <http://www.hkex.com.hk/eng/newsconsul/hkexnews/2011/111209news.htm> (last accessed 6 March 2016).

⁶ Hong Kong Stock Exchange (2012). 'The Exchange publishes Consultation Conclusions on Environmental, Social and Governance Reporting Guide', 31 August 2012, available at <http://www.hkex.com.hk/eng/newsconsul/hkexnews/2012/120831news.htm> (last accessed 6 March 2016).

⁷ Oxfam (2012), 'Hong Kong Stock Exchange adopts second rate reporting guide for Hong Kong companies', 13 September 2012, available at http://www.oxfam.org.hk/en/news_1949.aspx (last accessed 6 March 2016)

⁸ Publish What you Pay (2015).

The above legislation might not have been adopted had it not been for the efforts of civil society groupings (see **Box 4.5**). The Cardin-Lugar and Conflict Minerals provisions in the Dodd-Frank Act demonstrate the power of NGOs to influence the case for improved governance of the extractives sector, but arguably this has been given crucial support by the actions of various oil, gas and mining companies themselves, and their associations, and the leadership of several other key home governments (Germany for example). The same civil society commitment to assisting governments in achieving greater mandatory transparency is evident in the efforts to promote contract disclosure.⁹

Industry. For reputational reasons and reasons concerned with legitimacy, industry has engaged in this process, especially through associations (see **Box 4.6**). Industry initiatives have provided a platform for improved dialogue on transparency and accountability standards and norms. In the mining sector, the International Council on Metals and Mining (ICMM) is an example of an industry initiative to promote more transparent reporting through its Reporting and Assurance work program. The thrust of industry initiatives has been to press for voluntary standards based on, and aimed at, promoting more responsible corporate behaviour and impacts. Initiatives include the widely adopted Voluntary Principles on Security and Human Rights,¹⁰ which is a joint state/industry/civil society initiative offering practical guidance for strengthening human rights safeguards in company security arrangements in the extractive sector. Companies have also signed up to international initiatives such as the UN Global Compact, the OECD's Guidelines for Multinational Enterprises, and the ILO Convention 169 - the Indigenous and Tribal Peoples Convention.

Donors. Donors, too, have taken specific actions. An example of this is the Policy and Performance Standards on Social and Environmental Sustainability,¹¹ introduced in 2006 by the IFC with updated standards coming into effect in 2012. The standards apply to all investment projects, including those in the EI sector. The aim is to minimize the impact on the environment and affected communities. The standards have been extended to cover more governance issues, such as transparency requirements, and include phased in requirements for disclosure of EI contracts. Several states are progressing contract transparency by mandating that contracts be publicly available, such as Niger where the new constitution requires publication

⁹ See, for example, RWI (2009). *Contracts Confidential: Ending Secret Deals in the Extractive Industries*. New York: RWI. Available at <http://www.revenuewatch.org/analysis-tools/publications/contracts-confidential-ending-secret-deals-extractive-industries> (last accessed 6 March 2016).

¹⁰ *Voluntary Principles on Security and Human Rights*, available at <http://www.voluntaryprinciples.org/principles/index.php> (last accessed 5 December 2013).

¹¹ IFC (2011), *Update of IFC's Policy and Performance Standards on Environmental and Social Sustainability and Access to Information Policy*, available at http://www.ifc.org/wps/wcm/connect/fca42a0049800aaaaba2fb336b93d75f/Board-Paper-IFC_SustainabilityFramework-2012.pdf?MOD=AJPERES (last accessed 6 March 2016).

of all EI contracts in the official gazette.¹² Another example is the IMF's Code of Good Practices on Fiscal Transparency.¹³ This sets out robust requirements for all member governments to inform the public about the use of public goods, which includes natural resources.¹⁴

IFIs. International Financial Institutions (IFIs) have taken a growing interest in governance issues in recent years. The Equator Principles framework,¹⁵ a credit risk management framework for determining, assessing and managing risk in project finance, is based on the IFC Performance Standards and hence includes some transparency requirements for Equator Principle Financial Institutions,¹⁶ though the principles focus primarily on after-the-contract issues such as community engagement and consultation and government mandated reporting rather than licensing procedure or contract disclosure. The Equator Principles have now been adopted by 79 financial institutions in 31 countries and, *de facto*, have become an industry standard.

There is significant scope for cooperation and learning from related programs that have a wider or a different focus than on the extractive industries. Several initiatives that focus on better governance of natural resources focus on forestry, for example, and face similar challenges to the EI sector. Sharing learning experiences across the natural resource sectors is undoubtedly beneficial. Moreover, there is also potential to learn from broader anti-corruption or good governance initiatives. An example of that would be the efforts to strengthen procurement and public financial management processes, such as the Public Expenditure and Financial Accountability¹⁷ (PEFA) program.

¹² Heller, P./RWI (2011), 'An Emerging Norm of Contract Transparency', available at <http://www.revenuwatch.org/news/blog/emerging-norm-contract-transparency> (last accessed 5 December 2013). An important document in making the case for contract transparency is 'Contracts Confidential: Ending Secret Deals in the Extractive Industries', by Peter Rosenblum and Susan Maples, Revenue Watch Institute, NY, 2009.

¹³ IMF (2007), *Code of Good Practices on Fiscal Transparency*, available at <http://www.imf.org/external/np/fad/trans/code.htm> (last accessed 6 March 2016).

¹⁴ Government adherence to transparency requirements is monitored by civil society, for example, RWI/Transparency International (2010), Revenue Watch Index, available at <http://www.revenuwatch.org/rwindex2010/index.html> (last accessed 6 March 2016).

¹⁵ *Equator Principles* website, available at <http://equator-principles.com/> (last accessed 5 December 2013).

¹⁶ Equator Principle Financial Institutions (EPFIs) are those international financial organizations that have officially adopted the Equator Principles.

¹⁷ Public Expenditure and Financial Accountability (PEFA) website, available at <http://pefa.org/en> (last accessed 6 March 2016).

Box 4.5: Civil Society-led Initiatives

Supply chain due diligence has the potential to do more than remove illicit material out of official supply chains. As with other commodities, 'ethical trade' can help protect the rights of ASM communities and ensure they get a fair return for their labors. It can also influence the standards of environmental, health and social performance in these communities and the welfare of the people working at the mine site and generally promote sustainable development and the poverty and vulnerability of the miners. Ethically based certification assures buyers that minerals are mined, processed and traded in ways that do not compromise defined ethical standards. The terms attached to such schemes provide hints as to the focus of the systems attentions - fair trade, ethical, green, sustainable, development, responsible, origin, fair mined and fair made, etc.

Several initiatives have explored the prospect of certification as a tool for stimulating sustainable development in ASM communities – using procurement from artisanal miners that agree to adopt some basic standards as a tool for retailers to assure consumers of the provenance of their products and, of course, to establish a market niche.

One of the leaders in this field is the Alliance for Responsible Mining (ARM). ARM focuses on fair trade standards which provide a market niche for small scale producers and develops standards following the ISEAL Code of Good Practice for standard formulation. ARM has partnered with the FairTrade labeling Organisation – FLO - in developing and field testing of a Fairtrade and Fairmined standard for gold from artisanal and small-scale mining.

Box 4.6: Private sector-led Initiatives

The private sector has also undertaken their own initiatives to protect their specific commodities. Chief amongst these are the International Tin Research Institute's iTSCi (International Tin Supply Chain Initiative) and the World Gold Council's Conflict Free Gold Standard.

iTSCi is a joint initiative of traceability and due diligence for cassiterite from central Africa that assists upstream companies (from mine to the smelter) to institute the measures necessary to conform with the OECD's Due Diligence Guidance, including small and medium size enterprises, co-operatives and artisanal mine sites. It is designed for use by industry but with oversight and defined roles for government officials in keeping with the OECD Due Diligence Guidance. It also takes into account the recommendations of the UN Security Council (UNSC) to expand due diligence to include criminal networks as well as armed groups and to include violations of the asset freeze and travel ban on sanctioned individuals and entities.[*]

The iTSCi system supports companies wishing to maintain trade with responsible supply chain actors in the DRC and adjoining countries. iTSCi has three components which are chain of custody data collection (traceability), risk assessment, and independent third party audits.

More recently the World Gold Council has engaged in an extensive consultation exercise to develop a 'Conflict-Free Gold Standard' (2012), an industry-led approach to combat the potential misuse of mined gold to fund armed conflicts. The intention is to promote responsible mining practices throughout the gold mining industry and to protect the (large scale) legitimate suppliers as with other schemes such as the KP. "Gold produced in conformance with the Conflict-Free Gold Standard will provide confidence that it has been extracted in a manner that does not cause, support or benefit unlawful armed conflict or contribute to serious human rights abuses or breaches of international humanitarian law."[*]abbreviated version of the Criteria; unabbreviated criteria are also available (..).

Box 4.7: Summary: Transparency and Accountability

Transparency, by promoting accountability, minimizing waste and corruption, fostering democratic debate, guiding macroeconomic management, and enhancing access to finance, is fundamental to good governance in the EI sectors and should:

1. apply to all segments of the EI value chain, providing:
 - a. effective expenditure monitoring and reporting; and
 - b. sustainable development policies and projects;
2. establish formal and informal processes, such as the Extractive Industries Transparency Initiative (EITI) standard, and encourage more countries to implement such principles so that different stakeholders can hold EI sector producers and government agencies accountable;
3. involve mandatory information disclosure and public reporting to both regulators and the local community with regard to:
 - a. the obligations and the performance of EI sector producers, including the disclosure and public reporting of actual production figures and financial information regarding revenues and receipts, taxes and costs associated with the production, processing and sale of minerals and petroleum; and
 - b. the budget allocation and actual expenditure of government income alongside the ownership, management, fee structure and performance of any sovereign wealth funds receiving mineral or petroleum funds;
4. facilitate public debate and dialogue and help prevent 'commercial confidentiality' being invoked to restrict the release of information to other stakeholders without commercial justification;
5. support states enacting their own anti-corruption laws; and
6. support participation in initiatives such as the Kimberley Process Certification Scheme (Kimberley Process) and the Organization for Economic Cooperation and Development (OECD) Financial Action Task Force.