



**Supporting Inclusive Resource Development (SIRD)
East Africa
TRAINING PROGRAM
2019**



THE CANADIAN
BAR ASSOCIATION



Global Affairs
Canada Affaires mondiales
Canada



LAW SOCIETY OF KENYA



Tanganyika
Law Society



UGANDA LAW SOCIETY

Evaluating resource governance

- Good governance in extractive industry requires transparency and accountability
- Governance is key to sustainable developing resources
- Required to ensure appropriate development targets are chosen, that impacts are balanced and to overcome system biases



Contract Disclosure and Monitoring

- A variety of information that can be disclosed and monitored
- Where the information is disclosed depends on the tenure system and whether or not there is a registry
- On going monitoring will depend on institutional structure and legal tools



Importance of Disclosure

- Ensures regulatory system is not circumvented
- Allows tracking and appropriate allocation of resources
- Equity (regional, community, gender)
- Cannot enforce rights and obligations that are unknown
- Sets and maintains expectations



Importance of Monitoring

- Operation of a resource project has major impacts
- Ensures operations as agreed to
- Identifies unexpected impacts, long term trends and cumulative impacts
- On going disclosure



Impact on Intercommunity Equity

- What projects are chosen
- Differing impacts on those working in mines, supporting mines, outside of mine economy
- Gender, age (elderly, youth), proximity to mine, education levels, access to existing facilities, benefit from new facilities
- Community stakeholder engagement is required to determine appropriate projects



International Extractive Transparency Law

- A number of countries have developed national laws to increase the transparency of the extractive industry
- Norway first to implement in 2014
- EU enacted *Accounting and Transparency Directive*
- US introduced rules in 2012 (vacated) and 2016 (nullified in 2017)
- Australia introduced legislation in 2016 (lapsed)
- Canada *Extractive Sectors Transparency Measures Act* (ESTMA) in force 2015
- Extractives Industry Transparency Initiative eiti.org
- Natural Resource Governance Initiative resourcegovernance.org



EITI: Overview

- Multi-stakeholder group established at national level under EITI framework
- Present in 51 countries
- Process is designed by stakeholders (with EITI guidance) for each country
- Annual reporting, reviews every 3 months to 3 years
- Information is shared widely to increase industry transparency
- Encourages public debate and accountability



EITI: Scope

- Goal is to generate recommendations to improve tax and legal regimes, sharing of information and increasing accountability
- Supported by national initiatives as well as individual companies
- Disclosure is meant to include suggestions to increase transparency in extractives sector



EITI Open Data Policy

- 95% of data is open source
- Guidance on governance often applicable beyond national boundaries
- Tanzania (TEITI.or.tz)
 - 5 year work plan 2018-2023
 - Increased disclosure, Establishment of a new Mining Commission, review of current contracts



EITI versus Mandatory Disclosure

- Mandatory disclosure usually only requires disclosure of how much
- Voluntary will often disclose to whom, for what and commentary around the payment
- One is not necessarily better – they are complementary
 - For example, Nigeria \$5 billion was uncovered in unpaid taxes through their EITI process



Regional Examples

- Tanzania (TEITI.or.tz)
 - 5 year work plan 2018-2023
 - Increased disclosure, Establishment of a new Mining Commission, review of current contracts
- Democratic Republic of Congo
 - Contract database for oil and gas production sharing agreements
- Ethiopia EITI site has a number of resources
 - [Extractive Companies to Community Development – 16 Case Studies](#)



Company Support of EITI

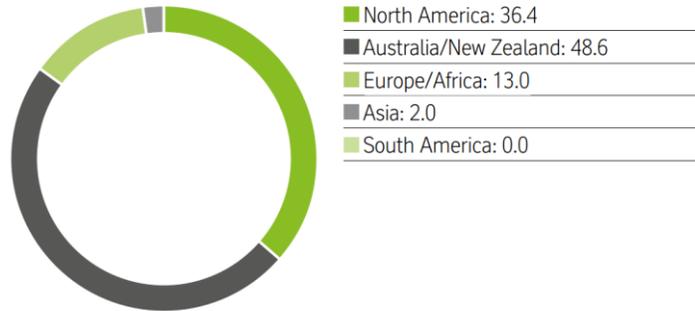
- A number of companies are also supportive of the EITI initiative
- Can be an ally when developing transparency initiatives nationally
- Will often be reflected in more in-depth reporting
- Rio Tinto is a supporter of EITI – disclosure through [Annual Sustainable Development Report](#)



Rio Tinto Sustainability Report – Community Relationships

Community contributions by region

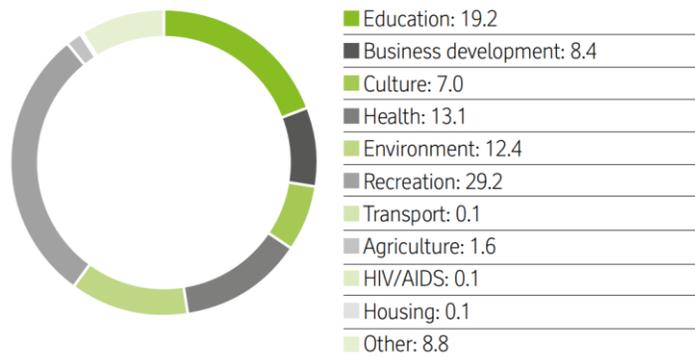
(percentage of annual total)



Excludes Rio Tinto management costs and direct payments.

Community contributions by programme type

(percentage of annual total)



Due to rounding the sum may not total 100 per cent

- Reiterate guiding principles
 - International Finance Corporation's (IFC) Performance Standards on Environmental and Social Sustainability
 - ICMM's Position Statement on Indigenous Peoples and Mining
- \$176M spent on 1,366 community programmes
- Some sample projects (usually a different one highlighted each year)

Other Disclosure

- Project proponent (most have detailed websites and contact information)
- Permitting (many permits require frequent data to be submitted. If not registry, may be a requirement for project proponent to maintain records and provide access)
- Environmental/social Impact Assessments
- SEDAR, EDGAR and other securities disclosure
- Consider Freedom of Information requests of both project proponent where there is government investment or with regards to government permits, negotiations and licenses



Questions

1. Are there vulnerable groups that need to be accommodated for effective disclosure?
2. What are some of the methods for increasing the efficiency of disclosure? Who can assist in that disclosure?
3. Aside from the amount paid, what other information about payments would be useful to you as an advocate?

[Global Witness Briefing](#) on Uganda Government commitment to implementing EITI and some of the legislative challenges



ESTMA: Overview

- Requires all companies listed in Canada, or with business or assets in Canada prepare and publish an annual report
- Report certain payments made to governments relating to “commercial development of oil, gas or minerals”
 - Does not include support services (construction) or post-extraction (e.g. smelting)
- Fine of up to \$250,000 per day for company and directors and officers



ESTMA: Who must report

Applies to entities

- Listed on a stock exchange in Canada (70% of global mining equity); or
- Doing business or assets in Canada

AND

- Size test (2 of 3)
 - \$20M in assets
 - \$40M in revenue
 - 250+ employees



ESTMA: Who receives payment

- Goal is to disclose payments to governments
- Act has a broad definition including:
 - Any government in Canada or in a foreign state.
 - A body that is established by two or more governments.
 - Any trust, board, commission, corporation or body or other authority that is established to exercise or perform, or that exercises or performs, a power, duty or function of a government for a government referred to above.
- Includes First Nations in Canada and abroad



ESTMA: Sample payments

- Must report all payments over \$100,000 including:
 - taxes, other than consumption taxes and personal income taxes;
 - royalties;
 - fees, including rental fees, entry fees and regulatory charges as well as fees or other consideration for licences, permits or concessions;
 - production entitlements;
 - bonuses, including signature, discovery and production bonuses;
 - dividends, other than dividends paid as ordinary shareholders; and
 - infrastructure improvement payments.
- Social payments, including capacity-building payments, accommodation payments, infrastructure improvement payments, and other payments or in-kind support need to be reported.



ESTMA: Report

- Government maintains a registry of links, not reports
- Must remain for at least 5 years
- Reports are published on-line
 - Review B2Gold Report



Group Exercise

1. Sample ESTMA report - B2Gold – 5 minutes as small groups

Review and discuss any items of interest.

Does this give more info?

Useful info?

What additional questions does it raise?

Where would you seek additional information?



Payee Name	Fees	Infrastructure Improvement	
Receiver General	950,000		Permits and annual land taxes.
Local Community (Chief of Village)		60,000	Local water programs and foot bridge.
Local Government (Commune)		40,000	Training in the use of mining equipment.
Enecal		10,000	In-kind contributions valued at cost for a study to improve drinking water in La Libertad.
Ministerio de Gobernacion		50,000	Provision of \$50,000 in in-kind contributions valued at cost for improvements to the fire station in La Libertad.
SINAPRED		1,510,000	Provision of \$1,510,000 in in-kind contributions valued at cost for tin roofs for low income housing program.
Alcaldia Municipal La Libertad		130,000	Provision of \$130,000 in in-kind contributions valued at cost for a slaughterhouse and fair grounds.
Alcaldia Santo Domingo Chontales		630,000	Provision of \$30,000 in in-kind contributions valued at cost for study to build a geomining museum.
Alcaldia Larreynaga		40,000	Provision of \$40,000 for local road improvements.
Policia Nacional	30,000		Required service for transportation of explosives.
Town of El Limon		1,040,000	Provision of \$1,040,000 in in-kind contributions valued at cost to provide electricity for the town of El Limon.
Ministerio de Energia y Minas	120,000		
Townpeople of Jabali		440,000	Provision of \$440,000 in in-kind contributions valued at cost for the resettlement of residents at Jabali Antenna.

ESTMA: Issues

- New legislation, not without its challenges
- High entity thresholds: captures majors but not ventures.
- What type of payments need to be reported? Lots of discretion left to entity, but fined if wrong
- Legislation requires reporting of the amount despite any confidentiality clause. Other details still confidential.
- Concern about impact on negotiations with local communities/First Nations
 - Will other funds be decreased because of payments from mining company



ESTMA: Follow up

- Disclosure registries may be nominal increase to transparency
- Follow up due diligence is required



Three years of ESTMA

- Reports are not easy to find
- High variance in reporting standards
- Positive step is an increase of more in-depth reports, but difficult of comparing between reports

