



Submission on EITI Validation Process

September 2015

Background

This submission draws on our findings from two major studies into the effectiveness of EITI. The first, *Protecting the Cornerstone: Assessing the Governance of Extractive Industries Transparency Initiative Multi-Stakeholder Groups* was conducted in 2014.¹ It entailed more than 80 interviews, primarily of multi-stakeholder group (MSG) members and local actors affected by EITI, as well as attendance at numerous MSG meetings and EITI Board meetings. The second, conducted during 2010-2013, is a pilot evaluation of EITI currently available online as a working draft.² It included extensive consultations with the EITI Secretariat and a detailed review of EITI's procedures. Both studies include detailed recommendations relating to EITI's monitoring processes, known within EITI as validation.

About MSI Integrity

The Institute for Multi-Stakeholder Initiative Integrity (MSI Integrity) is a nonprofit organization dedicated to understanding the human rights impact and value of voluntary initiatives that address business and human rights. MSI Integrity researches key questions surrounding the effectiveness of these initiatives, facilitates learning in the field, and develops tools to evaluate initiatives from a human rights perspective. MSI Integrity takes a particular interest in how initiatives include, empower, and impact affected communities.

Summary

In *Protecting the Cornerstone*, released earlier this year, we recommended that the EITI Board “[r]evis[e] the validation process to ensure it can reliably detect non-compliance with all aspects of the EITI Standard. This revision should explicitly seek public and expert input, and draw on good practices for monitoring and evaluation...”³ MSI Integrity therefore welcomes the current validation review and the opportunity to “submit comments and proposals for improving EITI Validation”.⁴

We formally submit our previous assessments and recommendations for EITI relating to validation and noncompliance, which we have appended to this submission. These are supplemented with additional comments in this document, and we welcome further opportunities to discuss our comments.

The two primary concerns that underpin the majority of the recommendations in this submission are:

- The current Validation process primarily focuses on methodologies that are appropriate for assessing compliance with the requirements related to the *content* of EITI Reports, and would benefit from greater emphasis on the *processes*

¹ The report was released in February 2015 and is available online: <http://www.msi-integrity.org/assessing-eiti-msg-governance/>

² The full report will be formally released later this year. However, the working draft (2013) is currently available online: <http://www.msi-integrity.org/evaluated-msis/> Encouragingly, some of the recommendations in this report, which evaluated EITI under the EITI Rules have been adopted as a result of modifications under the EITI Standard or other changes at the international level. We encourage EITI to consider the remaining recommendations.

³ Pg 70

⁴ See <https://eiti.org/consultation-validation>

relating to the report. In particular procedures need to be adopted by EITI to ensure that validation adequately assesses: (a) the processes and environments that allow for the creation of the report and (b) whether the report can be, and is, used to promote meaningful debate (see EITI Standard, Requirements 1.3 and 6.1 as examples). These are central to the success of EITI as a transparency and accountability tool, however they require different expertise, research and skills sets compared to validating the content of EITI reports.

- Like any standard-setting multi-stakeholder initiative, the credibility and value of EITI hinges on ensuring that countries that satisfy the mandatory requirements of the EITI Standard are clearly differentiated from those countries that have not met the requirements. Concerns that countries will not pass validation should not result in a softening of validation processes or the EITI Standard. Clear, consistent and defined consequences should follow for countries that fail to meet each EITI Requirement when they are validated, including the clarifying when revalidation, suspension and delisting are granted. An independent grievance mechanism should be established to address complaints of noncompliance that arise between validation periods or as a result of a validation.

We would welcome the opportunity to further explain and discuss these comments and to be included in the review process. Please contact Amelia Evans aevens@msi-integrity.org for further opportunities for input or discussion.

A comment on the validation consultation questions and process

Please note that we elected not to submit our comments by answering the question headings suggested by EITI in the EITI webpage and EITI Consultation Note. Our concern is that the issues and questions raised in those documents are very narrow and specific, and do not encompass very important concerns with the current validation process. While we recognize that EITI specifically notes that stakeholders should not consider themselves confined to those questions, we want to highlight that by posing narrow questions the public consultation process risks being skewed towards only focusing on those issues rather than allowing stakeholders and experts to voice the full spectrum of their views and suggestions. We also have concerns about neutrality and bias of the particular wording and framing of some of the questions and issues, which insert the subjective views of the EITI Secretariat regarding the goals and function of EITI and its views on the goals and functions of the validation process.

In future, when conducting public consultations, we encourage EITI to either conduct a comprehensive public review or to provide justifications for why the consultation has been confined to specific issues. To that end, we note that we have previously presented the issues raised below to the EITI Secretariat and other actors in EITI, and that other stakeholders have voiced a number of these issues. We therefore strongly encourage you to include these considerations in the current review.

Key Comments for Reform

I. Improving the EITI Validation process regarding non-technical Requirements in EITI

The Validation methodology needs to be comprehensively reviewed to ensure it provides sufficient procedures and safeguards to reliably assess non-technical Requirements in the EITI Standard that are critical to the success of EITI as a transparency and accountability initiative. For example, the existence of an enabling environment and the ability to “speak freely on transparency and natural resource governance issues”; the selection of civil society to the MSG that are operationally independent from government

and/or companies; and ensuring “that the EITI Report... contributes to public debate” (see *EITI Standard* Requirements 1.3 and 6.1).

The ability to assess the quality and sufficiency of public debate or to measure civic space requires vastly different skills from assessing the content and quality of EITI Reports. Robust procedural requirements must be established relating to measuring the non-technical requirements of the EITI Standard. The absence of such processes may explain why the 2015 validation report on Azerbaijan did not provide a sufficiently reliable or detailed report to enable the Board to make an informed decision on whether to deem Azerbaijan EITI Compliant in light of concerns regarding the lack of an enabling environment and civic freedom.⁵ Instead, recourse to external resources was required, which made matters confusing and difficult for all involved—a concern that was voiced by multiple Board members during the discussions.

We note that the issue of *validation methodology* (or process) is not listed in the EITI Consultation, despite it being one of the key issues raised by the first validation based on the EITI Standard. We strongly encourage EITI to consider expanding the consultation and review process to directly address this concern and to refer to our appended recommendations on this issue. Given that it is unclear whether the current review will meaningfully consider the validation process/methodology at this time, we confine our comments to only highlighting some of the most crucial issues. We are happy to expand on these issues if EITI includes a review of this process in the future.

Pressing aspects of the current EITI validation process/methodology that should be revised include:

1. Establishing Additional Qualifying Criteria for Validators. The expertise required for assessing the content of EITI Reports and technical aspects of the EITI process are vastly different from the skills needed to assess internal governance, the enabling environment, and whether there has been debate about the report (see EITI Requirements 1.3 and 6.1). It could be that ultimately there are teams of validators or two-stages to validation, which allow both technical and non-technical issues to be addressed appropriately. We strongly encourage EITI to require the validators examining these non-technical issues to have relevant skills such as a background in human rights and civic space issues, and familiarity with the local language/culture.
2. Revising the Validation Methodology to Address Non-Technical Issues: This would include establishing methodological guidance so that validators **must**:
 - a. Assess all non-technical requirements of the EITI Standard. A non-exhaustive list of non-technical requirements includes:
 - i. The independence and sufficiency of civil society representation on the MSG (Requirement 1.3);
 - ii. Whether MSG members liaised with constituents (Requirement 1.3(g));
 - iii. The sufficiency of internal governance provisions (Requirement 1.3);
 - iv. The sufficiency and extent of public debate prompted by the EITI Report (Requirement 6.1).
 - b. Obtain perspectives from key stakeholders that are crucial to determining whether all non-technical requirements have been met. This should include:
 - i. Interviews with civil society actors outside the MSG;

⁵ During the 29th EITI Board meeting, Board members had to refer to external evidence when discussing Azerbaijan as the validation report did not provide sufficient detail.

- ii. Field visits to regions affected by extractive activities (for example, to understand if EITI Reports have been disseminated and debated in areas of greatest importance or whether these stakeholders are familiar for opportunities to liaise with their constituent government, civil society or company representatives in the MSG);
- iii. Confidential and secure interviews with civil society within and outside the MSG. This includes ensuring validators establish safeguards to prevent reprisals to interviewees or whistleblowers.

In addition, we have previously highlighted concerns about the inadequacy of conflict of interest provisions for validators (see Annex B at page 21) and are pleased that this raised in the final section of the Validation Consultation Note. However, it is unclear why the Consultation Note follows this discussion with questions about whether the Secretariat or MSGs should play a greater role in validation, given that both risk deepening either concerns of conflicts of interest or insufficient understanding of local context on non-technical requirements of the EITI Standard. We instead recommend that the underlying conflict of interest guidelines be clarified and methodological guidance be deepened, as highlighted in our recommendations above and in our appended reports.

II. Strict requirement of compliance with all the requirements in the EITI Standard

The EITI Standard states that “where Validation verifies that a country has *met all of the requirements* the EITI Board will designate that country as EITI Compliant.” (Requirement 1.6(b) emphasis added). It is critical to the integrity and credibility of EITI that the rules are plainly enforced and that all countries should be held to the requirements of the EITI Standard. EITI should strictly require all implementing countries to meet all the requirements in the EITI Standard after their candidacy period is complete, including the non-technical requirements discussed above. Failure to meet these requirements should result in a clear, pre-determined outcome (see Section III below).

This should not result in unfair results. The EITI Standard is carefully structured to provide periods of time to enable new members, EITI Candidate countries, to prepare for validation and comply with the requirements in the EITI Standard. The EITI Standard also allows for an additional 3.5-year grace period for countries that have made “meaningful progress” to come into full compliance before being re-validated. Taken together, this provides ample opportunity for countries to obtain support for coming into compliance with the EITI Standard and provides a grace period for countries committed to making changes.

In research conducted for *Protecting the Cornerstone* it became clear that countries are not meeting the non-technical requirements of EITI (as discussed above, examples of non-technical requirements include Requirements 1.3 and 6.1), as none of the countries assessed in 2014 had internal governance provisions and practices that satisfied Requirement 1.3.⁶ Rather than responding by watering down the EITI process through loosening the validation standard, MSI Integrity encourages EITI to provide targeted capacity-building and technical assistance on the specific requirements that countries do not meet. This requires validators to continue to assess countries on a pass/fail basis and for validation to overall only allow compliance when all requirements are met. Validators should continue to identify the steps that need to be taken in order for countries to improve on requirements that have been failed. This will allow actors in the MSG to recognize their shortcomings and create a roadmap to compliance. Where countries fail

⁶ See *Protecting the Cornerstone* (2015) at page iv (available at: <http://www.msi-integrity.org/assessing-eiti-msg-governance/>).

to come into compliance after shortcomings have been highlighted through a validation or review process, it should be expected that sanctions should follow (see Section III below).

Changing the culture of EITI: quality of members over quantity of members

We are concerned that the language in the Validation Consultation Note on this issue belies a belief that the goal of the EITI is to encourage as many countries as possible to stay within its membership, rather than seeing the function of EITI to uphold principles of transparency and accountability. We point to the following examples from the Validation Consultation Note:

“... it seems contrary to the objectives of the EITI to punish a country that faces major governance challenges with suspension or delisting if it is has been documented that the country is making progress in the right direction.”⁷

“combined with the current pass/fail assessment approach and tough timelines for achieving compliance, this higher bar could represent three risks:

(1) implementing countries will become demoralised because Validation does not take into account progress and considerable advances in reporting under the new Standard

...

(3) that the EITI will be under pressure to take positive decisions regarding a country’s compliance even if implementation does not quite measure up because of the risk of losing members.⁸

We disagree with this perception of EITI or multi-stakeholder initiatives generally. There is no evidence to suggest that expanding an MSI or sustaining its membership, in itself, leads to greater impact or effectiveness. A hallmark of a robust multi-stakeholder initiative is that it has the “teeth” to delineate between members that are in compliance, and those that are not. Historically, EITI has sanctioned members that breach the EITI Rules. These sanctions—by way of suspension and delisting—should not be seen as failures of EITI, but as successful evidence of accountability and integrity. Evolving and improving the EITI process from the EITI Rules to the more extensive EITI Standard may, naturally, result in some countries not immediately conforming to the more extensive requirements. Provided that EITI, and actors supporting EITI, offer support for suspended or non-compliant countries to come into compliance, this should not be problematic.

We therefore encourage EITI to embrace a culture and process that only “passes” countries that are in full compliance with the individual EITI Requirements. For countries facing issues of noncompliance, validators should continue to note how shortcoming can be overcome, to provide a roadmap towards compliance. Motivated countries will then be able to move into compliance. We are concerned that the current framing of the issues, and questions, regarding “direction of travel towards meeting a requirement”, “level of progress” and, most worrying of all, whether “the consequences of not reaching compliance status be removed”, indicate a desire to significantly erode the function of EITI as an initiative that distinguishes countries with transparent extractive industries from countries that do not.⁹ A validation process that utilizes progress-based scoring, indexing or anything short of requiring all individual requirements to be met would undermine the EITI Standard, which was adopted just two years ago with the explicit wording that all countries must meet its individual requirements.

⁷ EITI Secretariat *Validation Consultation Note* (2015) at page 3.

⁸ EITI Secretariat *Validation Consultation Note* (2015) at page 2.

⁹ EITI Secretariat *Validation Consultation Note* (2015) at page 4.

Continuous improvement should be encouraged provided all the core requirements are satisfied

Finally, we are pleased that EITI is considering how to adopt incentives for continuous improvement. We suggest EITI look at initiatives that have their evaluators (or validators) measure two categories: baseline or compulsory standards (e.g. compliance with the EITI Standard) as well as additional recognition for voluntary continuous improvement upon standards. We would especially encourage EITI to specifically note areas where MSGs could expand their scope of reporting processes.¹⁰ This recognition could take the form of special status (e.g., compliant+) or benefits from home countries (e.g., export credits). However, it should be clear that countries should first meet all the requirements in the EITI Standard prior to obtaining any such recognition. There are many other approaches to continuous improvement that could be suitable for EITI based on the experiences of other multi-stakeholder initiatives and we are happy to share these if EITI explores this issue further.

III. Establish and follow clear processes and sanctions for countries that fail to comply with the EITI Standard.

To enhance consistency and credibility regarding the EITI process, and reduce inefficiency in decision-making, there should be clear consequences when a country fails to comply with all the requirements in the EITI Standard and therefore does not pass validation. In practice there has been considerable variation as to the outcomes for countries that are not in compliance with aspects of the EITI Standard.¹¹ The current validation review is an opportunity to clarify the existing uncertainties and address the unduly wide discretion held by EITI at the international level to respond to individual cases of noncompliance. If EITI does not address this issue, it risks politicizing individual cases of compliance and ultimately facing a crisis of credibility.

We urge EITI to establish and adhere to clear and predictable rules and responses for failing to meet each aspect of the EITI Standard. For example, in respect to suspension and delisting the EITI Standard provides:¹²

Where it is manifestly clear that *a significant aspect* of the EITI Principles and Requirements are not adhered to by an implementing country, the EITI Board will suspend or delist that country. In accordance with Requirement 1.6, this includes cases where a country has not met the requirements for timely EITI reporting, publication of annual activity reports and/or achieving compliance with the EITI Requirements by the deadlines established by the EITI Board...

We would encourage EITI to provide guidance as to how terms such as “manifestly clear” and “significant aspect” of the EITI Principles and Requirements are interpreted in practice, or to otherwise clarify the exact consequences of failure to meet a requirement of the EITI Standard. As an observer organization it was surprising, for example, to see that even where the EITI Board recognized that a country needed to ensure civil society representatives are able to speak freely about natural resource governance without fear or threat of reprisal, it did not consider this a significant enough breach of the EITI

¹⁰ During conversations with MSGs many non-government members did not understand that they could use EITI to expand reporting to different areas, such as environmental impact reporting, noting if communities gave free prior and informed consent to extraction sites, human rights impact or allegation reporting or beneficial ownership.

¹¹ For example, different outcomes for different countries found to be in noncompliance with various aspects of the EITI Rules occurred during 2010- 2014.

¹² EITI Standard, Requirement 1.7. (emphasis added)

Requirement 1.3 to warrant suspension until the country came into compliance, but instead responded by only requesting early validation.

Similarly, we believe the existing definition of “meaningful progress” must be clarified. Currently explanations of “meaningful progress” state:¹³

In order for the Board to conclude that a country has made meaningful progress, Validation or a Secretariat Review must demonstrate that the country has at least made meaningful progress in meeting all seven EITI Requirements. In assessing meaningful progress the EITI Board will consider:

- (1) The EITI process, in particular the functioning of the multi-stakeholder group and clear, strong commitment from government.
- (2) The status and quality of EITI reporting, including meaningful progress in meeting the requirements for timely reporting as per Requirement 2 and, where applicable, efforts to address recommendations for improving EITI implementation.

While some degree of flexibility may be desirable, the current framing grants too much discretion to the EITI Board and results in uncertainty as to whether a country will be deemed to have made meaningful progress. Instead, we suggest that a clear and consistent system for ascertaining whether a country has made meaningful progress should be developed. Such a system should ensure it takes account of progress related to both technical and non-technical requirements and should be careful to continuously highlight specific requirements that have not yet been met.

IV. Establishing an Independent, Effective and Accessible International Grievance Mechanism

Even the most robust validation process may occasionally fail to detect non-compliance with the EITI Standard. EITI needs to ensure that there are sufficient processes to enable stakeholders to report serious breaches of the EITI Standard either because (a) the validation process did not detect it or (b) the breach arose between validation periods.

Currently in EITI there are a variety of ways individuals can report non-compliance with the EITI Standard, such as by contacting the Secretariat or raising concerns with the EITI Board (see Requirement 1.6(b)). However, none of these processes amount to a comprehensive grievance mechanism and the processes do not take into account established good practice for grievance mechanisms in MSIs or other international bodies. The international good practice endorsed by the United Nations expressly states that MSIs should ensure that an effective grievance mechanism is available (see *United Nations Guiding Principles on Business and Human Rights*, Principles 30 and 31). The UN has enumerated seven basic qualities that make a grievance mechanism “effective”, such as transparency, accessibility, and predictability. Many of these enumerated qualities are clearly not met by EITI.

Therefore, to supplement the validation process EITI should develop an independent international-level grievance and dispute resolution mechanism to allow stakeholders in each implementing country to report substantive non-compliance with the EITI Standard. The mechanism should be designed consultatively and draw on existing good practice for grievance mechanisms in multi-stakeholder initiatives, such as being accessible, transparent, effective, and based on principles of fairness.

¹³ EITI Standard, Requirement 1.6(b).

Appendix A

Extract from *Protecting the Cornerstone: Assessing the Governance of Extractive Industries Transparency Initiative Multi-Stakeholder Groups* (2015), pages 65-71.

Available online at: <http://www.msi-integrity.org/assessing-eiti-msg-governance/>

Protecting the Cornerstone

**Assessing the Governance of
Extractive Industries Transparency
Initiative Multi-Stakeholder Groups**

February 2015



5. EITI Global Oversight and Framework

Overview

Interviews with MSG members and other stakeholders in EITI countries around the world have uncovered concerns about whether the EITI framework and oversight mechanisms are limiting the potential for the EITI to have an impact on extractive industry governance. In particular:

- Some countries have been granted “EITI Compliant” status despite appearing to not actually be in compliance with the EITI Rules. This is not being detected by the EITI Association, which indicates that the current validation process is not sufficiently rigorous or detailed to adequately identify whether a country is, in fact, EITI Compliant. Additionally, there are no well-known avenues for MSG members or other stakeholders to report concerns of non-compliance to an independent international oversight body in the years between validation reviews.
- The primary goal of the EITI process for many MSG members appears to be getting deemed “EITI Compliant”, rather than focusing on ensuring EITI leads to transparency outcomes that will, in turn, lead to greater accountability or improved resource governance. This is permitted by the framework of the EITI Standard, which does not encourage or incentivize MSGs to progress beyond the minimum requirements contained in the EITI Standard. Occasional efforts by individual MSG members to expand EITI to include transparent reporting on issues of importance in the domestic context, such as reporting on environmental impacts, indigenous rights, or local government payments and revenues, were often rebuked by MSGs who claimed that this exceeded the EITI Standard. This often limited the range of actors interested in participating in the MSG, or wider EITI processes.

5.1. Ensuring EITI has adequate tools to address concerns regarding compliance with the EITI Standard

One of the major concerns arising from this study is that some countries appear to have “EITI Compliant” status despite being actively in breach of the EITI Rules. This casts serious aspersions on the integrity of “EITI Compliant” status, as well as the credibility of the EITI itself. The EITI Board should take urgent action to address this issue.

5.1.1. Insufficient monitoring for compliance with the EITI Standard

EITI monitors countries for their compliance with the basic requirements of membership – previously formulated in the EITI Rules, and now in the EITI Standard – through a process known as “validation”. Under the EITI Rules, validation assessments were previously required to take place every five years. Under the EITI Standard, countries will need to be validated every three years.¹¹⁵

The increased frequency of validation is a positive step towards faster detection of non-compliance. However, the increased frequency of validation needs to be coupled with an improvement in the rigor and depth of these assessments. The current validation process has failed to detect some fundamental requirements of the EITI Rules, such as whether the selection of civil society to the MSG was independent, or whether MSG representatives are adequately liaising with their constituencies, as discussed in Parts 3 and 4 of this Report. In addition, some of the basic requirements regarding internal governance processes, such as making the MSG’s

¹¹⁵ EITI Standard, Requirement 1.6(b).

terms of reference publicly available or agreeing to internal governance procedures, are not being detected or addressed in validation reviews (see Part 1). The result is countries are deemed complaint despite being in violation of the EITI Standard.

While a full assessment and review of validation processes is beyond the scope of this assessment, it appears that some problems lie in a lack of establishing comprehensive frameworks for validators. Currently the validation protocol appears very focused on ensuring validators can detect compliance with technical aspects of EITI reporting, contained in Requirements 2-5 of the EITI Standard. However, there does not appear to be a sufficient methodology or framework to ensure that validation reliably assesses the wider societal issues in EITI contained in Requirements 1 and 6 of the EITI Standard, such as: ensuring there is effective and independent civil society participation in MSG; ensuring there is protection of the enabling environment; or, measuring public awareness and debate of EITI reports. The revision to validation processes being undertaken at the time of writing this report did not appear to take such factors into account and did not directly seek the feedback of experts who would have raised these concerns.

Box 10: Azerbaijan – Insufficient processes in place to assess the enabling environment?

While conducting research in Azerbaijan in May 2014, numerous civil society organizations raised concerns to MSI Integrity about the contraction of the enabling environment and restrictions on the freedom of civil society to operate independently of government: see Requirements 1.3(b)-(f) of the EITI Standard. These concerns range from suspicions about the government directing hotels to deny civil society accommodation to hold EITI-related meetings in their conference facilities,¹¹⁶ to the restrictive laws to sustain non-profit status in Azerbaijan.¹¹⁷ Although CSOs explained that government interference and intimidation had recently escalated, they also clarified that at least some forms of intimidation had existed even since the inception of EITI. These concerns have been raised in Azerbaijan by civil society for some time, with a review mission sent in September 2014 and a prior letter sent by EITI to the government going unanswered.¹¹⁸ The findings of the mission prompted the EITI Board to require early validation in January 2015.¹¹⁹

Azerbaijan, despite joining EITI in 2003, has only had one validation—in 2009—and the issue of civil society independence was barely raised in this report. Indeed, external CSOs outside the MSG were not interviewed for their views on CSO independence or freedoms.¹²⁰ There is no requirement that the new validation would need to seek these views or that experts with an understanding of enabling environment issues would be required to conduct the validation process. Similarly, the mission sent by EITI was composed of secretariat staff and did not require that those with training in human rights issues attend, despite this being the issue under investigation. The risk by not having adequate investigation processes is not only that EITI may fail to accurately understand the ability of CSOs to advocate for EITI, but that poorly conducted investigations could lead to serious human rights repercussions for the CSO interviewees that participate.

Unfortunately, it appears EITI currently does not have the necessary tools to ensure that Requirement 1.3(b) in the EITI Standard, that there is an “enabling environment for company and civil society participation”, is continuously met.

¹¹⁶ Coalition on Increasing Transparency in Extractive Industries of the Republic of Azerbaijan, *Press Release: Inofficial bans for provision of premises for conferences and other events of the Coalition* [sic] (June 20, 2014).

¹¹⁷ For example, Human Rights Watch, *Azerbaijan: Transparency Group Should Suspend Membership* (August 14, 2014).

¹¹⁸ EITI Board, *Mexico Board Minutes* (July 2014), 14.

¹¹⁹ EITI, *Azerbaijan Implementation*, available at <https://eiti.org/Azerbaijan/implementation>.

¹²⁰ Coffey International Development *Validation of the Extractive Industries Transparency Initiative (EITI) in the Republic Of Azerbaijan* (Feb. 2009) at A3-1;

Box 11: Standardizing the basic methodology for conducting validation

Currently there is little guidance given to validators regarding how they should conduct their assessments. While a protocol or terms of reference for validators does not need to be unduly prescriptive, there are basic expectations that should be established. For example, currently there is no requirement for validators to seek the perspectives of stakeholders outside the MSG. This makes it almost impossible to reliably assess compliance with certain EITI Requirements, such as the independence of CSOs in the MSG, or the effectiveness of liaising and outreach, as they inherently require an understanding of external circumstances (see the Azerbaijan case study in Box 10, above).

Requiring interviews of CSOs and communities outside the MSG is just one of a number of methodological requirements that EITI needs to address if its validation process is to be a reliable assessment of compliance with the EITI Standard. A non-exhaustive list of some other issues include:

- Establishing expectations that validators should: conduct field visits to extractive sites to assess the effectiveness of outreach and liaising; set parameters for confidential and secure interviews to ensure that interviewees do not fear reprisal; and, review documentation relating to the formation of the MSG.
- Establishing qualification criteria for validators to ensure they have the expertise to assess technical compliance with EITI reporting requirements as well as societal issues relating to MSG governance, such as political and operational independence.
- Establishing clear and standardized guidance for validators on how to determine compliance with the specific requirements of the EITI Standard. This is particularly important for requirements in the EITI Standard that use subjective or qualitative judgments, such as whether processes are “effective”, “independent”, or “open”.¹²¹

In addition, there should be clarity from the EITI Board regarding how non-conformities are to be addressed, to ensure that they are ultimately remedied. Otherwise, there is a risk that issues that are considered minor, such as those regarding internal governance provisions, may remain unaddressed indefinitely. For example, the EITI Board could define major and minor non-conformities, and explain the expectations for redressing such non-conformities to achieve or maintain compliant status. While it is understood that countries should not be suspended for minor non-compliance, there must be a credible and transparent procedure regarding how it is expected that such non-conformities must be rectified, with clear deadlines and transparent follow-up procedures. For example, minor non-conformities could be outlined in validation reports and remediation could be required within a six-month period.

5.1.2. Developing and publicizing effective compliant mechanisms

While validation enables EITI to assess compliance with the EITI Standard, it only occurs every few years. It is therefore crucial to the integrity of EITI that there are processes in place to detect and address any serious breaches of the EITI Standard that may arise in the periods between validations.

To achieve this, it is essential there are avenues to file complaints regarding alleged nonconformities with the EITI Standard. However, EITI neither requires MSGs to establish such mechanisms domestically,¹²² nor does EITI provide access to a formal grievance mechanism at the global level.

¹²¹ EITI Standard, Requirement 1.3.

¹²² Only 14% of the countries reviewed have any form of internal dispute resolution system within the MSG (see Part 1).

The EITI Board does have a Rapid Response Committee to react with “rapid responses to political developments” in instances when “civil society or other stakeholders in candidate countries are excluded from playing a fully active role in monitoring revenue transparency”.¹²³ Additionally, the EITI International Secretariat explained that it could respond to complaints if they were reported, although this seems to extend beyond its mandate stated in the EITI Articles of Association as: “the day-to-day running of the EITI Association”.¹²⁴ However, neither of these organs can be considered grievance mechanisms as neither body has a publicized procedure for complaints to be filed by either MSG representatives or other interested actors.¹²⁵ Furthermore, very few individuals in the countries visited were aware of the existence of the Rapid Response Committee or understood whether they could raise concerns of substantive non-compliance with EITI organs at the international level. For example, in the five countries visited, only CSO representatives in two countries, Azerbaijan and the DRC, were aware of the Rapid Response Committee. This is because civil society representatives in these countries are also representatives on the EITI Board, which convenes the Rapid Response Committee. MSG members in the other countries visited (Cameroon, Tanzania, and the Philippines) were unfamiliar with the Rapid Response Committee or its powers. Finally, there are provisions in the EITI Standard allowing stakeholders to “petition the EITI Board if they consider that Compliant status should be reviewed”.¹²⁶ While this is a possible avenue for filing grievances, MSG members on the ground were not aware of this right or of the process for filing a complaint. The process requires significant further development and detail in order to meet international good practice expected of multi-stakeholder initiatives, and grievance mechanisms.¹²⁷

By not establishing effective grievance mechanisms, not only is EITI failing to conform to the basic requirements now expected of international multi-stakeholder initiatives, it is also failing to become aware of, let alone address, major grievances that may be occurring within EITI countries.

5.2. Ensuring that the EITI Standard leads to meaningful change

NOTE: The following issues were not addressed directly by this assessment, however stakeholders highlighted them in the majority of the MSGs assessed. They are therefore being recorded as considerations for EITI to address in the future.

5.2.1. Clarifying that MSGs are encouraged to go beyond the EITI Standard

During discussions with MSG representatives, it became clear that for many communities directly affected by extractive activity, and for the wider population of a country, the main concerns regarding transparency of the extractive sector often extended beyond revenue transparency to issues such as the transparency of environmental impacts, or information regarding alleged human rights abuses. MSG representatives therefore often felt that the scope of EITI reports was too narrow relative to the actual concerns expressed by the populations who were affected by extractive activities regarding transparency in the extractive sector. In various countries, from Azerbaijan to the United States and Norway, CSOs reported that they had tried to make EITI more relevant to the national context by encouraging reporting on wider issues, but had been rebuked in the MSG because this was perceived to be going beyond the mandate of EITI and therefore not permissible.

¹²³ EITI, *Minutes of the 4th EITI Board Meeting* (2008), 4.

¹²⁴ *EITI Articles of Association*, Article 16(2).

¹²⁵ In addition, there are no established procedures regarding the admissibility of complaints, how complaints would be investigated, or establishing the possible outcomes of complaints.

¹²⁶ *EITI Standard*, Requirements 1.6(b).

¹²⁷ See, for example, MSI Integrity, *Draft MSI Evaluation Tool*, available at www.msi-integrity.org, Questions 120-151 and, United Nations Human Rights Council, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework* (2 March 2011), Principle 31].

It should be emphasized that stakeholders in both Northern and Southern countries expressed views that they wanted EITI's reporting scope to extend beyond finance-related issues. Civil society in Southern countries often cited human rights, indigenous rights, and revenue expenditure (i.e., government spending) as issues of major concern in the extractive sector that they were unaware or uncertain EITI could be used to address. Civil society in Northern countries, such as the United Kingdom, the United States, and Norway, observed that there is a large degree of public and CSO-based apathy about EITI given that transparency of payments is often only marginally interesting to the public, whereas if it was possible to address other issues, such as environmental impacts, there may be greater public engagement.¹²⁸

When MSI Integrity published a preliminary progress paper on this research in June 2014 to seek feedback from stakeholders, the EITI International Secretariat clarified that EITI can be used to achieve transparency in these issues.¹²⁹ It was explained that the EITI Rules and EITI Standard should be seen as simply the basic expectations required of MSGs, and that the EITI International Secretariat actually encourages MSGs to extend beyond the requirements.

This news is likely to be very well received by MSG representatives, who are often not aware that expanding beyond the requirements in the EITI Standard is permitted. This should be clearly stated by EITI and complimented with guidance on how MSGs could expand and build off the foundation of basic EITI reporting to enhance extractive industry transparency.

5.2.2. Incentivizing continuous improvement beyond the EITI Standard

MSG representatives in the countries that were deemed EITI Compliant at the time they were visited (Azerbaijan, Cameroon, and Tanzania) expressed that the energy and excitement from governments relating to ensuring transparency in the extractive industry significantly diminished after their country was deemed compliant. Many feel this is because after validation, there is no requirement to progress beyond the basic requirements contained in the EITI Standard and there is also significantly less oversight or encouragement from the international community to ensure improvement.

The concern from stakeholders is that once a country is considered part of the "EITI club", by way of obtaining compliant status, there is little motivation to ensure the quality and depth of transparency efforts. Instead, the emphasis is focused simply on continuing to issue EITI reports in conformity with the validated reporting framework. Consequently, after validation, primary or high-level representatives were less active in MSG meetings, and sometimes attendance levels of representatives across stakeholder groups dropped.

Positively, many stakeholders expressed that the new requirements introduced by the EITI Standard have inspired a resurgence of activity. This raises the possibility that EITI should establish expectations of continuous improvement in order to remain EITI compliant.¹³⁰ This would ensure that MSGs remain focused on improving extractive industry transparency and accountability within their country, and help to prevent lapses in compliance. There are a number of ways this could take place, such as standardized levels of progressive compliance set by EITI (e.g., linking to the "EITI++" model that the World Bank unveiled in 2008¹³¹) or by the MSG proposing clear additional goals that should be met by each subsequent validation period. While any continuous improvement model would need careful consideration and is outside the scope of this assessment, it warrants further exploration by EITI.

¹²⁸ Although the United Kingdom was not included as one of the MSGs assessed, MSI Integrity was invited to observe an MSG subgroup meeting in London on March 6, 2014 and had discussions with MSG members before and after the meeting.

¹²⁹ Eddie Rich (Deputy Head of the EITI International Secretariat), By Phone, July 23, 2014.

¹³⁰ For example, by making it mandatory to meet all or some of the MSG's work plan goals, or establishing a framework of progressive realization of recommendations set by EITI.

¹³¹ World Bank *World Bank Group and Partners Launch EITI++* (Press Release, April 12, 2008, available at: <http://go.worldbank.org/8Z3T3Z3TP0>)

Recommendations

For the EITI Board

1. Revise the validation process to ensure it can reliably detect non-compliance with all aspects of the EITI Standard. This revision should explicitly seek public and expert input, and draw on good practices for monitoring and evaluation. The revision should address, at a minimum:
 - a. Selection of validators. EITI should develop selection criteria to ensure that selected validators have the expertise and competence necessary to assess broader internal governance and societal issues that are central to EITI, such as the enabling environment and independence of civil society (see Requirements 1 and 6 of the EITI Standard). This may require a separate team of validators from those that assess technical compliance with EITI reporting process requirements.
 - b. Developing a clear standardized methodology for validators. The methodology should ensure validation meets certain minimum standards, such as by:
 - i. Requiring validators to engage stakeholders outside the MSG. In particular, external civil society must be interviewed to determine whether civil society representatives were selected independently, and whether they continue to operate independently.
 - ii. Ensuring validators will conduct confidential and secure interviews with contacts, to allow interviewees to give their views without fear of reprisal for participating.
 - iii. Requiring validators to conduct field visits to extractive sites and regions affected by extractive activities to assess: the effectiveness of outreach and liaising efforts of the MSG; the level of public awareness of the EITI implementation; and, the level of public debate about extractive resource governance, including EITI reports or other communications products.
 - iv. Requiring validators to comprehensively review internal governance procedures and documents relating to the formation of the MSG, to ensure they meet all aspects of Requirement 1.
 - v. Including specific criteria to assist validators to measure compliance with requirements that involve subjective or qualitative judgments to determine compliance (e.g., whether a process is “effective”, “independent”, or “open”: see Requirement 1.3).
 - c. Clarify the processes for standardization and transparency of validation reports.
2. Comprehensively outline the processes for finding non-compliance with specific aspects of the EITI Standard. Each process should address issues such as:
 - a. Identifying types of issues that are considered “significant aspects” of non-compliance, which trigger suspension proceedings under Requirement 1.7.
 - b. Outlining how instances of minor non-compliance, such as those relating to minor infringements of internal governance rules, should be rectified. There should be clear expectations that specify: timeframes to redress issues; follow-up procedures to ensure the country has become compliant; and, pre-defined consequences for ongoing instances of minor non-compliance.

3. Develop an independent international-level grievance and dispute resolution mechanism to allow stakeholders in each implementing country to report substantive non-compliance with the EITI Standard, and to resolve internal MSG governance disputes that cannot be resolved by national-level processes. The mechanism should be designed consultatively and draw on existing good practice for grievance mechanisms in multi-stakeholder initiatives, such as being accessible, transparent, effective, and based on principles of fairness. In the interim, EITI International should take steps to ensure all stakeholders are aware of existing mechanisms (e.g., the EITI Board Rapid Response Committee).
4. Clarify that the EITI Standard only establishes minimum requirements for MSGs and that MSGs are encouraged to go beyond these requirements. In particular, it should be clarified to all MSGs that the mandate and scope of EITI MSGs does not have to be limited to the provisions of the EITI Standard. This should be complemented with guidance on how the MSG could build from the foundation of basic EITI reporting to enhance extractive industry transparency in areas beyond finance, such as regarding environment impact management, disclosure of security arrangements at extractive sites (which is often relevant to human rights concerns), or any other issue that the MSG agrees should be disclosed by extractive companies.
5. Consider how to incentivize progressive and continuous advancement of transparency related to extractive industry resource governance beyond the minimum requirements of the EITI Standard. Examples of potential systems include:
 - a. Establishing a tiered series of compliance targets that implementing countries must meet in each subsequent validation process after achieving initial compliance; or,
 - b. Setting clear additional goals for EITI implementing countries to achieve, with some form of reward for achieving each standard – such as a compliance-level label or title indicating that the country has implemented enhanced levels of transparency requirements.

The EITI Board may wish to consider developing a sub-committee mandated to explore such possibilities.

Appendix B

Extract from *Extractive Industries Transparency Initiative (EITI): 2013 MSI EVALUATION REPORT (Working Draft, 2015)*, pages 16-26.

Available online at: <http://www.msi-integrity.org/evaluated-msis/>

2013 MSI EVALUATION REPORT

Working Draft

Extractive Industries Transparency Initiative (EITI)



IHRC

INTERNATIONAL HUMAN
RIGHTS CLINIC
HUMAN RIGHTS PROGRAM
AT HARVARD LAW SCHOOL

IMPLEMENTATION OF EITI'S STANDARDS⁷⁴

Incentive Regime

EITI does not have a formal regime that incentivizes governments to join EITI or meet its standards.

Updated information provided by EITI: As part of its standards review, EITI is considering adopting an incentive regime.

Evaluation:

EITI has attracted a significant number of members without a formal incentive regime that rewards countries for joining. While establishing such a regime is not essential to the success of EITI, it could incentivize outlying countries to join EITI. The creation of such a regime should aim to both incentivize countries to join EITI and incentivize existing members to comply with standards. One straightforward possibility could be to establish a regime in which home countries are required to encourage companies to operate in host countries with robust implementation of EITI's standards.

If EITI expands its mandate to include the human rights issues that prompted its development, it should adopt a regime that incentivizes members to adhere to any new mandatory human rights standards or standards that might be part of an optional human rights EITI protocol. Members who implemented human rights standards, and were found to be in compliance with the standards, should be recognized. This recognition could take the form of special status (e.g., compliant+) or benefits from home countries (e.g., export credits).

Recommendations:

- EITI should consider whether developing an incentive regime would increase its effectiveness as a transparency initiative.
- To be more relevant as a human rights instrument, EITI should incentivize compliance with human rights standards.

Monitoring of compliance with standards

Monitoring: Evaluating compliance with standards

All implementing countries undergo an evaluation in order to become EITI compliant.⁷⁵ This process does not evaluate or audit whether the reports produced are truly accurate or comprehensive, but rather monitors whether the country adhered to the processes set out in EITI's standards when developing its first EITI report and reporting process.

Countries choose their own evaluating bodies from a list of evaluators that EITI has pre-approved.⁷⁶ EITI "expect[s]" that "a number of people" will conduct the evaluation and that evaluators will have regional and local knowledge.⁷⁷ The list of approved evaluators largely consists of international consulting firms⁷⁸ and was assembled by a five-person sub-committee of the EITI Board.⁷⁹ The

⁷⁴ Unless otherwise noted, information in this section is taken from the EITI Rules. See *EITI Rules, 2011 Edition*.

⁷⁵ EITI refers to this process as "validation".

⁷⁶ EITI refers to evaluators as "validators".

⁷⁷ EITI "Invitation to Apply for Accreditation as an EITI Validator" (October 6, 2009) <<http://eiti.org/news-events/eiti-validator-accreditation>>.

⁷⁸ EITI "EITI Validators" <<http://eiti.org/validation/validators>> (accessed February 20, 2013).

⁷⁹ *EITI Rules, 2011 Edition* at 57.

country then sets terms of reference and a contract for the evaluator, including a conflict of interest provision.

After a country has contracted its evaluator, the entire EITI Board, “working through the Secretariat” reviews the adequacy of the procurement process.⁸⁰ It considers factors such as transparency of the hiring process, conflicts of interest, quality and whether the terms of reference are adequate to achieve the certification process’s goal. Stakeholders can raise concerns about the MSG’s evaluator selection process with the secretariat, which may refer the issue to the EITI Board. If the board has concerns about the process, it provides written recommendations to the country’s MSG. Once the MSG has addressed these issues, EITI will issue a letter of no objection and the country may proceed with the evaluation. The candidate country pays its evaluator directly for the cost of the evaluation.

EITI imposes a mandatory framework for conducting evaluations. The evaluation includes country visits during which evaluators must solicit information from “the multi-stakeholder group, the organisation contracted to reconcile the figures disclosed by companies and the government, and other key stakeholders (including companies and civil society organisations not represented in the multi-stakeholder group)”.⁸¹ In addition to in-person meetings, evaluators “should” also analyze relevant documents such as the MSG’s terms of reference and meeting minutes, the EITI reports and the forms companies are required to complete.⁸²

The evaluator assesses compliance with each standard (EITI Requirement) as “met” or “unmet”, and states “the rationale underpinning [her/his] assessment” as well as “key documentary evidence and stakeholder views” related to that assessment.⁸³ EITI has produced guidance for evaluators to assist in assessing compliance with each of EITI’s requirements. The evaluator compiles this information in a draft report, which must also contain additional material specified by EITI, such as the impact of EITI in the country, efforts that exceed EITI requirements and collated company disclosure forms. The board reviews draft reports and provides comments that “must be addressed in the final version of the report”.⁸⁴ The government and MSG must endorse the report. The objective is to produce a report that “identifies opportunities to strengthen the EITI process”.⁸⁵

Evaluations are first conducted within two and a half years from the start of the country’s candidacy,⁸⁶ and thereafter at least once every five years to assess the country’s continued compliance with EITI’s standards.⁸⁷ If a country fails to publish an EITI report, the board may request an additional evaluation.⁸⁸

Updated information provided by EITI: EITI staff explained that, as described in the minutes from the October 2012 Board Meeting, EITI is currently developing a more nuanced assessment system to be used during evaluations. They also explained that EITI is exploring the possibility of financing evaluations through EITI’s international management or the Multi-Donor Trust Fund (MDTF); per the minutes from the October 2012 Board Meeting, the board agreed in principle for evaluation to

⁸⁰ *EITI Rules, 2011 Edition* at 57.

⁸¹ *EITI Rules, 2011 Edition* at 40.

⁸² *EITI Rules, 2011 Edition* at 41.

⁸³ *EITI Rules, 2011 Edition* at 41.

⁸⁴ *EITI Rules, 2011 Edition* at 48.

⁸⁵ EITI “EITI Validation” <<http://eiti.org/validation>> (accessed October 1, 2012).

⁸⁶ EITI *EITI Policy Note #3: Validation Deadlines* (2008) at 2. The MSG-endorsed evaluation must occur within 12 months of the country’s issuance of its first EITI report.

⁸⁷ *EITI Rules, 2011 Edition* at 21.

⁸⁸ *EITI Policy Note #3: Validation Deadlines* at 2.

the financed by EITI or MDTF, subject to further exploration of the cost implications for EITI.⁸⁹ This would be a positive development.

In addition, EITI staff clarified that the benchmarks used by evaluators are determined by the terms of reference signed between the MSG and its evaluators; for example, MSGs define terms such as “materiality” and thus determine for themselves which payments will be included in their reports.⁹⁰

Monitoring: Reporting compliance and progress to the MSI or public

Countries are required to publicly release their first EITI report within 18 months of being deemed candidate countries by the EITI Board, and annually thereafter. The reports detail revenue in line with the process the country developed during its candidacy stage (see **EITI’s Standards**, above). Though EITI does not comment on these reports, it makes them available on its website, along with basic background information on each country.

In addition to the EITI reports, EITI also requires each member country to report annually to EITI on the efforts it has taken to implement standards, implement evaluators’ recommendations and to “strengthen EITI implementation, including any actions to extend the detail and scope of EITI reporting or to increase engagement with stakeholders”.⁹¹ The country’s MSG must endorse these reports, and the reports must be made available to the public.

Currently, EITI merely monitors the submission and availability of reports, and does not provide analysis of the financial reconciliations submitted or monitor whether material information is missing. This task is independently undertaken by an NGO, Revenue Watch Institute, which approximates quality based on several indicators. These indicators include, among others, whether countries include payment streams such as “bonuses” in their reports (13 of 28 reporting countries do not); whether countries include all extractive sector companies (13 of 28 reporting countries do not); and whether governments are required to provide revenue streams from audited financial accounts (in 20 of 28 reporting countries, governments are not).⁹²

Updated information provided by EITI: EITI staff explained that the annual reporting requirement did not officially come into effect until December 2012. EITI has also introduced a tool, available on its website, that allows the public to compare country reports. The information provided in the tool allows for the comparison of revenue streams covered, sectors covered, whether and what kind of revenue disaggregation was provided and whether in-kind payments were reported.

EITI staff explained some of the discrepancies between member reports and EITI requirements; for example, EITI staff reported that some extractive industries do not pay bonuses; they also explained that some extractive companies, especially in the mining sector, are so small that it would be impractical to require their inclusion. As for the countries that did not submit reports audited to international standards, staff explained that some countries do not have the capacity to comply with auditing requirements; other countries go above and beyond international standards, for example Norway reports on each payment using bank statements.⁹³

⁸⁹ EITI *Minutes of the 21st EITI Board Meeting* (2012).

⁹⁰ In-person meeting with EITI staff.

⁹¹ *EITI Rules, 2011 Edition* at 31.

⁹² Revenue Watch Institute “EITI Reports Results & Analysis” <<http://data.revenuwatch.org/eiti/indicators>>.

⁹³ In-person meeting with EITI staff.

Evaluation:

EITI's monitoring system focuses on assessing whether a sufficient process was followed by a country in releasing the first EITI report, but does little to monitor whether those processes have led to adequate reports or outcomes. Although the reports are required to be "comprehensible", EITI does not assess the substance of the reports released by country, or whether the reports are actually comprehensible to the public.⁹⁴ While it is good practice that EITI requires countries to annually produce such reports, and makes them publicly available, the failure to assess the quality of these reports and whether they are accessible to affected communities is a significant structural flaw. A country can still become compliant, even though the quality of its report may be poor.

First, as explained in **EITI's Mandate and Relationship to Human Rights**, above, EITI relies on MSGs to determine the content of an EITI report, by defining "the revenue streams that companies and the governments must disclose; the companies that will report; the government entities that will report; the time period covered by the report; and the degree of aggregation or disaggregation of data in the EITI report".⁹⁵ EITI should monitor whether the contents of reports as defined by MSGs are sufficiently comprehensive and whether material information is missing. Second, by merely monitoring the submission and availability of reports, EITI does not analyze the data. Instead, EITI assumes that civil society and watchdog organizations will provide adequate analysis of the financial reconciliations and offer critiques. This may not be realistic in countries where civil society is poorly resourced, despite the requirements that reports should be comprehensible and obstacles to civil society participation removed. EITI must, at a minimum, ensure that its evaluators provide accessible critiques and feedback to member countries, MSGs and the public on the quality and substance of the reports. This could lead to progressive improvement of implementation and greater understanding of country-level compliance (see **Accountability**, below).

It is helpful that EITI has started to provide analysis similar to Revenue Watch Institute's through its new online tool that allows for the comparison of member reports; from the data available, it is apparent that there is some truth to Revenue Watch Institute's findings. EITI's tool confirms, for example, that compliant countries such as Nigeria, Peru and Mozambique do not report bonuses, although they are required to. While the clarifications provided by EITI staff were helpful, to be transparent EITI should explain all discrepancies and make these explanations available online.

In neglecting to monitor these issues, EITI risks creating the false perception that certain countries and companies are more transparent than they are. This may have significant negative policy and human rights implications. To overcome this, EITI could expand its evaluation process to conduct random audits of report quality and accuracy or it could establish a working group responsible for reviewing the quality of all submitted reports and determining whether the definitions adopted by the MSG are suitable to the extractive industry in that country. As described in **EITI's Standards** above, such a working group could collate guidelines produced by EITI's learning programs and systems development to create or inform a set of minimum standards regarding the reporting requirements.

Despite existing limitations, it is evident that a lot of consideration has been put into the development of the monitoring process. In particular, the procedure for certifying evaluators, the guidance on how evaluators should determine if certain requirements have been met and the procedure for producing evaluation reports are very detailed. However, the evaluation process is

⁹⁴ Comment from expert reviewer.

⁹⁵ *EITI Rules, 2011 Edition* at 22.

still subjective, and sometimes there is not a clear “yes” or “no” answer.⁹⁶ Furthermore, the depth of in-country engagement expected of evaluators requires more rigor and detail to ensure that the evaluation reports issued are reliable. For example, the methodology simply states that evaluators “should” meet with the MSG, the reconciler and other stakeholders not in the MSG. While it is promising that EITI encourages this, it is unclear if this is an absolute requirement and whether meetings with individual members of the MSG, such as government officials or NGO and company representatives, are also required. Given that the MSG is likely to have core information about the integrity of a country’s process, and that some MSGs may feel uncomfortable expressing their reservations in a group setting, providing guidance and minimum expectations regarding the level of engagement with various stakeholders would be helpful and EITI should also set minimum procedural requirements to protect interviewees against reprisals.

In addition, there is no assurance regarding the quality or possibility of non-MSG stakeholders participating in the evaluation: What steps must evaluators take to ensure such stakeholders, including the public or locally affected communities, are aware of the evaluation and able to participate? While evaluators may be taking sufficient steps in practice, elucidating these requirements will ensure consistency and increase confidence in the evaluation reports.

The process for appointing and selecting evaluators is robust, although the minimal role that human rights expertise plays in this process is problematic if such issues are to be considered in the future. The selection process is also undermined by the current requirement that governments pay evaluators directly for their evaluation, as it raises some concern about the independence and legitimacy of the results of the evaluation.⁹⁷ Furthermore, governments with budget constraints may choose the cheapest evaluator, rather than the most robust evaluator, although it is acknowledged that all evaluators must be on the approved list. In addition, while EITI requires that countries have conflict of interest provisions regarding evaluators, and it reviews the procurement process, it does not set any clear substantive requirements for these conflict of interest provisions, such as requiring that they prohibit existing financial or personal interests. Publicly establishing such provisions would increase the credibility of the evaluation process and ensure consistency over time.

EITI requires an evaluator to examine an implementing country’s compliance with standards only twice: One evaluation is required to achieve compliant status and a second evaluation is required within the following three years. More frequent monitoring is necessary to ensure that countries are truly ensuring extractive industry transparency. Evaluations should be conducted at least every two years. Additionally, monitoring could take the form of random audits. For example, EITI could randomly select five members each year and closely scrutinize the quality of their reports. Where specific complaints of non-compliance can be alleged against a member, EITI should also have the option to order a targeted evaluation. This is discussed in **Accountability**, below.

Finally, it is good practice that member countries are required to file progress reports regarding implementation of EITI’s standards.

⁹⁶ Comment from expert reviewer.

⁹⁷ EITI could avoid this by, for example, requiring countries to pay a set evaluation fee into a trust fund and by setting the parameters of evaluations so that only those evaluators who agree to conduct evaluations within an established fee range will be approved. This reduces the moral hazard whereby evaluators offer countries low-cost bids that appeal to countries on the basis of being both cheap and non-invasive.

Recommendations:

- EITI should expand the scope of its monitoring to include an evaluation of the quality of reports provided by each implementing country. This should include an examination of whether specific substantive minimum reporting requirements regarding revenue and payments have been met.
- In order to meet minimum standards, EITI should:
 - Institute a process whereby the country evaluated does not pay its evaluators directly, such as by using a common fund or other pooling mechanism.
 - Take steps to improve the methodology for in-country evaluations and stakeholder engagement. For example, EITI should:
 - Specify minimum procedures regarding interviewing procedure, including procedures that seek to protect interviewees against reprisals.
 - Require evaluators to seek input from members of the MSG independently.
 - Require evaluators to seek input from affected populations during the evaluation process.
 - Make annual reports regarding the implementation of EITI publicly available on its website.
- In order to improve its monitoring system, EITI should:
 - Specify the minimum substantive requirements for conflict of interest provisions.
 - Require a thorough periodic re-evaluation and random ongoing monitoring of compliant countries.
 - Ensure that member countries are provided with accessible critiques and feedback on the quality of their reports.
 - Increase depth of report analysis on the website and explain all discrepancies between member reports and EITI standards.
- Even if the above recommendations are adopted, to be more relevant as a human rights initiative, EITI should also monitor compliance with human rights standards.

Grievance mechanisms to address allegations of non-compliance

EITI has three provisions in its governing documents that are relevant to grievances regarding member non-compliance with EITI standards or rules. These provisions address complaints relating to different components of the EITI process. However, none could be described as a complete “grievance mechanism”.

First, the Articles of Association give the EITI Board the general power to terminate a country or non-country member’s EITI membership if the member “has conducted his/her/its affairs in a way considered prejudicial or contrary to the EITI Principles”.⁹⁸ Second, in the context of evaluations, “[s]takeholders wishing to raise concerns regarding the procurement of the [evaluator], the terms of reference or the contract may contact the EITI International Secretariat, which will refer complaints to the EITI Board as warranted”.⁹⁹ Third, “[a]n implementing country — via its multi-stakeholder group — may petition the EITI Board to review its decision regarding the country designation as a Candidate or Compliant country at any time. The Board will consider such petitions with regard to the facts of the case, the need to preserve the integrity of the EITI brand and the principle of consistent treatment between countries”.¹⁰⁰ There is no right of appeal. The procedure and

⁹⁸ *Articles of Association for the Extractive Industries Transparency Initiative (EITI)*, art 5(5).

⁹⁹ *EITI Rules, 2011 Edition* at 58.

¹⁰⁰ *EITI Rules, 2011 Edition* at 37.

methods for raising complaints with the board are unknown.

Updated information provided by EITI: EITI staff explained that though EITI provides no formal grievance mechanism, any individual may file a grievance with the international secretariat, which, at its discretion, may choose to present the grievance to the board.¹⁰¹ Guidelines for filing grievances are not available on the website, though the EITI staff expressed that they would in the future provide such guidelines. They also enumerated several instances when complaints had been filed and internally resolved. Staff also explained that requests for re-validation could be made at any time, and that this amounted to filing an allegation of non-compliance. In addition, staff explained that the board's Rapid Response Committee, which can be convened in response to pressing problems in implementing problems, was able to respond to specific complaints.¹⁰²

Evaluation:

EITI appears to have a variety of informal procedures for registering concerns or allegations of non-compliance. However, there is not a clear, formal mechanism that allows individuals or organizations outside of the MSG to file a complaint directly with EITI alleging that a country has breached its standards or failed to follow its internal reporting processes. This may make the process of filing complaints difficult for those not familiar with EITI's governance. For example, it is unclear whether the Rapid Response Committee responds to all types of grievances reported, including breaches of EITI's standards. Nor are there safeguards to ensure that individual members of an MSG who wish to file a complaint are not blocked by other MSG members who do not support the complaint. Although EITI does have the power to sanction implementing countries on certain grounds, such as failure to report or non-compliance with principles (see **Accountability**, below) EITI has no express process for bringing or hearing claims regarding such breaches. While it is positive that any member may file a complaint by writing to the secretariat, this does not substitute for a formal grievance mechanism; there does not appear to be guidance for the secretariat regarding its handling of complaints, or set time frames for the resolution of complaints. Due to the lack of transparency surrounding the complaints filed under this system, it is difficult to assess how effectively the system addresses issues raised.

The lack of an accessible grievance mechanism is a major weakness in EITI's design. It allows breaches of standards to remain unaddressed unless either the MSG itself raises an issue regarding its own compliance with standards, or the EITI Board addresses the issue of non-compliance. Indeed, there is not a mechanism for filing complaints that payments or revenue from specific countries or companies are directly contributing to human rights violations. EITI should consolidate its various complaint processes, clarify procedures and, if it wishes to be relevant as a human rights initiative, ensure the process extends to covering allegations of payments directly contributing to human rights violations.

Recommendations:

- In order to meet minimum standards, EITI should design and implement a comprehensive grievance mechanism that allows stakeholders, including civil society and affected populations, to file complaints alleging that a compliant or candidate country or company has breached EITI standards.
- To be effective as a transparency initiative, EITI should ensure that complaints can be filed alleging that the quality or accessibility of reports is insufficient. This includes permitting

¹⁰¹ In-person meeting with EITI staff.

¹⁰² Phone conversation with Jonas Moberg and Sam Bartlett, April 4, 2013.

grievances on the basis that specific substantive minimum requirements regarding the revenues and payments have not been met.

- To be more relevant as a human rights initiative, EITI should ensure that complaints can be filed alleging that payments or revenue from specific countries or companies are contributing to human rights violations.

Accountability

Accountability of members who do not comply with MSI requirements

EITI has the ability to impose sanctions against countries. The board “may” suspend an implementing country if “it is manifestly clear that the EITI Principles and Criteria are not in a significant aspect adhered to and honored by an implementing country”, or if the country has not met regular reporting requirements.¹⁰³

Suspensions are temporary, set for a specified length of time by the EITI Board. A country’s suspended status is indicated clearly on the EITI website. If the issue is “not resolved to the satisfaction of the EITI Board” by the agreed deadline, the country is delisted.¹⁰⁴ Delisting, which entails removing a member’s compliant or implementing status, is tantamount to expulsion. Countries then have to reapply for admission, when the board will “assess previous experience in EITI implementation, including previous barriers to effective implementation, and the corrective measures implemented”.¹⁰⁵

There are also additional accountability features for candidate countries. First, the failure of candidate countries to provide their first evaluation or EITI report on time “will result in delisting”.¹⁰⁶ Second, where a final evaluation report “shows that no meaningful progress has been made toward achieving EITI compliant status, and that there is little evidence of a sincere intention to implement EITI in line with the Principles and Criteria”, that country will be delisted.¹⁰⁷

The affected country has a right to complain and appeal against these decisions to the EITI Board.

EITI also provides a detailed process for voluntary suspension for countries experiencing political instability or conflict.

EITI recommendations to member governments implementing EITI’s standards

EITI publicly provides specific recommendations for candidate countries who submit an evaluation report “that does not evidence compliance but does demonstrate to the EITI Board that there has been meaningful progress” in meeting the EITI Requirements.¹⁰⁸ When this is the case, the EITI Board “set[s] out the remedial actions that the country must complete in order to achieve compliance”.¹⁰⁹ The country’s MSG “must agree to and publish a work plan with the timetable for the implementation of the remedial actions”.¹¹⁰ Where remedial actions are “not complex and can be quickly undertaken”, the secretariat will prepare an assessment of the country’s compliance.¹¹¹ If remedial actions are more complex, the country must undergo another evaluation to demonstrate

¹⁰³ *EITI Rules, 2011 Edition* at 19, 63.

¹⁰⁴ *EITI Rules, 2011 Edition* at 64.

¹⁰⁵ *EITI Rules, 2011 Edition* at 65.

¹⁰⁶ *EITI Rules, 2011 Edition* at 59.

¹⁰⁷ *EITI Rules, 2011 Edition* at 60.

¹⁰⁸ *EITI Rules, 2011 Edition* at 60.

¹⁰⁹ *EITI Rules, 2011 Edition* at 60.

¹¹⁰ *EITI Rules, 2011 Edition* at 60.

¹¹¹ *EITI Rules, 2011 Edition* at 60.

compliance.

EITI does not provide recommendations for improvement based on the quality of EITI reports produced by each country. In addition, the organization responsible for reconciling discrepancies between companies and government disclosures in EITI reports “makes recommendations for remedial actions to be taken” where this is “necessary”.¹¹²

Evaluation:

Accountability of members who do not comply with MSI requirements

EITI’s provisions for sanctions and expulsion (i.e., delisting) for “candidate” countries are well-defined, clarifying the specific actions that lead to specific sanctions. However, the guidelines for imposing sanctions on “compliant” countries lack specificity. This creates a perverse incentive: After countries are initially deemed “compliant”, there is no rigorous mechanism to ensure ongoing accountability.

For example, sanctions “may” be imposed where it is “manifestly clear” that a member is not in compliance with “a significant aspect” of EITI’s standards, but there is no further detail regarding the procedure to be followed by the EITI Board, or time frames for resolving such broader issues. This lack of specificity may lead to ambiguities or delays in ensuring accountability for members’ non-compliance with standards.¹¹³

Nonetheless, EITI should be credited for having held countries to account in the past. Equatorial Guinea was delisted after EITI refused to grant its request for an extension for the evaluation report deadline, and Sao Tome de Principe was delisted after it requested to voluntarily suspend itself and the board refused the country’s request, presumably because there was no conflict or political instability to warrant this status.¹¹⁴ Yemen, a compliant country, was suspended in 2011 because the board was “not satisfied that the full and active participation of civil society and other actors in EITI implementation could be maintained”, but it has been reinstated now that political conditions have become more stable.¹¹⁵ Madagascar, a candidate country, has been suspended since 2011, as the board does “not believe that the relationships necessary for effective EITI implementation in Madagascar are currently possible and capable of being sustained”.¹¹⁶ To ensure that these positive accountability steps continue into the future, and do not hinge on having an active and organized board, EITI should follow the recommendations set out below.

EITI’s transparency of listing suspended and delisted countries on its website is good practice. EITI should strive to always provide as detailed reasons as possible for its sanctions. EITI should also consider expanding its sanctioning power to include countries that make unauthorized statements of

¹¹² EITI *Rules, 2011 Edition* at 27.

¹¹³ At the time of this report, several implementing countries listed as compliant had not published a report for several years, although EITI requires annual reporting. As a starting point, EITI could look at the Kimberley Process’s reporting procedure, which provides specific dates and identifies actions that must be taken when governments are slow to report, while providing some leniency for late reports. EITI should also hold to account countries that fail to provide annual implementation reports, as required under EITI Requirement 21(c). This currently appears to be unenforced. During the engagement, EITI clarified that the annual reporting requirement did not kick in until December 2012; this information is not available on the website.

¹¹⁴ EITI “EITI Board Agrees Status of 20 Countries” (April 16, 2010) <<http://eiti.org/news-events/eiti-board-agrees-status-20-countries>>.

¹¹⁵ EITI “Yemen” <<http://eiti.org/Yemen>> (accessed October 1, 2012).

¹¹⁶ EITI “Madagascar” <<http://eiti.org/Madagascar>> (accessed October 1, 2012).

compliance with EITI standards. EITI should also impose a time frame for EITI to respond to issues of non-compliance and impose sanctions once they have been brought to its attention.

Lastly, it is also important to note that EITI cannot ensure accountability without periodic monitoring and evaluation of members' continuing compliance with standards or a full grievance system: EITI must be made aware of non-compliance in order to respond to it. EITI should also have the power to order targeted evaluations where a complaint of non-compliance is alleged.

Further information provided by EITI: EITI staff clarified that a requirement that reports be published annually officially took effect in December 2012.¹¹⁷ This is a commendable development. It will hopefully mean that countries will not be listed as compliant if they have not published a report for several years. Nigeria, for example, published its reports covering the fiscal years 2006, 2007 and 2008 only in 2011, and the reports covering 2009, 2010 and 2011 in January 2013.¹¹⁸

Furthermore, EITI staff confirmed that EITI is often reluctant to delist and suspend countries. In EITI's view, delisting or suspending a member country may actually lead to worse human rights outcomes.¹¹⁹

EITI's recommendations to member governments implementing EITI's standards

EITI has very clear guidelines for compliance with recommendations issued during the evaluation process and requires that countries comply with those recommendations, which EITI always makes public. EITI also has a strong process for following up on a country's implementation of recommendations, which includes specified time frames for compliance. However, EITI does not provide recommendations on compliant countries' annual EITI reports — it only provides recommendations when a candidate country submits an evaluation report that does not show compliance with standards. As explained in **Monitoring of Compliance with Standards**, above, recommendations on the quality and implications of individual compliant countries' reports would provide valuable feedback for MSGs and strengthen EITI's ability to have a broader societal impact.

Additionally, it is not clear whether countries are required to follow up on the country reconciler's recommendations for remedial action to address discrepancies between the government's disclosure figures and the payments that companies have disclosed. Without such requirements for follow-up, the reconciler's recommendations may go unheeded and possible indicia of corruption may not be addressed, diminishing opportunities for public debate.

Recommendations:

- EITI should expand the scope of its recommendation process by providing recommendations on the quality and implications of individual compliant countries' annual and EITI reports. These should include recommendations as to how to implement specific substantive minimum reporting requirements regarding revenue and payments. EITI should also make an assessment of the wider impact of EITI reports in each country and recommend follow-up actions to address the findings of these reports.
- In order to meet minimum standards, EITI should:
 - Impose outer-limit time frames for the EITI Board to respond to allegations of non-compliance and impose sanctions.

¹¹⁷ In-person meeting with EITI staff.

¹¹⁸ EITI "Nigeria" <<http://eiti.org/Nigeria/reports>> (accessed February 20, 2013).

¹¹⁹ In-person meeting with EITI staff.

- Clarify the threshold and process for determining when a breach of EITI's standards has occurred, particularly for compliant countries.
- In order to improve its existing accountability mechanisms, EITI should:
 - Have the power to order a targeted evaluation when non-compliance is alleged, and ensure that an evaluation is not directly paid for by the accused country.
 - Clarify whether compliant countries are required to take remedial actions based on reconciler's comments about discrepancies in figures disclosed by governments and companies.
 - Extend its ability to sanction so that it covers instances in which countries make unauthorized statements of compliance with EITI standards.
- Even if the above recommendations are adopted, to be more relevant as a human rights initiative, EITI should also develop accountability mechanisms to ensure that minimum human rights standards are met.

Stakeholder Learning and Engagement

EITI incorporates learning activities into its annual conferences. EITI has also held three national EITI coordinator meetings in which participants have discussed “lessons from the validation and EITI reporting processes, and the growing impact of the EITI”.¹²⁰ EITI's multi-donor trust fund offers knowledge about “international best practice” for individual countries¹²¹ and individual member countries also sponsor regional meetings for EITI members.¹²² Additionally, EITI has produced educational material, research and guidance documents on its standards for implementing countries, civil society organizations and companies.¹²³

Evaluation:

EITI should be commended for the amount of helpful guidance material it has produced for its stakeholders.¹²⁴ To ensure learning flows down to the local level, where it is needed, more initiatives that are similar in nature to the national coordinator meetings should be held. This would allow MSGs to share knowledge across country groups, promote good practice, understand how to develop effective implementing legislation (see **Systems Development and Operationalization**, below) and avoid duplication of efforts among MSGs. This is particularly important for realizing the full benefits of EITI's decentralized process of implementation, which currently allows for considerable variation among MSGs. In addition, EITI should include affected populations in some of its learning programs, to maximize its understanding of impacts, experiences and needs from those whom the initiative was established to benefit. For example, staff operating the EITI Association (see **Internal Governance**, below) could collaborate with local NGOs to engage affected populations or require that MSGs conduct such outreach. EITI's learning programs should also carve out appropriate confidentiality levels to allow participants, such as governments and companies, space to discuss issues frankly.

To maximize the outputs of the learning program, EITI should create a formal process to incorporate the guidance material into other areas of implementation. For example, learning

¹²⁰ EITI *EITI Newsletter: December 2010* (2010) at 2.

¹²¹ EITI “The EITI Multi-Donor Trust Fund” <<http://eiti.org/about/mdtf>> (accessed October 1, 2012).

¹²² See, e.g., “Timor-Leste Hosts Regional EITI Conference” (September 5, 2011) <<http://eiti.org/news-events/timor-lestehosts-regional-eiti-conference>>.

¹²³ EITI “Publications” <<http://eiti.org/resources>> (accessed October 1, 2012).

¹²⁴ It is difficult to find information on EITI's website about the learning opportunities and documents that EITI has generated in the past. Consequently, many other opportunities may have been offered than are described in this report.