2013 MSI EVALUATION REPORT

Working Draft

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Extractive Industries Transparency Initiative (EITI)

EXTRACTIVE INDUSTRIES TRANSPARENCY INITIATIVE (EITI): EVALUATION REPORT

This evaluation is focused on the global governance of the Extractive Industries Transparency Initiative (EITI). It does not include detailed evaluations of in-country implementation of EITI.[1]

Core Documents: Unless otherwise noted, information in this report is derived from the EITI Rules, 2011 Edition (April 4, 2011) (the EITI Rules). All EITI documents are located on its website at eiti.org.

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[1] However, it does highlight numerous areas where the global structure could be altered to improve implementation at the country level.

EITI'S MANDATE AND RELATIONSHIP TO HUMAN RIGHTS

Impetus for EITI's Creation

Transparency of extractive industry revenue became a major global issue in the late 1990s, when nongovernmental organizations (NGOs) began to raise public awareness about the link between extractive industry revenue and corruption, human rights abuses and a lack of development. Part of the discussion was a concern about what is known as the "resource curse", which describes the phenomenon that countries rich in natural resources tend to be materially poorer, and poorer in terms of human development and quality of life indicators, than countries with fewer natural resources. In human rights discourse, the "resource curse" is also used to describe the human rights situation of countries rich in natural resources, since "it is often the case that a small number of entities or individuals benefit from the exploitation of these resources, while public revenues are small or misused and local populations remain poor".[2] The poverty engendered by misuse of extractive revenue and corruption often undermines the economic, social and cultural human rights (ESC rights) of affected local communities, and may also facilitate civil, political and solidarity rights abuses by motivating and enabling armed conflict, displacement, ethnic violence, dispossession and other related crimes.

While it is difficult to pinpoint the exact foundations of the transparency movement, attention was being focused on the issue by 1999. That year, Human Rights Watch published a report on the human rights abuses associated with oil extraction in Nigeria. It highlighted the lack of transparency in government-company relationships and noted that Nigerian governments had continuously misspent oil wealth, "salting it away in foreign bank accounts rather than investing in education, health, and other social investment".[3] Oil-producing regions had lower education and health demographics than the already low national average.[4] The report contained various recommendations, calling on the Nigerian government and oil companies to uphold human rights, as well as to "publish all documents relating to payments, gifts or contracts in relation to operations in the oil producing communities".[5]

Later that year, Global Witness also revealed in its report, *A Crude Awakening*, that significant amounts of oil revenue in Angola were being directly pocketed by corrupt officials, who were using the money for personal gain or to fund a three-decade-long conflict, leading to concomitant human rights abuses.[6] Meanwhile, less than 14 percent of Angolan government spending was allocated to sectors that promoted ESC rights, such as education, health, social security, welfare and housing.[7] A country that had the natural resources to be one of the richest in Africa was thus suffering widespread malnutrition and absolute poverty. Global Witness recommended that oil companies and the international community "establish a formal coalition, which should support International Monetary Fund attempts to forge transparency and accountability for Angolan Government revenue

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[2] Oxfam International *Lifting the Resource Curse: How Poor People Can and Should Benefit from the Revenues of Extractive Industries* (2009) at 1.

[3] Bronwen Manby *The Price of Oil: Corporate Responsibility and Human Rights Violations in Nigeria's Oil Producing Communities* (Human Rights Watch, 1999) at 3. The report also discussed the proximity between oil companies and security forces, who had used violence and intimidation to silence communities protesting against oil companies.

[4] Manby at 45, 85–86.

[5] Manby at 20, 23.

[6] Global Witness *A Crude Awakening: The Role of the Oil and Banking Industries in Angola's Civil War and the Plunder of State Assets* (1999) at 2.

[7] Global Witness at 8.

and expenditure" and "insist that the Angolan Government respects its obligations as a signatory to international conventions, such as the Universal Declaration of Human Rights, and the International Covenant on Civil and Political Rights".[8] Global Witness called for oil companies to adopt "a policy of full transparency" not just in Angola, but also in all "other countries with similar problems of lack of transparency and government accountability".[9] In response to NGO concerns such as these, as well as issues raised by environmental organizations, the World Bank announced that "it would conduct a comprehensive review of its activities in the extractive industries sector".[10]

By 2001, NGO attention had expanded from country-specific analysis to demonstrating a broader resource curse across poor oil and mineral dependent states. An Oxfam America study demonstrated that health care, education and poverty were negatively affected by such dependency, while the likelihood of conflict increased.[11] In order to prevent impacts on ESC rights associated with these afflictions, Oxfam developed five core recommendations. Two of these directly related to extractive industry revenue: first, that host governments should make "disclosures about all revenues they receive from extractive firms", and second, that international funders should only support projects where "the host government specifies in advance how the resource revenues are to be used to alleviate poverty, and agrees to independent monitoring to ensure that this occurs".[12] Awareness of the impact of the lack of transparency and accountability surrounding extractive industry revenue continued to mount and, by June 2002, a group of NGOs founded the Publish What You Pay coalition to promote "greater transparency and accountability in the management of revenues from the oil, gas, and mining industries".[13] The rationale behind forming Publish What You Pay was that "if it was known how much governments received for the extraction of natural resources, it would be easier to advance the respective human rights, development, anti-corruption and social justice goals of the founding members."[14]

Following these events, in October 2002, United Kingdom Prime Minister Tony Blair announced the formation of EITI at the World Summit on Sustainable Development. A year later, in June 2003, the G8 issued a declaration on "Fighting Corruption and Improving Transparency", which focused on government "corruption and mismanagement of public resources in both revenue raising and expenditure".[15] In October 2003, the General Assembly adopted the United Nations Convention against Corruption, another part of the international community's push toward

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[8] Global Witness at 3.

[9] Global Witness at 3.

[10] International Finance Corporation, World Bank Group "Extractive Industries Review" <hthttp://www1.ifc.org/wps/wcm/connect/Industry_EXT_Content/IFC_External_Corporate_Site/Industries/Oil%2C+Gas+and+Mining/Development_Impact/Development_Impact_Extractive_Industries_Review/> (accessed April 5, 2013).

[11] Michael Ross *Extractive Sectors and the Poor* (Oxfam America, 2001).

[12] Ross at 18. The other three recommendations were for resource-rich governments to diversify their exports, for developing nations to "Only Aid Governments that are Democratic and Pro-Poor" and for the international community to "Monitor and Control Resource Revenues". Of these, the last is most relevant to EITI's purpose and position, as discussed *infra*.

[13] Mabel van Oranje and Henry Parham *Publishing What We Learned: An Assessment of the Publish What You Pay Coalition* (2009) at 27.

[14] See van Oranje and Parham at 34.

[15] 2003 G8 Summit "Fighting Corruption and Improving Transparency: A G8 Declaration" <http://www.g8.fr/evian/english/navigation/2003_g8_summit/summit_documents/fighting_corruption_and_improving_transparency_-_a_g8_action_plan.html> (accessed October 1, 2012).

transparency.[16] Early EITI conferences expressly acknowledged the conferences were "informed by broader anti-corruption and transparency policy discussions in the G8"[17] and the push for greater transparency that had been "pursued actively by non-governmental organizations".[18]

Evaluation: Do EITI's standards adequately address the human rights issues that led to its creation and/or exist in the industry?

1.   EITI's mandate does not explicitly or directly address human rights

EITI was principally prompted by concerns that revenue from the extractive industries was not only failing to ensure the progressive realization of economic and social rights, but that it sometimes directly contributed to gross human rights violations.

Populations living in resource rich areas were struggling to enjoy basic social and economic freedoms, such as the right to health,[19] education[20] and an adequate standard of living.[21] The lack of transparency and accountability mechanisms regarding payments from companies to governments, and how those payments were used, inhibited the flow of profits from local resources back into communities and often into the society at large. In addition to these failures of development, payments to government also sometimes funded conflict or other activities that directly violated human rights. This was compounded by the concern that the profits generated by the extractive industries were, at times, themselves linked to abusive activities.

Despite the human rights implications behind EITI's development, EITI's Principles, Criteria and Requirements do not refer to any international human rights norms or obligations. EITI's stated objective is to make its transparency standards "the internationally accepted standard for transparency in the oil, gas and mining sectors, recognizing that strengthened transparency of natural resource revenues can reduce corruption, and the revenue from extractive industries can transform economies, reduce poverty, and raise the living standards of entire populations in resource-rich countries".[22]

Transparency is important. The freedom to seek and receive information is a critical component of the right to freedom of expression, a significant human right in and of itself.[23] Increased transparency may create conditions that reduce corruption; build trust in producing regions and among communities, companies and governments; and enable citizens to monitor payments, which may lead to increased scrutiny on government resource management and the ability to ensure that sufficient benefits are returned to the community.[24] These may in turn have human rights benefits.

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[16] United Nations Convention against Corruption 2349 UNTS 41 (entered into force December 14, 2005). Another driver was the work of the Open Society Institute and Caspian Revenue Watch, the precursor to Revenue Watch. See Svetlana Tsalik, Caspian Revenue Watch *Caspian Oil Windfalls: Who Will Benefit?* (Open Society Institute, 2003) <http://www.revenuewatch.org/sites/default/files/Caspian-Oil-Windfalls-051203.pdf>.

[17] EITI *Statement of Principles and Agreed Actions, London Conference, 17 June 2003* (2003) at 1.

[18] Department for International Development *Report of the Extractive Industries Transparency Initiative (EITI) Workshop, 11–12 February 2003* (2003), Annex 4.

[19] International Covenant on Economic, Social and Cultural Rights 993 UNTS 3 (entered into force January 3, 1976), art 12 (ICESCR); Universal Declaration of Human Rights GA Res 217A (III) (adopted December 10, 1948), art 25 (UDHR).

[20] ICESCR, arts 13, 14; UDHR, art 26.

[21] ICESCR, art 11; UDHR, art 25.

[22] EITI *Articles of Association for the Extractive Industries Transparency Initiative (EITI)* (2009), art 2.

[23] International Covenant on Civil and Political Rights 999 UNTS 171 (entered into force March 23, 1976), art 19(2) (ICCPR).

[24] These benefits are recognized by EITI. EITI "EITI Benefits" <http://eiti.org/eiti/benefits> (accessed October 1, 2012).

However, transparency *itself* it not a panacea to human rights abuses; transparency of payments and revenue streams from companies does not necessarily translate to ensuring that populations have an adequate standard of living or other social and economic rights associated with revenue that is generated from natural resources. EITI admitted this during its formation, noting that while transparency itself was "not sufficient" to achieve wider goals such as to "eliminate poverty", it was critical to keep the initiative "focused and manageable".[25] In addition, the benefits of transparency that stakeholders agreed upon had much more to do with improving investment conditions than with improving the human rights of resource-rich countries.[26] That an EITI compliant country, meeting EITI's transparency standards on extractive industry payments and revenue, is still entitled to use that revenue however it wishes — which may include purchasing weapons to fund an armed conflict or directly fund human rights abuses — is one illustration of the limitations of the transparency standards with regard to human rights considerations.

In other words, EITI's narrowly defined notion of transparency is one step toward creating conditions to improve human rights. By limiting EITI's mandate to transparency of revenue and payments, rather than directly incorporating human rights standards or analyzing those payments and revenue (and subsequent government expenditure of that revenue, discussed below) through a human rights framework, EITI does not explicitly attempt to protect human rights. Even an indirect benefit on human rights has been brought into question by the conclusion of a recent review commissioned by EITI, which stated that it has had "little impact at the societal level . . . largely due to [EITI's] lack of links with larger public sector reform processes and institutions" (see **EITI's Capacity to Evolve Over Time**, below).[27]

There may have been pragmatic reasons behind launching EITI with an intentionally narrow focus on transparency of payments. However, EITI needs to broaden its focus if it wishes to address the human rights concerns that were part of the reason for its development. The recent development of the *Guiding Principles on Business and Human Rights* underscores the need for EITI to expressly expand its mandate to include human rights.[28] The *Guiding Principles* expressly state that government participants in a multilateral institution such as EITI should promote respect for human rights within EITI's mandate.[29] EITI has been functioning for 10 years, and hundreds of governments, companies and civil society organizations now formally participate in EITI. It has clearly been successful in moving extractive industry transparency onto the global agenda. This has been an important first step, even though there has not yet been full transparency as EITI allows for

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[25] Department for International Development *Report of the EITI Workshop* at 2, 9.
[26] Notes on stakeholder perspective from an early meeting concluded: "There was also widespread agreement that transparency can bring benefits, including: strong economic growth through an attractive investment climate; long-term stability, which protects investments; quality of investment choice; reduction of political risk and therefore reduction of reputational risk and security costs; fewer demands for social development projects; and the creation of understanding and trust between parties." Department for International Development *Report of the EITI Workshop* at 2.
[27] Scanteam *Achievements and Strategic Options: Evaluation of the Extractive Industries Transparency Initiative; Final Report* (2011) at 1.
[28] United Nations *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework* (2011).
[29] See in particular, principle 10 of the *Guiding Principles on Business and Human Rights*, which provides that "when acting as members of multilateral institutions that deal with business-related issues, [states] should encourage those institutions, within their respective mandates and capacities, to promote business respect for human rights". In addition, principle 1 (duty of states to protect against human rights abuse within their territory and/or jurisdiction by third parties), principle 3(a) (duty of states to enforce laws that require businesses to respect human rights) and principle 5 (states' international human rights obligations where the state privatizes the delivery of services) all reflect ways in which EITI can promote respect for human rights within its transparency mandate by helping states to fulfill their duties under the *Guiding Principles on Business and Human Rights*.

payment aggregation, for example, which makes it difficult to discern who has made specific payments. However, to be seen as a credible part of the solution to the human rights problems that prompted it — and to justify the resources devoted to its operation — EITI must now examine how it can translate increased transparency directly into improved human rights outcomes for populations of member countries.

Another limitation on the mandate has been that EITI does not address transparency of flows leaving implementing countries; illicit financial flows leaving the developing world may lead to significant amounts of lost revenue, which could otherwise be used to improve human rights. In addition, EITI has not required implementing countries to disclose subnational transfers, although many EITI implementing countries make these transfers; transparency of these payments can help ensure that local communities enjoy the benefits of revenue-sharing arrangements.

Material update: The minutes from the October 2012 EITI Board Meeting indicate that, in the future, countries will be required to disaggregate the payments they report, providing in their reports information by company and revenue stream.

Updated information provided by EITI: EITI staff expressed the view that EITI was not founded to be foremost a human rights initiative, and that its narrow focus may make it more likely to contribute to improved respect for human rights.[30]

MSI Integrity recognizes that EITI has had successes in increasing transparency, and that it may legitimately elect to remain narrowly focused as a transparency initiative. However, if it is to do so, its limitations to address the core issues that motivated EITI's development should be recognized by external commentators, EITI and its members. If the possibility of EITI evolving to more directly address issues such as the funding of human rights abuses through extractive industry revenue and activities, or the lack of fulfillment to basic rights such as to education and housing for populations living in resource-rich areas, is ruled out, this may give hesitation to those supporters of EITI whose mandate is to advance these issues.

2.   EITI's standards do not require human rights analysis of revenue and expenditure, which is essential to improving governments' compliance with their human rights obligations

EITI does not analyze expenditure of the proceeds from extraction, or evaluate governments' allocation of revenue, which is the critical issue that directly correlates to rights enhancement. Accountability surrounding expenditures was called for by both Global Witness and Oxfam America in the period immediately prior to the development of EITI, and was raised during the creation of EITI.[31]

EITI could require an analysis of extractive industry revenue, and possibly its subsequent allocation, through a human rights framework. At a minimum, a human rights-based analysis should help ensure that revenue was not used to fund human rights abuses directly.[32] To encourage the progressive realization of human rights, EITI could set specific expenditure targets for member countries to adopt contingent upon their allocating resources to improve human rights, as Oxfam

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[30] Information provided by EITI staff during a telephone conversation with Head of Secretariat, Jonas Moberg, and Technical Director, Sam Bartlett, on April 4, 2013, as part of ongoing dialogue after EITI's official comment period (Phone conversation with Jonas Moberg and Sam Bartlett, April 4, 2013).

[31] Department for International Development *Report of the EITI Workshop* at 2.

[32] Full consideration of the appropriate form of such analysis is outside the scope of this evaluation, and requires input from appropriate stakeholders.

America recommended in 2001.[33] Alternatively, EITI could designate an additional status to be granted to those member countries that assess the allocation of revenue against human rights standards in a transparent manner.[34] If violations of rights occurred, or spending targets were not met, EITI could make a grievance or monitoring process available that could apply to both home and host countries. Should the EITI Board or members' meeting be unable to agree to the inclusion of human rights standards, an alternative could be to pursue the development of an optional human rights protocol (see **Incentives**, below).[35] EITI's mandate allows for such an expansion, as it requires member countries to recognize, upon joining, that "the prudent use of natural resource wealth . . . contributes to sustainable development and poverty reduction, but if not managed properly, can create negative economic and social impacts"[36] and to acknowledge that they "believe in the principle and practice of accountability by government to all citizens for the stewardship of revenue streams and public expenditure".[37]

Expanding EITI to adopt a human rights analysis of revenue and expenditure may be politically complicated, but EITI has not begun to attempt to explicitly address the human rights issues that are directly or indirectly associated with extractive industry revenue and its subsequent expenditure. Given its origins and the number of human rights organizations that continue to actively participate in EITI, expanding EITI to include explicit human rights standards and analysis is critical to its ongoing integrity and effectiveness on the ground from a human rights perspective. It would also help to address the concerns raised in EITI's internal review that the initiative has had little societal level impact.[38]

3.   EITI does not focus on the role of home countries in protecting human rights

Presently, host countries make up the majority of EITI's implementing countries, and home countries have been a more passive role as "supporting" governments that do not have to undertake substantive obligations. The *Guiding Principles on Business and Human Rights* indicate that home countries have an important role to play in monitoring extractive industry revenue, particularly in "conflict-affected areas" in which "the 'host' State may be unable to protect human rights adequately due to a lack of effective control".[39]

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[33] Ross at 18. For example, EITI could set a standard for allocation of revenue, by which governments would commit to dedicating a certain percentage of expenditure to activities that promote economic and social rights. EITI could require reports to include a specific breakdown of expenditure according to categories of human rights.

[34] In this regard, there are several possibilities. First, EITI could assess revenue against Article 25 of the ICCPR (linked to democratic processes). Second, EITI could assess revenue against economic and social rights and duties embodied in the ICESCR. Third, EITI could analyze the governments' management of revenue over long periods of time, which may implicate the rights of future generations. Last, multi-stakeholder groups (MSGs) could conduct rights-based assessments of revenue use. For example, if transparency triggers knowledge about rights problems, MSGs could file complaints with EITI about use of funds through a grievance mechanism.

[35] EITI++, the World Bank initiative that was launched in 2008, demonstrates how issues beyond a narrowly defined notion of transparency can be brought into EITI. Its mandate is described as follows: "Broadening the focus of EITI's revenue transparency agenda, EITI++ will cover the entire breadth of the resource chain, from extraction, to other stages such as processing, managing revenues, and promoting sustainable and efficient utilization of resource wealth. The EITI ++ will seek to support committed governments, notably in Africa, in implementing good policy and practice throughout the whole process of natural resource utilization". World Bank "Fact Sheet: Extractive Industries Transparency Initiative Plus Plus" (April 12, 2008) <http://go.worldbank.org/LFMARP2TN0>. This report does not evaluate or endorse the EITI++ approach, but merely notes the possibility of expanding EITI's mandate and standards.

[36] EITI *EITI Principles and Criteria*, principle 1.

[37] *EITI Principles and Criteria*, principle 8.

[38] Scanteam at 1.

[39] United Nations *Guiding Principles on Business and Human Rights* at 9.

While detailed consideration of how best to incorporate home states is beyond this report, EITI could require or encourage home countries to incentivize implementing countries to adopt any of the revenue/expenditure analysis mechanisms developed by EITI recommended above. For example, export credit agencies could incentivize companies to operate in countries that are designated as meeting EITI's new revenue/expenditure focus. In addition, EITI could develop standards requiring home countries to disclose revenue from extractive industry companies that operate internationally. Some countries, such as the United States and the members of the European Union, already require disclosures,[40] and EITI could make it a requirement for all home countries that are members of EITI. Home countries could also be required to take action in certain circumstances; for example, if EITI found a state to be in conflict and unable or unwilling to meet its reporting requirements. EITI should begin to explore such approaches, for example at its member meetings and in working groups, to examine how they could operate and build political will for their adoption.

4.   EITI's exclusive focus on reporting processes rather than minimum substantive standards limits its ability to promote transparency at the local level

EITI's standards require countries to follow specific procedures, rather than imposing substantive reporting requirements. EITI's lack of specific substantive minimum standards prevents it from being a more fully effective tool. One of the most crucial components of EITI's standards is its requirement that countries publicly report the "material" payments by extractive companies.[41] The definition of "material" determines what payments are reported and therefore are made public and transparent. Yet, provided that countries follow EITI's prescribed process, countries are permitted to define which payments and revenues will be deemed "material". In other words, countries are free to decide what they will report. While EITI does provide some guidance by, for example, listing revenue streams that are "commonly recognized" as those that should be reported, this guidance is not mandatory.[42]

Consequently, different countries report different revenue streams, choose whether to report in-kind payments[43] and decide whether to disaggregate information by revenue stream, companies, projects or commodities.[44] For example, Revenue Watch Institute has found that 13 of 27 reporting countries studied do not require the reporting of revenue and payments from all of the extractive sector companies in their territory.[45] This lack of minimum standards results in unreliability, especially where a Multi-Stakeholder Group (MSG) provides a definition so narrow that its reports are rendered brief, simplistic and unhelpful. Conversely, sometimes reports are so complex and technical that they are also unhelpful.[46]

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[40] Section 1504 of the Dodd-Frank Financial Reform Act requires extractive companies registered with U.S. stock exchanges to disclose payments. The European Union has recently adopted similar legislation, which implicates private companies as well: Barbara Lewis *European Union Reaches Deal on Tough Oil, Gas Anti-Corruption Law* (TrustLaw, April 9, 2013) <http://www.trust.org/trustlaw/news/european-union-reaches-deal-on-tough-oil-gas-anti-corruption-law/> (accessed April 15, 2013).
[41] EITI *EITI Rules, 2011 Edition* (April 4, 2011) at 22.
[42] *EITI Rules, 2011 Edition* at 22 (listing, for example, profit taxes and royalties as "commonly recognised" material revenue streams).
[43] This is critical; Azerbaijan, for example, reported more payments in-kind than in cash. EITI "Azerbaijan: In-Kind Payments Larger than Cash" (June 11, 2012) <http://eiti.org/news-events/azerbaijan-kind-payments-larger-cash>.
[44] See EITI "EITI Reports" <http://eiti.org/document/eitireports> (accessed August 2, 2012).
[45] Revenue Watch Institute "EITI Reports: Results and Analysis" <http://data.revenuewatch.org/eiti/indicators> (accessed July 25, 2012).
[46] Comment from expert reviewer.

Furthermore, there are a number of countries and companies that do not use international auditing standards,[47] as required by Criteria 12 and 13. Therefore, it is possible that some countries are merely producing procedural audits, and not financial audits, and satisfying EITI's audit requirement.[48] Financial audits should be required in order to ensure the reliability and accuracy of members' reports.

The process-focused mandate of EITI limits its ability to achieve full transparency. To be a more complete transparency initiative, EITI must expand its mandate to provide specific substantive minimum standards to ensure that its reports are more consistent and comparable. Without these substantive reporting requirements, EITI cannot guarantee full meaningful transparency of extractive industry revenue and payments.

Updated information provided by EITI: EITI staff clarified that validation does look to whether a country's definition of "materiality" is justified and suitable to the industry implicated. EITI staff also explained that the Revenue Watch Institute's findings that 13 of 27 reporting countries studied do not require the reporting of revenue and payments from all of the extractive sector companies in their territory is likely due to the fact that, in the mining sector, some companies are so small that imposing such requirements on all of them would be unreasonable.[49]

Recommendations:

- To be relevant as a human rights instrument, EITI should be updated to include an explicit human rights mandate and analysis. This expansion should ensure both the promotion and protection of human rights, including economic, social and cultural rights. Possibilities include:
    - Requiring analysis of revenue and expenditure from a human rights perspective.
    - Increasing the role that home governments play in protecting human rights and incentivizing EITI compliance.
- To be effective as a transparency initiative, EITI should be updated to include specific substantive minimum requirements regarding the revenues and payments that countries must report.

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[47] Comment from expert reviewers.
[48] Comment from expert reviewers.
[49] Information provided by EITI staff during an in-person meeting with Deputy Head and Regional Director for Eastern and Southern Africa and the Middle East, Eddie Rich; Strategic Advisor, Wouter Biesterbos; Regional Director (Asia), Francisco Paris; Regional Director (Central Asia) Dyveke Rogan; and Technical Director, Sam Bartlett, as part of EITI's comment period (In-person meeting with EITI staff).

DEVELOPMENT OF EITI

A multi-stakeholder consultation process that included "140 delegates representing 70 governments, companies, industry groups, international organizations, investors and NGOs"[50] contributed to EITI's development. The EITI Principles were developed in 2003, EITI Criteria in 2005, and internal governance and evaluation procedures in 2006. The first EITI Board was appointed in October 2006.[51] The EITI Board modified the internal governance rules and validation procedures in 2008, and revised the EITI Rules in 2011.

Evaluation:

EITI's solicitation of broad input from stakeholder groups during its process of formation is commendable, particularly the inclusion of civil society organizations that operate on a purely national scale.[52] EITI notably undertook numerous in-country consultations with civil society groups during this process, and many civil society representatives from implementing countries were invited, all expenses paid, to the first EITI conference in London.[53] EITI appears to have benefited from the early convening power of the United Kingdom, G8 and the World Summit on Sustainable Development, and to have been inclusive of organizations that were actively engaged in relevant issues at the global level.

Unfortunately, EITI's inclusion of stakeholders in its formation processes did not extend to affected communities. Affected communities include both citizens of host countries directly affected by resource extraction (e.g., those who work at or live near mines, processing facilities or transportation routes) and, more broadly, the public and future generations of nations whose governments receive money from extraction contracts. It is not sufficient to rely on civil society as a proxy for participation by affected communities. Consequently, the process may have failed to fully consider the diverse knowledge and views of the communities whose "economic and social development" the initiative ultimately aspires to promote. This could have been remedied if EITI had made more active attempts to obtain public feedback in resource-rich countries and mining localities throughout the development of various components. From the information available, it appears that EITI provided very few opportunities for public input throughout its creation. The only initial component open to general public input appears to have been the development of its standards, and even then EITI simply noted that it "welcome[d] all comments and suggestions on this paper".[54] Meanwhile, the first meeting relating to the development of EITI was invitation-only and held in London, with subsequent meetings largely in European centers, making the development process highly inaccessible to most affected communities.

EITI would also have benefited from considering the importance of human rights impacts during its formation process. While EITI relied upon the civil society organizations involved in its development to share human rights insights, conducting a formal assessment would not only have

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[50] Department for International Development "Report of the Extractive Industries Transparency Initiative (EITI) London Conference, 17 June 2003"
<http://collections.europarchive.org/tna/20070701080507/http://www.dfid.gov.uk/news/files/eitireportconference17june03.asp> (accessed April 9, 2013).
[51] EITI "History of the EITI" <http://eiti.org/eiti/history> (accessed August 1, 2012).
[52] Such as the Episcopal Conference of Cameroon, Chad-Cameroon Bishops' Conference and IBASE (Brazil). See Department for International Development *Report of the EITI Workshop*.
[53] Information provided by EITI staff in an email dated April 3, 2013, as part of ongoing dialogue after EITI's comment period. (EITI staff email)
[54] Department for International Development *Report of the EITI Workshop*, Annex 4.

directly involved communities but would have increased awareness of human rights issues to non-civil society stakeholders involved in EITI. Such information might have influenced the initiative's design and the content of its standards, and provided direction for how to incorporate human rights considerations.

Recommendations:

- In order to meet minimum standards, EITI should:
    - Include affected communities as equal partners in future development activities, such as structural reviews, progress reporting and MSG activities.
    - Take special care to allow meaningful opportunities for public input into all further development and revision given that, in the case of EITI, affected communities include the general public.
- Even if the above minimum standards are met, to be more relevant as a human rights initiative, EITI should conduct a human rights impact assessment and take special care to include affected communities in that assessment. The results of this assessment should be used to inform the expansion of its mandate with regard to human rights.

EITI'S STANDARDS[55]

EITI operates by requiring each country member to release annual reports that detail the payments declared by extractive companies to the country's government, reconciled against the revenues declared as received by that government. The procedure for preparing and releasing these "EITI reports" must be agreed upon by a national MSG following a process established by EITI's standards.

There are three tiers of EITI Rules: Principles, Criteria and Requirements. These are supplemented by Policy Notes, which offer guidance and clarifications regarding implementation of the Rules. The EITI Principles consist of 10 general statements about EITI members' commitment to transparency of natural resource revenue and their belief in the importance and benefits of such transparency. For example, members "recognise that a public understanding of government revenues and expenditure over time could help public debate and inform choice of appropriate and realistic options for sustainable development".[56] The EITI Criteria provide the general framework for government and company disclosure of revenue. The six criteria require "regular publication of all material oil, gas and mining payments by companies to governments . . . and all material revenues received by governments from oil, gas and mining companies".[57] They establish that governments must develop a public work plan for implementing criteria, which includes "a credible, independent" audit and active engagement from civil society.[58] The EITI Principles and EITI Criteria should be viewed as the "principles" of the MSI, setting out the general process and aspirations for targeted actors.

Nested below these principles are the EITI Requirements, which should be viewed as the "standards" of the MSI, dictating the actual steps that implementing countries must follow. There are 21 requirements, and most requirements are accompanied by one or more indicators, which give context on how to discharge these requirements.[59] The indicators include optional recommendations.

Process established by EITI standards

EITI functions by requiring its implementing countries to fulfill all EITI Requirements, which are classified into six categories, in order to be considered "EITI compliant" countries. The first category comprises "sign up" requirements, which direct a government to issue a public statement of its intention to work with civil society and industry to implement EITI; set up an MSG that includes these two stakeholder groups; to oversee implementation of the EITI; and to direct the MSG to develop a detailed work plan implementing the remainder of the standards. Once this is completed, a country may apply to become an "EITI candidate" country.

The "preparation" and "disclosure" requirements direct the MSG to agree on "a definition of materiality and the reporting templates" by determining the national definition of "material payments and revenues" as well as "a pre-defined, reasonable materiality threshold" for reporting.[60]

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[55] Unless otherwise noted, information in this section is taken from the EITI Rules. See *EITI Rules, 2011 Edition* at 11–31.

[56] *EITI Principles and Criteria*, principle 4.

[57] *EITI Rules, 2011 Edition* at 12.

[58] *EITI Rules, 2011 Edition* at 12.

[59] This does not refer to the EITI Validation Indicators, which have been replaced with requirements. Rather, it refers to the lettered points expanding on each of the 21 Requirements.

[60] *EITI Rules, 2011 Edition* at 22.

Government must engage with civil society and companies and "remove any obstacles" to implementation.[61] All "relevant companies" and government must report using accepted international accounting standards, following the definitions set by the MSG.[62] A "credible, trustworthy and technically competent" organization "must ensure that that the EITI report is comprehensive, identifies all discrepancies, where possible explains those discrepancies, and where necessary makes recommendations for remedial actions to be taken".[63] Under the "dissemination" requirement, the government and MSG "must ensure that the EITI report is comprehensible and publicly accessible in such a way as to encourage that its findings contribute to public debate".[64]

The "review" and "validation" requirements obligate companies to support EITI implementation and "encourage" the government and MSG to "take steps to act on lessons learnt, address discrepancies and ensure that EITI implementation is sustainable".[65] Countries also must submit their initial reports in order to achieve certification as EITI compliant countries.[66] Once a country has completed these steps and been deemed EITI compliant, EITI expects it to produce and disseminate these reports annually to retain this status.[67]

Material update: The minutes from the October 2012 EITI Board Meeting indicate that EITI has agreed to condense the current Criteria and Requirements into seven requirements, and that the secretariat is to draft standardized validation templates that will be put forward for the board to approve. The minutes also indicate a plan to include with the five sign-up requirements a provision on applying for adapted implementation. While it was optional at the 2012 meeting, the board approved a proposal to require implementing countries to disclose sub-national transfers but only where mandated by a national constitution or statute.

Updated information provided by EITI: EITI staff were uncertain whether the current Criteria and Requirements would be condensed into six or into seven requirements. The first of the new requirements will be a sign-up requirement.[68]

Evaluation:

Most of EITI's requirements and indicators define clear, mandatory processes for governments and/or MSGs to implement. Providing indicators is very helpful for clarifying the steps that governments and MSGs must take, and for determining whether these have been followed.

However, several crucial standards would benefit from more clarity and precision.[69] An example is the standard that describes the follow-up process when there are discrepancies in the EITI report between reporting by companies on payments made to a government and the government's report on the revenues received from extractive companies. This standard "encourages" the government and MSG "to take steps to act on lessons learned, address discrepancies [between figures that companies and governments disclose] and ensure that EITI implementation is sustainable".[70] The use of the term "encourage" suggests that such follow-up is not mandatory, and its inherent

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[61] *EITI Rules, 2011 Edition* at 24.
[62] *EITI Rules, 2011 Edition* at 20–21, 24–27.
[63] *EITI Rules, 2011 Edition* at 24, 27.
[64] *EITI Rules, 2011 Edition* at 28.
[65] *EITI Rules, 2011 Edition* at 30.
[66] *EITI Rules, 2011 Edition* at 30.
[67] See **Monitoring of compliance with standards**, below.
[68] In-person meeting with EITI staff.
[69] See also the discussion on the lack of specific requirements in terms of reporting: **EITI's Mandate and Relationship to Human Rights**, above.
[70] *EITI Rules, 2011 Edition* at 30.

ambiguity makes it difficult to determine whether the government is meeting the standard, raising questions about whether in practice governments will take any steps to remedy discrepancies. This standard is at the heart of EITI, as it is the process by which governments are accountable to their constituents for explaining discrepancies that, on their face, may suggest corruption or mismanagement. In addition, EITI does not precisely identify which of its standards are accepted international accounting standards; where this is the case, EITI should make this clear.

Ambiguity largely arises because EITI's standards relate to establishing processes for governments and MSGs with which compliance is difficult to measure. An MSI that seeks to establish processes is nonetheless required to ensure that the standards that set out those processes are specifically defined and clearly obligatory. This may lead to incomparable results and without verifiable and obligatory actions for countries to undertake, it is difficult to determine if countries are making sufficient effort to change their practices.

Another problematic aspect of EITI's standards is that the obligations set out in the indicators sometimes go beyond those identified in the requirements. While some of the indicators are clearly optional, others are expressed as mandatory even though they extend beyond the obligation set out in the higher-level requirement.[71] As it revises its standards, EITI should clarify which indicators are mandatory and which merely provide implementation guidance for governments and MSGs.

EITI's standards would also benefit from reference to international law. International law could provide useful guidance for member countries and benchmarks for assessing compliance. For example, human rights bodies' jurisprudence on freedom of expression, which entails access to information,[72] should be included in EITI's dissemination requirement. While it may not be appropriate or possible for some of the more procedural or novel indicators to reference international law, EITI should consider how international law could be incorporated into its framework. If EITI expands to directly address the human rights concerns that prompted its development, express reference to international law would become essential.

In addition, as discussed in **EITI's Mandate and Relationship to Human Rights**, above, failure to concretely set substantive minimum standards and define terms such as "material payments" undermines EITI's ability to ensure transparency of extractive industry revenue. EITI has developed guidance on the implementation of existing standards through its stakeholder learning and systems development programs. To address the current lack of substantive requirements for its members, EITI could consider creating a system to draw on or transform these recommendations and guidelines into mandatory minimum standards. This would allow for the utilization of existing learning to advance the goals of transparency and help overcome the shortcomings of EITI's standards.[73] In addition, EITI fails to require implementing countries to disclose sub-national transfers, unless mandated by law. Transparency of these payments is necessary to best ensure that local communities enjoy the benefits of revenue-sharing arrangements.

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[71] For example, requirement 2's Indicators (a-d) identify that governments "must" undertake certain activities. However, page 41 of the EITI Rules suggests that meeting only one of these Indicators would be sufficient to show that a government has met Requirement 2. *EITI Rules, 2011 Edition* at 16, 41.

[72] The "right of access to information held by public bodies" under the ICCPR is a key component of the right to freedom of expression. UN Human Rights Committee *General Comment 34* CCPR/C/GC/34 (2011), para 18.

[73] This is discussed further in **Stakeholder Learning and Engagement** and **Systems Development and Operationalization**, below.

Recommendations:

- EITI should be updated to include specific substantive minimum requirements regarding the revenues and payments that countries must report (as noted in **EITI's Mandate and Relationship to Human Rights**, above).
- In order to improve its existing standards, EITI should:
    - o Clarify those ambiguously worded standards that make it difficult for independent evaluators to objectively assess whether a member is in compliance.
    - o Make clear which indicators are requirements and which are guidance.
    - o Tie its standards or principles to international law where possible.
- Even if the above recommendations are adopted, to be more relevant as a human rights initiative, EITI should:
    - o Revise its standards to include explicit human rights standards.
    - o Require implementing countries to disclose revenue flows leaving the country.
    - o Require implementing countries to report on subnational transfers of revenue.

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 firms[78] and was assembled by a five-person sub-committee of the EITI Board.[79] The

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[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

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[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]

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[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.revenuewatch.org/eiti/indicators>.
[93] In-person meeting with EITI staff.

<u>Evaluation:</u>

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

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[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.

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[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.

<u>Recommendations:</u>

- 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

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[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

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[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

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[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

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[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:
  - o Impose outer-limit time frames for the EITI Board to respond to allegations of non-compliance and impose sanctions.

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[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 countries[121] 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

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[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-leste-hosts-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.

outcomes could be reported directly to working groups or members' meetings for approval to become mandatory practices.

Recommendations:

- In order to meet minimum standards, EITI should develop a carefully tailored confidentiality policy for its learning programs to allow participants, such as governments and companies, space to discuss issues frankly.
- To be effective as a transparency initiative, EITI should create a formal process to incorporate the guidance material into other areas of implementation. In particular, EITI should use its learning outcomes to develop specific substantive minimum reporting requirements regarding revenue and payments.
- In order to improve its existing learning programs, EITI should:
  - o Facilitate more learning opportunities for members on a regular basis.
  - o Promote in-country learning, including across MSG groups and involving affected communities.
  - o Facilitate the involvement of affected populations in stakeholder learning programs.
  - o Publicize members' individual learning efforts so that it encourages a culture of improvement among members and allows them to benefit from lessons learned by others.
- Even if the above recommendations are adopted, to be more relevant as a human rights initiative, EITI should extend its programs to encompass learning regarding relevant human rights issues.

Systems Development and Operationalization

EITI's standards require governments to change their laws and policies. Implementing countries are "required to remove obstacles to the implementation of the EITI", including "legal, regulatory or other obstacles" such as "confidentiality clauses in government and company contracts and conflicting government departmental remits".[125]

EITI has released a "Sourcebook", which contains recommendations and advice for governments and companies on developing and implementing systems. The secretariat and MDTF also "provide technical and financial assistance to countries" by "making EITI advisers and consultants available to governments to assist them in implementation; sharing international best practices; and providing grants to governments to help support EITI implementation".[126]

Evaluation:

It is good practice that EITI requires changes to countries' laws and regulatory systems. Moreover, it is innovative that, where necessary, EITI requires changes to contracts. Such changes are crucial to ensuring a change in culture that will encourage lasting compliance with standards. As with **Stakeholder Learning and Engagement**, above, EITI would benefit from creating a formal process to incorporate its systems development material into other areas of implementation, such as the development of mandatory specific substantive minimum standards. One option could be to require participant countries to pass an "EITI law" as a requirement for validation.[127]

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[125] *EITI Rules, 2011 Edition* at 21.

[126] EITI "EITI Multi-Donor Trust Fund."

[127] This is a suggestion from an expert reviewer. Countries could be put in a difficult position when they have made a commitment to the EITI process but have no legal tools (i.e., no EITI law) to force companies operating in their territories to cooperate.

For systems development to effect change, it must be coupled with effective and ongoing monitoring of members' compliance with standards. For example, while the initial evaluation requires the evaluator to "cite evidence that the government has removed any obstacles to compliance", which includes appropriate law changes,[128] the lack of subsequent regular monitoring prevents accountability for governments' long-term implementation of changes, as well as identification of new obstacles to transparency that may have emerged. The lack of specificity in EITI's standards in defining terms such as "material payments", and in not requiring sub-national payments, all undermine the requirement of law change. This is because the ambiguity in the terms leaves open the possibility that countries may simply be "ticking a box" when passing legislation, by enacting laws that lack rigor, or will not be enforced, and are not capable of affecting deep change.

However, even if these issues are addressed, without an expanded mandate, systems development and operationalization will have limited impact on the human rights issues that spurred EITI's formation. Without directly incorporating human rights standards by, for example, requiring human rights analysis of revenue and expenditure, EITI will not be a credible human rights instrument.

Recommendations:

- To improve its systems development and operationalization, EITI should follow the above recommendations to institute an effective system of monitoring.
- EITI should ensure that its systems development and operationalization include specific substantive minimum reporting requirements regarding revenue and payments.
- Even if the above recommendations are adopted, to be more relevant as a human rights initiative, EITI should facilitate members' efforts to systematically embed human rights standards in domestic governance.

Programs and Outreach

EITI has conducted significant outreach to encourage non-member governments to join the initiative, either as implementing countries or as supporters.[129] For example, EITI has sponsored some regional programs to reach out to non-member governments, such as the Mediterranean Roundtable for Middle East and North African countries.[130] EITI also provides information for companies on methods for promoting EITI implementation and lobbying governments to join EITI.

With respect to general publicity, EITI has a logo that members and supporters may use to publicize their association with the initiative. The secretariat must approve all uses of the EITI logo and the "general policy is to permit its supporters and other stakeholders to use the EITI logo only in the context of their activities promoting the EITI and its principles".[131]

Evaluation:

EITI historically has conducted impressive outreach to encourage non-member governments to join the initiative. It also has engaged with companies to encourage them to lobby non-member governments to join the initiative. EITI should now expand its focus and conduct outreach efforts targeted at the general public and affected communities in the countries in which its standards apply. Since EITI's standards aspire to "contribute to public debate", local outreach activities should be a

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[128] *EITI Rules, 2011 Edition* at 44.
[129] See EITI *Progress Report 2007–2009* (n.d.) at 31.
[130] See *Progress Report 2007–2009* at 31.
[131] EITI "Use of EITI's Name and Logo" <http://eiti.org/about/logopolicy> (accessed October 1, 2012).

key component of the secretariat's work.[132] As it stands, EITI relies too heavily on MSGs and governments, which may have limited resources or a low desire to actively distribute local-level information about EITI. At least one outside observer has stated that "EITI reports remain under-utilized as a source of information and a tool for advocacy" at the domestic level.[133] This issue is explored further in **EITI's Level of Community Involvement**, below. For the same reasons, EITI would also benefit from including outreach aimed at local NGOs.

Recommendations:

- In order to improve its outreach efforts, EITI should support or facilitate local-level outreach activities to inform the general public and local NGOs about the initiative in the countries in which the standards apply, the opportunities for participation in MSG groups or EITI, and the EITI reports and results.
- To be effective as a transparency initiative, EITI should be updated to include specific substantive minimum requirements regarding the revenues and payments that countries must report (as noted in **EITI's Mandate and Relationship to Human Rights**, above) and provide outreach to ensure that stakeholders, particularly communities and NGOs, are aware of the report findings and their consequences.
- Even if the above recommendations are adopted, to be more relevant as a human rights initiative, EITI should conduct outreach programs to raise awareness of companies, the general public and local NGOs of the human rights issues relating to extractive industry payments and revenues.

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[132] *EITI Rules, 2011 Edition* at 28.
[133] Revenue Watch Institute "About RWI's EITI Report Analysis"
<http://data.revenuewatch.org/eiti/about.php#numbers> (accessed October 1, 2012).

EITI'S INTERNAL GOVERNANCE PROCEDURES

Stakeholder Involvement[134]

EITI has both country-level and global-level operations. The EITI Association is the global organization of EITI. Members of the EITI Association are divided into three constituencies: (1) countries; (2) extractive sector companies and institutional investors; and (2) civil society organizations. Each constituency decides its own rules of membership. In order to join the Association, all stakeholders must commit "to support" the Association's mission.

There are two broad types of country membership: implementing countries and supporting countries. Implementing countries are required to meet EITI's standards. At the date of publication, there were 37 implementing countries, divided into two groups: 16 compliant countries (those that have met EITI's standards) and 21 candidates (those countries in the process of meeting the standards). To gain candidate country status, a country must meet five sign-up requirements (see **EITI's Standards**, above). After fulfilling these requirements, candidate countries have two and a half years to fulfill EITI's requirements for becoming a compliant country, including "preparation", "disclosure", "dissemination" and "review and validation".[135] Each implementing country creates its own MSG, made up of companies and local civil society.

Supporting countries "provide political, technical and financial support to the initiative" and are required to publicly endorse EITI, but are not required to meet its standards.[136] They are not mere observers however, as they may contribute to decision-making processes.[137]

In addition to more than 60 member companies,[138] EITI has more than 80 institutional investors.[139] Member companies must make a statement endorsing the EITI Principles and Criteria (and make that statement available on their website) and contribute to implementation of EITI in candidate or compliant countries. Companies are "asked to make an annual contribution to the international management of the EITI" and "fill in an international-level self-assessment form within a year of becoming an EITI Supporting Company".[140] Institutional investors also must "contribute[] to raising awareness about the EITI with companies and other investors" and are "asked to make an annual contribution to the international management of the EITI.[141]

EITI's 14 members from civil society organizations comprise representatives of "non-governmental organizations [and] global action networks or coalitions."[142] Civil society organizations "are involved with EITI at the international level" and eight organizations are listed on the website, although the precise number involved is unknown.[143] It is unclear whether the international "partner

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[134] Unless otherwise noted, the information on membership in this section is based on the EITI Members Registry, which was last updated by EITI on November 29, 2010. EITI "Members Registry" (November 29, 2010) < http://eiti.org/files/EITI_MEMBERS_REGISTRY.pdf>.

[135] *EITI Rules, 2011 Edition* at 14.

[136] EITI "Stakeholders: Countries" <http://eiti.org/supporters/countries> (accessed August 2, 2012).

[137] See **Decision-making Functions and Balance of Power**, below.

[138] EITI "Stakeholders: Companies" <http://eiti.org/supporters/companies> (accessed August 2, 2012).

[139] EITI "Stakeholders: Institutional Investors" <http://eiti.org/supporters/institutionalinvestors> (accessed August 2, 2012).

[140] EITI "Company Support of the EITI" <http://eiti.org/supporters/companies/howto> (accessed August 2012).

[141] EITI *How to Become a Supporting Investor* (2009).

[142] *EITI Rules, 2011 Edition* at 72.

[143] EITI "Stakeholders: Civil Society" <http://eiti.org/supporters/civilsociety> (accessed August 2, 2012). The actual number of organizations involved is unclear for two reasons. First, 14 civil organizations are listed in the members

organizations" that "have endorsed and provide support to the EITI" are a separate constituency not discussed in the Articles of Association.[144] These organizations range from International Council on Mining and Metals and G20, to the African Union.[145]

Updated information provided by EITI: EITI staff clarified that the 650-plus members of Publish What You Pay are included in EITI's civil society membership base as one member, which significantly increases the true participation from civil society.[146]

Evaluation:

EITI's effort to involve a broad range of stakeholders at multiple levels of involvement is impressive. EITI clearly recognizes the importance of stakeholder involvement. Nevertheless, there are several ways in which the initiative could improve the diversity among stakeholders that are involved in the EITI process.

First, none of EITI's implementing countries are from North America or Oceania, and Norway is the MSI's only European implementing member country, despite the fact that extractive companies operate in these regions. Currently, such countries have joined as supporting countries and are not required to meet any transparency requirements. These countries are not to be assumed to lack corruption or human rights abuses simply because they are wealthy. Allowing countries with extractive operations to indefinitely remain in the category of supporting countries creates a safe harbor for countries to take part in EITI's decision-making processes but not comply with any of its standards. In addition, it is observed that existing supporting countries are wealthy industry hubs, such as the United Kingdom and Canada. We note some promise in initial steps by Australia, the United States and also the United Kingdom to move toward implementation, and hope this continues.[147] We also commend many of these countries for taking other steps to promote extractive industry transparency. In addition, EITI could provide a unique space for incentivizing the behavior of companies by utilizing the membership of home countries to require or incentivize improved behavior (see the discussion on host and home countries in **EITI's Mandate and Relationship to Human Rights**, above).

Second, as explained in **Stakeholder Learning and Engagement**, above, there appears to be a general disconnection among MSGs, as well as between MSGs and the Association. This makes it difficult to determine the flow of information and decision-making from the in-country level to the global level. According to EITI, the 650-plus members of Publish What You Pay are considered civil society members; however, there is a lack of transparency surrounding their level of participation, e.g., how many of these members actively participate and whether they engage at the national or international level. Additionally, EITI does not have criteria to ensure that civil society

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registry, while only eight are listed on EITI's website. Second, Publish What You Pay (PWYP) is a civil society network with more than 650 organizations. It is unclear how the governance and representation arrangements of EITI and/or PWYP enable these member organizations to participate in EITI, if at all.

[144] EITI "Partner Organisations" <http://eiti.org/supporters/organisations> (accessed December 10, 2011).

[145] EITI "Stakeholders: Partner Organisations" <http://eiti.org/supporters/partnerorganisations> (accessed August 2, 2012).

[146] In-person meeting with EITI staff.

[147] Since the date of the evaluation, Australia has announced that it will pilot EITI. EITI "Australia to Pilot the EITI" (October 27, 2011) <http://eiti.org/news-events/australia-pilot-eiti> (accessed October 1, 2012). Additionally, the United States has committed to implementing EITI. EITI "The US Establishes Its National EITI Oversight Group" <http://eiti.org/US-establishes-national-EITI-Oversight-Group> (accessed August 2, 2012). The United Kingdom International Development Select Committee released a report in August 2012 recommending that the country implement EITI. EITI "UK Parliamentary Committee: UK Should Implement EITI" <http://eiti.org/news-events/uk-parliamentary-committee-uk-should-implement-eiti> (accessed February 26, 2013).

members of the Association do not have conflicts of interest with governments or companies, and the conflict of interest criterion for civil society participating in MSGs is very broad.[148] For example, some MSGs pay substantial "per diems" to the individuals involved, which may result in MSG participants feeling restrained in critiquing the MSG's work.[149] Stringent criteria are necessary to ensure that civil society members act as impartial, independent voices in the EITI process. Related to this, EITI should immediately clarify whether partner organizations have decision-making power and, if so, through which constituency this is channeled. It would be of concern if partner organizations were participating through the civil society constituency.

Third, EITI does not provide any opportunities for direct involvement of affected communities at the EITI Association. The EITI Association has no mechanism to allow for participation from affected communities, either by becoming members or through other participation means (see **EITI's Level of Community Involvement**, below). Thus, a crucial stakeholder voice is missing from the initiative.

Recommendations:

- In order to meet minimum standards, EITI should:
    - o Revise its governance rules to allow for the participation of affected communities.
    - o Develop stringent conflict of interest provisions for civil society at both the global and national level.
    - o Clarify whether partner organizations are given decision-making power and, if so, how.
- In order to improve its stakeholder involvement, EITI should:
    - o Conduct outreach to increase overall civil society membership, either itself or perhaps in partnership with existing civil society members, such as Publish What You Pay, with particular emphasis on increasing membership from national or sub-national NGOs that operate in Latin America, Oceania or Africa.
    - o Incentivize or require supporting countries to become implementing countries, particularly those that are industry hubs.

Decision-making Functions and Balance of Power[150]

Overall decision-making body

A conference is held every two years "to provide a forum for EITI stakeholders . . . to further the objective of the EITI Association and to express their views on the policies and strategies of the EITI Association".[151] All EITI members may attend this conference, and the board may invite other stakeholders to participate at its discretion. "Members' meetings" are held in conjunction with this conference in order to "approve the activities report, the accounts and the activity plan of the EITI Board"; elect the EITI Board and chair; and "consider any other matters pursuant to requests from a Member".[152] The members' meeting is the highest level of decision-making in EITI. At members' meetings, a first effort is made to make decisions by consensus. Where this is not possible, decisions are made by a "qualified majority requiring the support of at least two thirds of

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[148] EITI Requirement 4(d) states that "Civil society groups involved in EITI as members of the multi-stakeholder group must be operationally and in policy terms independent of government and/or companies", but this leaves open space for remaining personal or financial interests: *EITI Rules, 2011 Edition* at 17.

[149] Additional comment from expert reviewer.

[150] Unless otherwise specified, information in this section is taken from the Articles of Association: *EITI Rules, 2011 Edition* at 70–82.

[151] *EITI Rules, 2011 Edition* at 72.

[152] *EITI Rules, 2011 Edition* at 72.

the total votes cast and must include the support of at least one third of the votes cast by the Members representing each Constituency".[153]

Executive decision-making body

The EITI Board is responsible for "key decision-making".[154] It is elected by, and is accountable to, the members' meeting. The board has 20 members, allocated into fixed roles: eight members represent the country constituency (a limit of three may be supporting countries); six represent the company constituency; and five represent the civil society constituency. The final member is also the chair, who heads the board and may be from any constituency. As with the countries, civil society board representation requires geographic/development diversity: two board members must be from OECD/supporting countries and three from implementing countries. Companies have no such requirement. EITI "expect[s] that countries from different regions and companies and civil society organizations with strong links to different regions" will be represented on the board and constituency groups "are encouraged to ensure that both genders are adequately represented".[155] Board decisions are made by consensus; in the absence of consensus, decisions require two-thirds of the overall votes and one-third of votes in each constituency.

Committees and working groups

The EITI Board also has the power to create committees. Presently, EITI has committees on implementing countries evaluation;[156] finance; audit; governance; candidature and outreach; rules revision follow-up; and rapid response.[157] The composition of these committees "should, as far as is reasonable, reflect the multi-stakeholder nature of the EITI Association."[158] Very little information is available about these groups online, though EITI staff have stated that the terms of reference for these committees are available upon request from the secretariat.[159] The board has also created a Strategy Working Group that is discussed in greater detail in **EITI's Capacity to Evolve Over Time**, below.

Administrative body

The EITI International Secretariat is "responsible for the day-to-day running of the EITI Association under the direction of the EITI Board through its Chair".[160]

Updated information provided by EITI: EITI staff clarified that the 650-plus members of Publish What You Pay are included in EITI's civil society membership base, which significantly increases the true participation from civil society.[161] It was explained that the board has ultimately always made their decisions by consensus, rather than using the voting mechanism.

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[153] *EITI Rules, 2011 Edition* at 73.
[154] *EITI Rules, 2011 Edition* at 69.
[155] *EITI Rules, 2011 Edition* at 80.
[156] EITI refers to this as "validation". Comments from an expert reviewer indicate that this committee evaluates only implementing countries, not all members.
[157] EITI "Board Committees" <http://eiti.org/about/board-committees> (accessed March 4, 2013).
[158] *EITI Rules, 2011 Edition* at 76.
[159] Phone conversation with Jonas Moberg and Sam Bartlett, April 4, 2013.
[160] *EITI Rules, 2011 Edition* at 77.
[161] In-person meeting with EITI staff.

Evaluation:

EITI has robust decision-making processes. EITT's voting structure in its governing body, the members' meeting, is a solid foundation to ensure representativeness and equality.[162]

Delegating core decisions to the EITI Board is sensible. It is good practice that EITI seeks to address gender balance on the EITI Board. However, it is disappointing that civil society is allocated the smallest portion of board seats, even fewer than companies. While sovereignty considerations may justify EITI providing a larger portion of board seats to implementing countries, there is no readily apparent justification for favoring companies over civil society. There should be one constituency for all private sector interests, with the same number of seats as civil society. Even if in practice, the result of requiring one-third of each constituency to support decisions results in two civil society members being needed to approve a motion (the same number as for companies), the lower representation of civil society may affect both the internal decision-making dynamics and its legitimacy. While the country and civil society constituencies adopted rules for 2011-2013 that required diversity among their board representatives, the company constituency did not. This is possible because EITI only "expects" that the constituencies will provide diverse representation on the board and does not impose any hard requirements to ensure this. The company constituency should be required to ensure diversity, to prevent the monopolization by American and European companies in decision-making.

While EITI has a number of working groups and sub-committees, it is difficult to find information about their terms of reference, membership and decisions, and therefore evaluate their design and operation. EITI should publicize such material. One innovative committee is the Rapid Response Committee, established by EITI in 2008 to "respond quickly to cases in which civil society or other stakeholders in candidate countries are excluded from playing a fully active role in monitoring revenue transparency".[163] Given the lack of EITI material available about the committee, reference to the testimony by the Chairman of Revenue Watch Institute is illustrative as to the committee's impact: "when the Committee intervenes it does so with considerable force" and "interventions by EITI's Rapid Response Committee have helped, if not to correct general patterns of human rights abuse, then to stop harassment in specific cases, using the influence and authority of the Initiative".[164] To deter other countries from excluding civil society and to provide an example to other MSIs, EITI should make further details about the committee available.

Recommendations:

- In order to meet minimum standards, EITI should disclose the terms of reference, membership and related documentation for each sub-committee and working group it establishes.
- In order to improve its decision-making processes, EITI should ensure that civil society does not have less representation on the board than profit-motivated actors.
- Even if the above recommendations are adopted, to be more relevant as a human rights initiative, EITI should expand the mandate of its Rapid Response Committee to also address

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[162] Its approach of first seeking consensus, but having a backstop position of equitable voting, is somewhat ambiguously worded, though EITI staff have clarified that the two-third requirement does require proportionally weighted votes: Phone conversation with Jonas Moberg and Sam Bartlett, April 4, 2013. On their face, the voting guidelines do not make it clear whether two-thirds of the absolute number of votes allows for a decision to be passed; if this were so, it would disadvantage the underrepresented civil society organizations.

[163] EITI *Minutes of the 4th EITI Board Meeting* (2008) at 4.

[164] Anthony Richter "Prepared Statement of Anthony Richter, Chairman of the Governing Board, Revenue Watch Institute" (The Link between Revenue Transparency and Human Rights: Hearing before the Commission on Security and Cooperation in Europe, Washington, D.C., April 22, 2010).

urgent human rights concerns. If EITI's mandate is expanded to include human rights more generally, a human rights committee or working group could also be established.

EITI's Funding, Resources and Accountability

EITI does not impose membership fees. Instead, the initiative relies on voluntary contributions from "EITI members and grants from bilateral and multilateral donors, international financial institutions and other agencies, organizations and entities".[165] Contributions may include in-kind support, and all contributions are published in EITI's financial reports. In particular, country-level EITI organizations benefit from the MDTF, which is administered by the World Bank "to provide technical and financial assistance to countries implementing or considering implementing the EITI".[166]

EITI's financial reports are audited and EITI specifically publishes details on proportions of its expenditures on various activities. At the date of evaluation, 20 percent of EITI's budget consisted of contributions from the Government of Norway; 37 percent from supporting countries; 3 percent from supporting NGOs; and 40 percent from the private sector. EITI spends 48 percent of its budget on staff and associated costs; 18 percent on implementation support; 10 percent on office, administration and board meetings; 9 percent on outreach support; 9 percent on EITI conferences; 3 percent on communications; and 3 percent on contingency.

In addition to hosting the EITI reports online, the EITI Board is also required to produce an activity report every two years at the EITI conference. These reports often include a review of learning programs implemented, and are all publicly available on the EITI website.

Updated information provided by EITI: EITI staff reported that a memorandum of understanding has been signed with the World Bank, and that it is available upon request.[167]

Evaluation:

EITI is fortunate to have strong funding. This is supported by transparent reporting, including disclosing payments received by individual members, and by permitting in-kind donations. It is unclear if EITI is endowed or has other stable funding arrangements aside from the MDTF that would facilitate long-term strategic planning.

The World Bank website does not yet indicate that there is a memorandum of understanding in place, although it states that one is in process.[168] Given the outdated information on the World Bank's website, EITI should make the signed memorandum of understanding publicly available on its own website.

EITI exhibits good practice by specifically publishing information about the proportion of its expenditure dedicated to various categories of expenses. It is not immediately clear what proportion of expenses within certain categories (e.g., "staff and associated costs") is spent on implementation activities versus administrative tasks, though EITI staff have stated that a total breakdown of EITI's accounts is available upon request from the secretariat.[169] A minimum of 33 percent of total

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[165] *Articles of Association for the Extractive Industries Transparency Initiative (EITI)*, art 18.
[166] EITI "EITI Multi-Donor Trust Fund".
[167] Phone conversation with Jonas Moberg and Sam Bartlett, April 4, 2013.
[168] World Bank "Extractive Industries Transparency Initiative: About the EITI Multi-Donor Trust Fund" <http://go.worldbank.org/155CQ1CCG0> (accessed October 1, 2012).
[169] EITI staff email.

expenditure should be devoted to implementation.[170] EITI's audited accounts should also break down expenditure into more sub-categories.[171]

Recommendations:

- In order to improve its funding and resource accountability, EITI should:
  - o Break down its full administrative and implementation spending, and devote a minimum of 33 percent of its total expenditures to expenditures on implementation.
  - o Itemize expenditure in its audited accounts on a line-by-line basis to ensure accountability for expenses.

Dispute Resolution

EITI does not have a detailed dispute resolution process for resolving breaches of internal governance or for when decision-making processes otherwise fail. However, its governing charter, the Articles of Association, does provide the EITI Board with the power to terminate membership if a member "does not comply" with the Articles of Association.[172]

Evaluation:

EITI's dispute resolution process lacks detail and does not articulate the steps for the board to take when it receives an allegation that a member has breached the rules of internal governance. An established procedure would promote transparency and consistency in internal governance procedures, and prevent complications if a dispute arises. Internal disagreements about procedure, and uncertainty about the process for resolving these disagreements, have been problematic in some MSIs, leading to a devotion of resources to addressing internal issues rather than promoting good MSI governance.

Recommendations:

- In order to meet minimum standards, EITI should revise Article 5 of its Articles of Association to state clearly the procedure to be followed when it is alleged that a member has breached the rules of internal governance.

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[170] This percentage is consistent with good practice expected from other nonprofit organizations. See, e.g., Charity Navigator "How Do We Rate Charities' Financial Health?"
<http://www.charitynavigator.org/index.cfm?bay=content.view&cpid=35> (accessed March 1, 2011).
[171] While EITI's audited account itemizes contributions on a line-by-line basis, it does not itemize expenditure in the same fashion. For example, in EITI's 2009 audited accounts, there is over NOK$9,324,359 listed as "other operating expenses". The only expenditure accounted for within those expenses is NOK$2,015,496, listed in a note as wages and compensation for the "Head of Secretariat". It is difficult to hold EITI accountable for its expenditure without a line-by-line disclosure of its expenses. While some previous annual budgets do break this spending down further, an audited version is preferable to uphold EITI's integrity.
[172] *Articles of Association for the Extractive Industries Transparency Initiative (EITI)*, art 5(5).

EITI'S CAPACITY TO EVOLVE OVER TIME

More than 10 years after its launch, EITI has conducted several reviews of the initiative, or specific components of it, at the request of the board or through the biennial conference. The review reports are publicly available. For example, a review occurred from October 2010 to May 2011 with the purpose to "document, analyse and assess the relevance and effectiveness of the EITI, where EITI's objectives are to strengthen transparency of natural resource revenues".[173] However, it is unclear whether the recommendations from the reviews have been implemented.

In June 2011, the board established the Strategy Working Group "to present options and recommendations to the Board of EITI regarding the strategic direction of the EITI for the next 3-5 years".[174] The group is currently reviewing "the EITI Principles, EITI Criteria and scope of the EITI; the system for assessment (e.g., compliance and/or sliding scale); communication and use of EITI reports; linkages with other governance reform programs; technical assistance provision, governance and organization; the findings from the evaluation of the EITI; and proposals and feedback from partners and stakeholders and from a public consultation on EITI strategy".[175] According to EITI's website, the group "consists of members from all stakeholder groups, including members of the EITI Board and external experts".[176] However, the recently released terms of reference state that, with the exception of World Bank representatives, the members of the group are all members of EITI; there are no external members within the working group.[177] Progress reports are available on the EITI website.

Evaluation:

It is commendable that EITI has conducted reviews. Regular reviews are essential to ensuring that initiatives evolve over time to meet changing circumstances and that they progress toward meeting their stated purposes. EITI would likely benefit from building this process into its formal rules or Articles of Association, building on the now-expired provision that required EITI to review its constitution within two years.[178] This would ensure that regular reviews continue, and would allow EITI to establish minimum standards regarding the review process. Some of EITI's reviews provide little information about the process that the review entailed. For example, the identities of reviewers, scope of reviews and sources of information reviewed are often unknown. Most reviews should involve key stakeholder groups, including affected communities.

The scale and scope of the current review conducted by the Strategy Working Group is noteworthy. As with previous reviews, although some information is available about the progress of the current Strategy Working Group, there do not appear to be specific guidelines for or updates on the review process. This limitation was rectified somewhat by EITI's release of the Strategy Working Group's terms of reference, although it is problematic that these details were only released more than a year after the group was formed. It is also promising to see the very detailed outreach efforts that are in motion, including specific outreach missions to countries such as Myanmar[179] and Colombia. There appears to be greater emphasis on engaging the general public, although it is unclear whether there

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[173] Scanteam at 1.

[174] EITI "Strategy Working Group" <http://eiti.org/about/strategy-review> (accessed February 20, 2013).

[175] EITI "Strategy Working Group".

[176] EITI "Strategy Working Group".

[177] EITI *Strategy Working Group Terms of Reference* (2011) <http://eiti.org/files/SWG_TORs.pdf>.

[178] *EITI Rules, 2011 Edition* at 78.

[179] Myanmar has committed to applying for candidate status by the end of 2013.

are specific efforts to target specially affected communities (see **EITI's Level of Community Involvement**, below).

The impact of the recommendations from prior reviews, and the degree to which they have been adopted, is unknown. For example, EITI's 2010-2011 review appears to have been quite thorough and frank, drawing conclusions such as "little impact at the societal level can be discerned . . . largely due to [EITI's] lack of links with larger public sector reform processes and institutions".[180] Nonetheless, it is unclear what measures, if any, EITI has taken in response to this conclusion. We understand that the Strategy Working Group was set up in response to the independent evaluation, but this is not clear from the information on the EITI website.[181] It may be helpful for EITI to include follow-up provisions in its reviews, to ensure that the lessons of the review are absorbed. For example, EITI should institute a formal process that requires recommendations from reviews to be considered during members' meetings. This was partially addressed under the current Strategy Working Group's terms of reference, which states that the group "will task the Secretariat with preparing an options paper for consideration by the Board."[182] In addition, EITI should ensure independence in its review processes.

Recommendations:

- In order to meet minimum standards, EITI should ensure that affected communities are included in review processes.
- In order to improve its capacity to evolve over time, EITI should:
    - o Institute a permanent review mechanism to ensure that it is subject to regular, thorough reviews, and disclose this mechanism publicly.
    - o Develop follow-up procedures to ensure that recommendations are considered by the EITI Board and/or members' meeting. Where recommendations are not adopted, justifications should be made publicly available.
    - o Ensure a degree of independence in its review processes.

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[180] Scanteam at 1.
[181] Comment from expert reviewer.
[182] *Strategy Working Group Terms of Reference* at 2.

EITI'S LEVEL OF COMMUNITY INVOLVEMENT

Individuals and communities whose human rights are affected by extractive industries and EITI

EITI's mandate implicates three categories of communities: 1) the general public in implementing countries; 2) specific local populations that have a special interest in extractive industry operations ("specifically affected communities"); and 3) future generations. EITI has failed to engage these affected communities adequately in its processes.

Public availability of revenue information ultimately should benefit the general public in implementing countries, since the national community has great interest in reducing corruption and improving a country's economy, standards of living and human rights. EITI largely lacks systematic direct engagement with the public. EITI has engaged the national community in implementing countries to some extent as the MSG in each country is responsible for ensuring representation from civil society. However, EITI must ensure that MSGs actually fulfill this responsibility in a way that effectively involves and represents the public; EITI lacks sufficient standards to safeguard that civil society will meaningfully engage with affected communities, or to ensure that MSGs will actively disseminate EITI reports in a manner that is accessible to the public.[183]

Similarly, revenue from natural resources has a heightened effect on specifically affected communities that host extractive industry operations. These communities often bear a disproportionate cost of any negative consequences of extractive industry operations. Yet EITI has taken no apparent steps to ensure that these communities serve on MSGs or are targeted in outreach.

Standards

EITI's standards do not require the participation of affected communities in national MSGs. In terms of the general public, no comment periods in the process of developing the reporting criteria or public meetings are required. Similarly, specially affected communities are also not involved in the MSG decision-making process. Indeed, there is not an express requirement that specially affected communities be consulted during the development process. EITI was principally prompted by the need to address the lack of socio-economic rights of these affected communities. As the core right holders, these affected communities should not only be involved, but should also be key stakeholders.

EITI does not require or encourage the participation of NGOs specially seeking to advance the interests of those hosting extractive industry operations, does not require civil society to solicit public feedback and has only a weak conflict of interest provisions for civil society members.[184]

Implementation

EITI does not ensure that the information disclosed in reports is distributed at a local level. Instead, MSGs are merely encouraged (but not required) to conduct outreach activities, but there are no clear

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[183] The closest suggestion is Requirement 6(b), which states: "The multi-stakeholder group should undertake effective outreach activities, including through communication (media, website, letters, etc.) with citizens, civil society groups and/or coalitions, informing them of the government's commitment to implement EITI, and the central role of companies and civil society, as well as widely disseminating the public information that results from the EITI process (e.g., the national EITI report)". *EITI Rules, 2011 Edition* at 20. However, this is so vague as to be ineffective, for it does not require any specific outcomes. The monitoring guidance for this requirement is also basic, referring to criteria that it "could" include, such as whether the report is available online. *EITI Rules, 2011 Edition* at 47.
[184] See **Stakeholder Involvement** above.

standards or measures for enforcing this. For example, one requirement states that MSGs must conduct some public outreach and requires the government and MSG to ensure "that the [national EITI annual] report is comprehensible, including by ensuring that it is written in a clear, accessible style and in appropriate languages".[185] These terms are vague, and not adequately monitored for compliance. For example, "appropriate languages" is not defined. This approach has resulted in outcomes such as the situation in Mauritania, where the country report is available only in French,[186] a language considered to be elite and spoken by some 35,000 people, compared to Arabic, the country's official language that is spoken by more than 3 million people.[187] Furthermore, it is unclear if a member of the public can complain that an EITI report is inaccurate.

In terms of specially affected communities, implementation efforts have also been lacking. For example, reports can currently be written in the country's official language but not in local languages of specially affected communities. There also does not appear to be accommodation for illiterate communities. In addition, it appears that there is no formal process for these communities to file a complaint that extractive industry revenue and payments have led to human rights violations. This was the major issue that led to the establishment of EITI (see **EITI's Mandate and Relationship to Human Rights**, above).

EITI's outreach budget seems to be mostly aimed at recruiting new countries into EITI and neglects to include activities specifically targeted at specially affected communities. National MSGs are reliant on the national government for funding, which may limit an MSG's ability to undertake outreach activities targeted at specially affected communities. EITI has no mechanism to encourage governments to allocate resources for these activities. It also does not monitor the level of community involvement in MSGs since EITI does not comment and provide annual recommendations on EITI reports or the associated process.

Internal Governance

Affected communities do not and cannot participate as members of EITI and they are not apparently included in any of EITI's international-level activities. While representation in the Association may be difficult, at the very least EITI could encourage greater transmission of knowledge from the local level to the international level by facilitating increased reporting from MSGs, particularly the civil society branches of MSGs, back to the EITI Board and/or members' meeting. Similarly, the initiative should include at least one NGO that operates exclusively on a local or national level from countries in which the EITI standards are implemented to ensure greater transmission of knowledge. Another possibility is for EITI to consider holding special interest forums that facilitate input from specially affected communities, which could then feed into EITI's internal governance system.

Updated information provided by EITI: EITI staff explained that there are multiple routes by which affected community members can participate in EITI, for example via community-based organizations (CBOs). First, a community member or CBO can join EITI at the international or MSG level as a civil society member. Alternatively, community members or CBOs can engage with civil society members without joining EITI. Finally, a community member or CBO may bring concerns to its MSG secretariat, or directly to the international secretariat.[188] While it is positive that

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[185] *EITI Rules, 2011 Edition* at 28.
[186] EITI "Mauritania" <http://eiti.org/Mauritania> (accessed August 2, 2012).
[187] The Joshua Project "Mauritania: Languages" <http://www.joshuaproject.net/countries.php?rog3=MR> (accessed July 2, 2012).
[188] In-person meeting with EITI staff.

affected communities are able to participate as described, this does not ensure that community members will be able to exert meaningful influence at both the international and MSG level, due to underrepresentation. EITI should take steps to reach out to these populations to actively encourage their engagement.

EITI staff also emphasized the fact that many MSGs do allow for meaningful affected community participation and representation, through their civil society arm.[189] However, as there is no guarantee that civil society will be committed to engaging affected communities or have the resources to do so, EITI should strengthen its standards so that affected community representation at the national level is ensured.

Recommendations:

- In order for EITI's standards to meet minimum standards of affected community involvement, EITI should:
    - o Revise its standards to ensure opportunities for input from the public and specially affected communities.
    - o Revise its standards to ensure independent representation on local MSGs for specially affected communities.
- In order for EITI's implementation to meet minimum standards of affected community involvement, EITI should:
    - o Revise its implementation efforts to focus on stimulating debate about EITI reports among the public, with a special emphasis on specially affected communities.
    - o Take steps to reach out to specially affected populations to publicize information about the initiative and solicit input about the implementation of EITI at the local level.
    - o Include affected community groups in its annual reviews of operations and effectiveness, and in the formation and revision of any new components.
- In order for EITI's internal governance to meet minimum standards of affected community involvement, EITI should:
    - o Undertake activities to encourage more NGOs that operate on a local or national level to become involved with EITI's governance at the international level, and to bring the relationship between MSGs and the EITI Association closer.
    - o Clarify publicly existing practice regarding allowing community members (including CBOs) the ability to join EITI at the MSG or international level.

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[189] Phone conversation with Jonas Moberg and Sam Bartlett, April 4, 2013.

EITI'S TRANSPARENCY

EITI's website provides a significant amount of information for the public and its overall transparency is high. Contact information is available on EITI's website for the secretariat in Oslo as well as for each EITI National Coordinator. EITI releases a Global Report every two years that describes the major activities of the initiative and summarizes implementing countries' reports. EITI also publishes implementing countries' reports on its website. EITI documents are available in several languages. Standards are available in English, French, Arabic, Russian and Portuguese, and the EITI Validation Guide is published in languages including Arabic, French, German, Portuguese, English and Swahili. Since conducting the evaluation, EITI has released EITI reports online with basic search and comparison functions. This is a promising effort. EITI also appears to be making an ongoing effort to improve transparency. For example, when this evaluation was first conducted, EITI's audited accounts were difficult to locate, being appended to materials for review at upcoming EITI members' meetings. However, since then audited reports dating back to 2007 have been posted online in an easily accessible part of EITI's website.

Despite this generally high level of transparency, there are some areas in which EITI could improve. For example, some basic documents are not accessible to members of the public and require a password.[190] Similarly, a number of documents referred to in board minutes are not available.[191] Finally, documents appended to meeting minutes, reports or prep materials are difficult to search for and should be made independently available.

Some key information is not available on the website. For example, the terms of reference for some of EITI's committees could not be found on the EITI website. Likewise, while there is a significant amount of information available about most aspects of the EITI formation process, there is little available information regarding the decision-making process for EITI's criteria. EITI also offers insufficient information on its website about some of its supporting stakeholders and their role in the EITI process. For example, there is no description of the role of industry associations and "international partners" in supporting EITI, and there is not a description of the requirements or process for a civil society organization to become an EITI supporter.[192] EITI should immediately clarify the role of partner organizations in EITI, such as the G20. This not addressed in the Articles of Association.

Updated information provided by EITI: EITI staff emphasized that while some documents are not available on the website, the secretariat has a policy of making them available to anyone who requests to see them.[193] This is an important first step toward full transparency, however EITI should continue to release core materials to the public, as it may be difficult for those outside EITI to understand which documents exist or can be requested.

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[190] For example, the link to the third global conference (Oslo Conference), a key conference that led to the implementation of EITI's first internal governance structures, requires a username and password.

[191] For example, Board Circular 93, which approved the new Rules on February 16, 2011, is not available.

[192] Although the EITI website lists the contact information to locate "more information" about the process of becoming a supporting civil society or industry association, it offers no information regarding the process for joining EITI or the expected activities of supporters from these stakeholder groups.

[193] Phone conversation with Jonas Moberg and Sam Bartlett, April 4, 2013.

Recommendations:

- In order to improve its transparency, EITI should:
  - o Ensure that all key documents are available on its website. This includes a list of current committees, their members and their terms of reference.
  - o Clarify whether partner organizations are given decision-making power in EITI and, if so, how.
  - o Provide more information on its website about the roles of and requirements for industry associations and civil society organizations as supporting stakeholders.