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# Protocol for Developing Multi-Stakeholder Group Terms of Reference and Internal Governance Rules and Procedures

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Effective implementation and oversight of the EITI process requires a robust multi-stakeholder group (MSG) that is guided by clear, comprehensive governance rules and procedures. The EITI Standard requires that the MSG must agree to a clear, public Terms of Reference (ToR) for its work.<sup>1</sup> This Protocol offers guidance on how to develop the terms of reference, and recommends provisions that should be included in addition to the EITI Standard requirements to facilitate strong MSG operations. These are the key principles:

- I. ToRs for MSG governance should be developed and agreed using a participatory process that includes all MSG members, and should be subject to regular review.
- II. ToRs should address a comprehensive set of internal policies, procedures, and expectations for MSG members. At a minimum, each MSG should consider including provisions in the ToR to:
  1. Define the mandate and independence of the MSG;
  2. Clarify the selection process, roles, and responsibilities for MSG members;
  3. Create a dispute resolution mechanism to address grievances related to MSG governance rules, or breaches of member responsibilities, and public complaints regarding substantive EITI compliance and fulfillment of the MSG mandate;
  4. Establish the presumption of transparency of MSG processes, records, and decisions; and,
  5. Specify the mandate and authority of any national secretariat or other supportive institutions established by the MSG.

**For newly-established MSGs**, the good practices presented here should be incorporated as part of the MSG formation process, and the internal governance issues should be agreed upon by all stakeholders during the EITI candidature process and included as written terms in the ToR or other MSG governance documentation. **For existing MSGs**, it is recommended that a review of internal governance processes and documented rules should be conducted as soon as possible, and revisions should incorporate the good practices in this Protocol.

Please note that this Protocol should be read in conjunction with the EITI Standard and *EITI Guidance Note 14* (especially step 3). It is meant to supplement the existing guidance and requirements contained in those documents, and is not an exhaustive list of all the issues or concerns that should be addressed in the development of the MSG.

## Section I: Process for developing the terms of reference

The initial formation of the MSG and the subsequent development of the ToR is an early opportunity to build legitimacy and credibility regarding EITI. It is a key moment for establishing trust and goodwill amongst the MSG representatives, and the MSG should seek to foster confidence by developing the ToR in a transparent and participatory process.

<sup>1</sup> *EITI Standard*, Requirement 1.3(g).

## **1. Develop the ToR in a participatory process**

### **1.1. Ensure the process is open to all MSG members and involves each stakeholder group**

The EITI Standard requires the MSG to agree to ToR.<sup>2</sup> To discharge this responsibility, the ToR development process should be open for all current or incumbent MSG members to deliberate over internal rules and procedures that will govern the operation of the MSG. While some representatives may ultimately elect not to participate in the process or to delegate a member within their stakeholder group to be responsible, it is critical that at least one person from each stakeholder group is involved.

### **1.2. Involve independently selected MSG representatives**

The legitimacy of MSG representatives involved in developing the ToR critically depends upon whether they were independently appointed by the stakeholder group they represent. Civil society should also follow an inclusive selection process.<sup>3</sup> If representatives are not perceived to be independent and credible, then the legitimacy of their decisions may be contested. This may cause controversy about the MSG immediately, or risk disrupting MSG proceedings when a dispute arises related to MSG governance or decision-making. More details regarding measures for guaranteeing the independence of MSG representative appointments are listed in Section II(1) of this Protocol.

### **1.3. Ensure all participants in deliberations are informed about the relevant issues**

Prior to deliberating the provisions of the ToR, it is imperative that all members know what governance provisions the EITI Standard requires, and understand basic good practice for multi-stakeholder governance. To achieve this, wherever possible MSGs should hold an informational training session to familiarize each stakeholder group with the EITI Standard, and also with the procedures and issues relevant to good multi-stakeholder governance. This Protocol and *EITI Guidance Note 14* should, at a minimum, be disseminated to educate stakeholders regarding basic components of MSG governance. Ideally, trainings would be facilitated by, or incorporate input from, independent experts.

### **1.4. Offer opportunities for external input into the process**

The ToR deliberation process should allow opportunities to liaise with stakeholders outside of the MSG to ensure that rules and procedures: (i) are established in the ToR transparently and legitimately in concert with those external stakeholders; and, (ii) address those stakeholders' concerns regarding MSG governance. Basic principles for liaising are discussed further below, and also in the Civil Society Guidance Note (released by MSI Integrity in 2015).

## **2. Ensure the ToR is agreed with the consensus of all MSG members**

Even if individual delegates or sub-committees of the MSG draft the ToR, the final document must be confirmed by consensus agreement of all MSG members. This is not only a requirement in EITI<sup>4</sup>, it is critical to building the trust and confidence between members that will be necessary for negotiating the substantive requirements of EITI reporting arrangements. It also ensures that all stakeholder groups perceive the governance processes of the MSG to be credible, fair, and predictable.

<sup>2</sup> *EITI Standard*, Requirement 1.3(g) (which states, "[t]he multi-stakeholder group is required to agree clear public Terms of Reference (ToRs) for its work").

<sup>3</sup> For more information about good practice for inclusive civil society selection processes, please refer to Part 3 of *MSI Integrity's Assessment of the Governance of Multi-Stakeholder Groups in the EITI*, and the Civil Society Guidance Note in Annex II of the Report.

<sup>4</sup> *EITI Standard*, Requirement 1.3(g) (which states, "[t]he multi-stakeholder group is required to **agree** clear public Terms of Reference (ToRs) for its work" [emphasis added]).

### 3. Review at regular intervals to ensure governance policies and procedures are improved based on lessons and experiences of MSG members over time

The ToR and other documented MSG governance rules and procedures should be reviewed and updated at regular intervals to ensure that the MSG can improve its operational effectiveness, and address any deficiencies that may have developed or become apparent in practice. To plan for reviews to occur regularly, it is recommended that an explicit provision is included in the ToR that requires reviews within specified periods of time, or as deemed necessary by MSG members.

For example: *"The Terms of Reference will be reviewed and renewed by the MSG every three years from the date of signing, unless it is agreed by consensus that an earlier review is required."*

This allows the MSG to reflect on their experience, and update the ToR based on good practices and lessons learned at both the national and international level.

## Section II: Issues to be addressed in the terms of reference

MSGs that establish clear, written governance processes in ToRs are able to function predictably according to defined processes that are legitimate to the stakeholders involved. When MSGs fail to establish and document critical rules, then governance procedures are developed on an ad hoc basis, which distracts MSGs from their substantive work, and is often a slow and difficult process because the need for rules often arises at a time of disagreement or conflict (see Part 1 of the Report).

The EITI Standard requires that ToRs should include certain minimum provisions,<sup>5</sup> which should be adapted to the context and needs of EITI within the country. However, the experience of many MSGs has shown that a more comprehensive governance structure is necessary to ensure the MSG operates effectively. Each country is free to develop governance processes that best suit its context, and some of the core issues that should be considered are discussed below.

### 1. Define the mandate and independence of the MSG

The ToR must establish the roles, responsibilities, and rights of the MSG.<sup>6</sup> In defining the mandate and independence of the group, it is important that ToRs:

- State explicitly that **the MSG is not limited in its mandate by the requirements in the EITI Standard**. The EITI Requirements are the minimum responsibilities that must be implemented in order to meet the government's commitment to implement the EITI in the country. It should be clear in the ToR that it is permissible and encouraged for the MSG to innovate and expand beyond the requirements of the EITI Standard. For example, MSGs could choose to use the EITI framework to include reporting on the environmental or human rights impacts of extractive industries, or to expand beyond extractive industries to include other sectors.
- Consider the **degree of independence for the MSG and EITI**. Ideally, this involves structuring the **institutional format of the MSG to ensure it is sufficiently distinct from government, and is accountable to all stakeholders**, or establishing an independent legal basis for the EITI and MSG. The MSG should consider including provisions in the ToR that allow the EITI institutions to control their financial affairs, and manage their own bank accounts. The MSG should also consider whether it is desirable and feasible to locate the MSG or any supporting institutions (e.g., the national secretariat, discussed further in section II(5) below) in offices that are physically separate from government.

<sup>5</sup> EITI Standard, Requirement 1.3(g).

<sup>6</sup> EITI Standard, Requirement 1.3(g)(i)-(iii).

## 2. Clarify the selection process, roles, and responsibilities for MSG members

The ToR must establish the process for each stakeholder group to nominate and change MSG representatives,<sup>7</sup> and should clarify the roles, responsibilities, and expectations of MSG members through internal rules and governance procedures. To ensure that the selection of MSG members is transparent and credible, and that members are fully aware of the expectations of their role, the ToR should explicitly:

### 2.1. Guarantee the right of stakeholder groups to appoint their own representatives

The right of each stakeholder group to appoint its own representatives independently and free from coercion should be explicitly guaranteed in writing in the ToR.<sup>8</sup> This is particularly important for civil society representatives, who must be credible and accountable to the constituents they are mandated to represent.

For example, the Terms of Reference for the MSG in the Philippines states:

*“PH-EITI MSG will be composed of the following: ...*

- *Five (5) Business Group Representatives*
- *To be selected through a process initiated by business with the support of the PH-EITI Secretariat*
- *Five (5) Civil Society Organizations*
- *To be selected through a process initiated by CSOs with the support of the PH-EITI Secretariat*

*... Each organization, upon the decision of its members and through its own independent process, can replace their representatives in the MSG anytime following their own governance mechanisms.”<sup>9</sup>*

To further safeguard the independence of stakeholder group representatives, ToRs should also require that civil society organizations (CSOs) and industry representatives must be **appointed without interference or coercion from government**.<sup>10</sup> Provisions should explicitly state that:

- Government has no power to directly select or veto selections of representatives for other stakeholder groups; and,
- Government does not have the authority to pre-define categories or types of actors that other stakeholder groups must appoint.

### 2.2. Outline the selection process for appointing and changing MSG members

The internal rules and procedures addressed in the ToR should include the **agreed overall procedure for nominating and changing MSG representatives**<sup>11</sup> and require that **individual stakeholder groups set and publish their own independent procedures** (e.g., by publishing a code of conduct or code of ethics that outlines the representative selection or replacement process). To enhance transparency and credibility of MSG representatives, the ToR should outline more than the number of positions allocated for representatives of each stakeholder group. It should **explain key rules and criteria for stakeholder groups to follow in selecting representatives**. This may include provisions that:

- Require **each stakeholder group to publish their nomination procedures** for appointing representatives to the MSG.

<sup>7</sup> EITI Standard, Requirement 1.3(f) and 1.3(g).

<sup>8</sup> EITI Standard, Requirement 1.3(g)(ii).

<sup>9</sup> Philippine Extractive Industries Transparency Initiative (PH-EITI), *Multi-Stakeholder Group (PH-EITI MSG) Amended Terms of Reference*, Ch. IV (August 2, 2013).

<sup>10</sup> EITI Standard, Requirement 1.3(f)(ii).

<sup>11</sup> EITI Standard, Requirement 1.3(g)(vi).

- Require each stakeholder group to appoint **alternate representatives** for each MSG member. In particular, high-ranking and senior government officials should be required to appoint alternates that can commit to regularly participate in MSG meetings, such as permanent civil servants.
- Require **gender diversity** to be considered in appointments. Each stakeholder group should be required to strive to ensure that representatives include a balance of genders. In situations where it is difficult to achieve a gender balance immediately, the ToR should include provisions to encourage diversity, such as:
  - Requiring stakeholder groups that do not appoint sufficiently gender diverse representatives (e.g., less than 40% female) to issue a **public explanation** of the reasons this could not be accomplished, and the steps being taken to improve gender diversity in future; and,
  - Encouraging or requiring the **selection of alternates from the under-represented gender** in order to enhance the capacity and technical expertise of future candidates for the MSG through participation in the MSG in this secondary capacity; or,
  - Conducting a gender-sensitivity assessment or trainings in the MSG.
- Require consideration of **geographic diversity** in appointments. Particularly for appointments by the government and civil society constituencies, stakeholders should be encouraged to include:
  - Representatives from **areas directly impacted by extractive sector activities**;
  - Representatives from **entities that are focused on local or regional concerns** (e.g., local community organizations or municipal or regional governments), as appropriate.
- Establish the **duration of MSG representatives' mandate** including term limits specifying the maximum number of times each representative can be re-appointed to the MSG, and whether representatives may serve consecutive terms.<sup>12</sup>
- Establish **staggered appointment mandate durations** for the representatives in each stakeholder group, so that not all members are replaced at any one time or year. This will encourage continuity and institutional memory within stakeholder groups. This also allows opportunities for training and capacity building for new members to benefit from the expertise of retiring representatives.

### 2.3. State key expectations and rights for the participation of MSG members

The rights and expectations for the conduct and duties of individual members' to participate actively in the MSG should be outlined in the ToR, in addition to the basic roles and responsibilities identified in the EITI Standard.<sup>13</sup> To establish measures of accountability and provide guidance to enhance members' capabilities to fulfill their duties,<sup>14</sup> ToRs should:

- Outline basic expectations or responsibilities for members to **liaise with their constituencies** and other external stakeholders, and require each stakeholder group to develop comprehensive processes for liaising and outreach. MSGs should emphasize the importance of MSG members liaising with communities and organizations in areas where there is extractive industry activity. Basic expectations in the ToR could explain:
  - **How members are expected to liaise** with their constituency groups (e.g., by email, letter, newspaper announcements, public meetings, or other);
  - **When or how frequently members are expected to liaise** with their constituency groups to communicate information, and seek feedback or input (e.g., before and/or after MSG meetings, at monthly or quarterly intervals, or other); and,
  - **How members are expected to report feedback received** through their outreach and liaising efforts back to the MSG at large.

<sup>12</sup> EITI Standard, Requirement 1.3(g)(vi); EITI Guidance note 14: on the establishment and governance of multi-stakeholder groups, Annex 1: Model Terms of Reference for an EITI Multi-Stakeholder Group, § 3.1.

<sup>13</sup> EITI Standard, Requirement 1.3(g).

<sup>14</sup> EITI Standard, Requirement 1.3(g)(i).

- Provide procedures for **assessing, disclosing, and resolving potential and real conflicts of interest** that could arise for MSG representatives in the course of their duties. Conflict of interest provisions should include, at a minimum:
  - Disclosure requirements for current and past MSG members (within a specified period) to relate any financial or in-kind **payments they received from the MSG, or other MSG members**; and,
  - Rules governing financial or in-kind **transactions between MSG representatives** of different stakeholder groups. In particular, provisions should specify any prohibition or conditions of transactions between civil society and government or extractive industry companies during – or within a certain period before and after – MSG members’ mandates.
- Specify explicitly that each stakeholder has the **right to table issues for discussion**.<sup>15</sup> The ToR provisions that clarify internal rules and procedures for MSG deliberations should also explain:
  - Procedures for members to table topics for the discussion agenda; and,
  - Procedures for demanding a decision or vote on matters under consideration, including the quorum of members from each stakeholder group required for a decision to be valid.
- Require MSG members to designate a national contact person for the EITI International Secretariat, and offer members the chance to opt-in to receive these communications. The contact information for each member that wishes to be included in correspondence should be sent to the EITI International Secretariat.
- Establish processes to **hold members accountable for adhering to the expectations** stated in the ToR. This may include procedures for reviewing and sanctioning members for inadequate performance of their duties, including the authority to revoke membership and request a replacement representative, either by the voluntary decision of the stakeholder group or by consensus agreement of the whole MSG.
- Establish the **meeting attendance expectations for MSG representatives**. This may be expressed as a number or percentage of meetings per year, or could be expressed as a general expectation of attendance that can trigger a review of the representatives’ mandate if valid concerns are raised. Provisions should clarify:
  - Procedures for requesting permission to be absent;
  - Permitted bases for absence from MSG meetings;
  - Whether the presence of designated alternates excuses absences of official members; and,
  - Any consequences for frequent unexcused absenteeism, and the process for applying those sanctions.

<sup>15</sup> *EITI Standard*, Requirement 1.3(g)(vi).

### **3. Create a dispute resolution mechanism to address grievances related to MSG governance rules, breaches of member responsibilities, and public complaints regarding substantive EITI compliance and fulfillment of the MSG mandate**

Effective implementation of the EITI depends on (i) the MSG complying with EITI requirements to fulfill its mandate, and (ii) MSG members acting in accordance with MSG governance rules and procedures. Dispute and grievance resolution mechanisms ensure that where either the MSG or individual members are breaching their obligations, they can be held accountable. The MSG should therefore establish mechanisms that are publicly accessible and designed to transparently and equitably address:

- Internal disputes reported by MSG representatives or their stakeholder group constituents related to breaches of MSG governance rules and procedures, allegations of misconduct by MSG members, or other internal disputes based on the MSG terms of reference, code of conduct, or other governance documents; and,
- Grievances reported by the public, MSG representatives or stakeholder group constituents, related to EITI reports (e.g., the reporting process, content, or insufficient dissemination of reports), or substantive non-compliance with any EITI Standard requirements or other obligations agreed by the MSG.

These mechanisms also protect the internal trust of the MSG by ensuring that disputes are resolved through a predictable and procedurally fair process agreed by all stakeholders before disputes arise. They preserve the public legitimacy of the MSG by offering an accessible avenue for concerned citizens to engage the decision-making body responsible for implementing the EITI and seek remedies for substantive concerns or misconduct related to aspects of EITI implementation.

The MSG should create the basic governance rules and procedures for these dispute resolution mechanisms by including provisions that:

#### **3.1. Detail the rules and procedures that govern the dispute resolution process**

The ToR should provide detailed provisions to govern the rules and procedures for dispute resolutions processes to ensure they are predictable, fair, and legitimate. More guidance for good practices for internal dispute resolution processes in the multi-stakeholder context are available in the *MSI Evaluation Tools*, available on the MSI Integrity website.<sup>16</sup> They include considerations such as:

- Eligibility qualifications for who can file or report grievances, and on what grounds complaints may be reported;
- Accessible procedures for reporting grievances or complaints;
- Eligibility qualifications for evaluators of complaints, such as procedures for appointing adjudicators or tribunals that include conflict of interest provisions;
- Transparency rules regarding complaints, decisions, and the reasoning for outcomes. MSGs should consider how and when complaints and decisions should be published, taking into account the legitimacy and predictability that is gained from transparent reporting of dispute resolution outcomes and reasoning; and,
- Time requirements for each stage in the process, including a maximum period before decisions must be delivered once a complaint is resolved (e.g., “*Complaints will be resolved within three months of being filed*”).

#### **3.2. Clarify the procedure for referring unresolved disputes to EITI International**

The ToR should also clarify the available processes for elevating or referring disputes to the EITI Board or International Secretariat for resolution if the issue is not satisfactorily resolved at the national level.

<sup>16</sup> <http://www.msi-integrity.org>.



#### 4. Establish the presumption of transparency for MSG processes, records, and decisions

Transparency enhances the legitimacy of MSG decisions and provides the information necessary for non-member stakeholders to assess whether outcomes were the result of a fair, inclusive process that considered and incorporated their views and concerns. The ToR should establish a presumption of transparency for MSG processes, records, and decisions by:

- Requiring that **current member lists are publicly available** on the national EITI website, and include: member names, organizational affiliation, the stakeholder group they represent, and some method for contacting members. Contact details may be kept confidential for privacy reasons, but some information should be published that enables communication with MSG members, even through a generic contact point. Lists of members or staff of MSG working groups, the national secretariat, or other bodies that support the EITI should also be available.
- Establishing that **MSG meetings are open to the public by default**, at least upon request or invitation according to a public procedure accessible to any individual or organization. Where requests to observe meetings are denied, the ToR should require that responses provide the policy reasons for prohibiting attendance.
- Stating that **MSG discussions and decisions are presumed to be transparent**. This includes that meeting minutes should be available to the public promptly after being finalized. **Meeting minutes should include**, at a minimum:
  - An attendance list of meeting participants and any absent MSG members;
  - A copy of the agenda of issues to be discussed; and,
  - Outcomes for all issues decided at the meeting and, where possible, reasons for the decisions. This includes instances where consensus could not be reached or votes did not pass, and identification of members that abstained from, or disagreed with, the decision.
- Disclosing **policies for reimbursements or per diem allowances** offered to MSG members for expenses directly incurred to attend meetings. The ToR should include:
  - The amount of money allowed or offered for reimbursement or per diem allowances, and any scales or formulas applied to determine amounts; and,
  - Procedures for claiming allowances or reimbursements, including any documentation that members are required to provide.
- Requiring that **annual budgets and financial accounts of national secretariats and the MSG are publicly available**. These should be posted on the EITI website along with other public information deriving from the MSG and secretariat. Accounts should itemize:
  - Any payments to MSG members, including reimbursements or per diem allowances; and,
  - Sources of revenue, income, or funding for the MSG and secretariat, including in-kind or non-financial support provided by MSG stakeholders (e.g., office space provided by government, or staff resources provided by government, companies, or civil society groups).
- Establishing if there are any **exceptions to the presumption of transparency**. This should include an explanation of legitimate policy reasons or circumstances that allow confidentiality for a discussion, decision, meeting, or record. Procedures should also be outlined for assessing and resolving requests for confidentiality that do not fit the designated policy reasons.

## **5. Specify the mandate and authority of any national secretariat, or other supportive institutions established by the MSG**

The majority of MSGs have established national secretariats to assist and support the MSG to implement the EITI process. Where a secretariat is created, the roles and responsibilities of the secretariat and its relationship to the MSG should be clearly expressed in writing. To accomplish this, the MSG should consider including provisions in the ToR that:

- Define the relationship between the secretariat and the MSG, and specify the secretariat is accountable to the MSG and not to the government or another institution or stakeholder group.
- Clarify the roles and responsibilities of the secretariat, including the procedure for the MSG to agree to delegate tasks and functions to the secretariat.
- Explain the process for determining and financing the operational budget and staff resources for the secretariat, and require the secretariat to transparently disclose financial accounts and annual reports.
- Specify the level of operational independence of the secretariat from the government. This includes considering whether it is appropriate or necessary<sup>17</sup> for the secretariat to be located somewhere physically distinct from government offices, or set up as an independent legal entity such as an incorporated non-profit organization.

<sup>17</sup> In the context of some countries it may be more desirable or necessary for the MSG to arrange the secretariat as physically and legally distinct from government as possible, whereas in other countries it may not be feasible or legally possible. In all countries, the MSG must consider the benefits for legitimacy and credibility that result from clear operational independence defined in the governance policies and procedures in the ToR.