ICNL
INTERNATIONAL CENTER FOR NOT-FOR-PROFIT LAW

PUBLISH WHAT YOU PAY

Submission to EITI Board

Introduction

The International Center for Not-for-Profit Law (ICNL) and Publish What You Pay (PWYP) welcome the opportunity to provide input into the Extractive Industries Transparency Initiative's (EITI) consultation relating to "The future of Validation."

ICNL is an international organization that facilitates and supports the development of an enabling environment for civil society and public participation worldwide. Since its inception in 1992, ICNL has provided technical and research assistance to support the development of enabling laws and regulatory systems for civil society organizations (CSOs) in more than one hundred countries.

PWYP is the worldwide campaign for an open and accountable extractive industry. It is the only global movement working to ensure that revenues from oil, gas and mining are used to drive development. With more than 700 member organisations and 49 national coalitions, PWYP coordinates action nationally and globally, to maximise its collective impact, so everyone benefits from their natural resources.

The following submission addresses section 4 of the Consultation Question, pertaining to "Assessing stakeholder engagement", and Questions 3 and 4 in particular.

ICNL and PWYP stand ready to provide more in-depth advice, including on Questions 1 and 2 of section 4, should the opportunity to provide such advice be available.

ICNL and PWYP hope this submission will be useful to the EITI Secretariat in ensuring the validation process develops in a manner that ensures civil society can participate fully, independently and meaningfully in the EITI process. These conditions are necessary to enable the EITI to foster accountability and achieve transparency in the natural resource governance sector in EITI implementing countries.

We would like to emphasize the below elements further developed in the submission:

- The civil society protocol already requires that validations look at actors and activities related to natural resource governance more broadly.
- Validators should assess stakeholders' engagement in EITI implementation against the background of the broader civic space environment.
- There is a need to enhance the EITI Secretariat's expertise on civic space issues.

Section 4, Question 3

- "The Validation of the civil society protocol assesses whether actors substantively engaged in the EITI can freely express themselves, operate, associate and participate in decision-making in relation to the EITI process. Should the Validation of the civil society protocol cover issues, activities and actors related to natural resource governance beyond the EITI process?"

The civil society protocol already provides that validation should cover issues, activities and actors related to natural resource governance beyond the EITI process.

The civil society protocol defines "civil society representatives" as referring to those "substantively involved in the EITI process, including *but not limited to* members of the multi-stakeholder group." It also defines the "EITI process" to include "activities related to preparing for EITI sign-up; MSG meetings; CSO constituency side-meetings on EITI, including interactions with MSG representatives; producing EITI Reports; producing materials or conducting analysis on EITI Reports; expressing views related to EITI activities; *and expressing views related to natural resource governance*".

Considering "issues, activities and actors related to natural resource governance beyond the EITI process" in validations would thus be consistent with the approach set out in the civil society protocol. Given that civil society participation assessed against the background of the civil society protocol has been a point of contention, and criticized by many observers as being inconsistent and insufficiently reflective of realities on the ground (as described in more detail below), it is critical that this review not result in a narrower approach to validation of the civil society protocol which exacerbates challenges facing stakeholder engagement in EITI processes.

Validation of the civil society protocol should not only cover issues, activities and actors related to the EITI process -- including those related to natural resource governance -- but also consider civic freedoms in member countries more broadly.

Requirement 1.3 already generally requires governments to "ensure that there is an enabling environment for civil society participation with regard to relevant laws, regulations, and administrative rules as well as actual practice in implementation of the EITI." Requirement 1.3 thus sets up a two-fold inquiry: first, into the general environment for civil society participation; and second, into actual practice in promoting civil society engagement in implementation of the EITI. Considering civic freedoms in implementing countries more generally is necessary in order for validation to fully and adequately evaluate Requirement 1.3, based on the Civil Society Protocol. It would also lead to more meaningful examination of the second component described above: actual practice in promoting civil society engagement in EITI.

A 2016 report by MSI Integrity -- based on a workshop convening natural resource governance activists, leading experts on international accountability mechanisms, and civil society representatives from the EITI International Board -- found that "[t]hreats to individuals and generally shrinking civic space are not being accurately detected in the EITI system. This is in part because the validation process does not have detailed information about the real degree of freedom or civic space in a country, and because there are not trusted processes for raising complaints with EITI." MSI Integrity observed that "[v]alidators are not required to have any training or expertise in human rights and civic space issues, nor any familiarity with the local language/culture." Furthermore, validations do not require interviews with civil society actors outside the MSG, field visits to regions affected by extractive activities, or ensuring that interviews are confidential and secure. Stakeholders reported that "they feared the consequences of what might happen if they spoke up." It is worth noting in this connection that civil society stakeholders who might potentially engage in EITI activities represent vulnerable communities affected by extractive industries, with all the implications this generates in terms of susceptibility to rights violations.

This review should address the limited expertise of EITI validators, and provide a way to compensate for the fact that in restrictive environments, relevant stakeholders (especially those who are not members of MSGs) may avoid expressing their views on issues related to natural resource governance, including on EITI issues in order to avoid government or industry repression, or may participate but self-censor in reporting challenges and violations encountered in the course of participation. These issues can be addressed by ensuring that validation of the civil society protocol begins with a broad evidence base and then considers more specific information where such information is available and trustworthy.[1] Validations should begin by assessing the state of civic freedoms in EITI implementing countries, considering whether there are general protections for association, assembly, expression, and participation and whether the government or industry actors impose restrictions on civil society, either generally or in specific sectors. Resources such as ICNL's Civic Freedom Monitor can assist with this general assessment. Where available and trustworthy, validations should then consider information specifically related to the enabling environment for civil society participation in natural resource governance, and the extent of meaningful civil society participation in EITI activities.

---

[1] Against the background of pre-validation efforts, the EITI Secretariat has recently reached out to a variety of stakeholders, including the PWYP Secretariat, to enquire as to how they could monitor self-censorship, and more specifically, what should be the methodology used to accurately capture if self-censorship exists among members of civil society as defined by the civil society protocol. The PWYP Secretariat highlighted on numerous occasions that these efforts, in order to be of any utility, should be aimed at scoping the general context of civic freedoms. This approach would enable validators to assess whether civil society organizations generally operate in an enabling environment, providing them with the necessary latitude to carry out their activities.

This approach would allow validators to supplement their knowledge by consulting reputable resources regarding civic freedoms in EITI implementing countries. The broader picture that results should inform more specific reports regarding civil society participation in EITI activities, helping validators assess whether these reports reflect chilling effects or self-censorship resulting from restrictions on civil society. In this connection, it is important to note that self-censorship, including by MSG members, is a consequence of a generally restrictive environment for civil society, and that there are no metrics or other methods of detecting the extent of self-censorship, other than by considering the general state of civic freedoms in a country. Civil society engagement in specific EITI activities also depends on the broad protection of civic freedoms such as association, assembly, expression, and participation. A generally enabling environment for civil society is necessary to support the associational activity, public discourse, and access to information and resources which leads to a vibrant civil society. This in turn leads to the development and mobilization of civil society actors with the expertise, experience, and opportunity to specifically engage in processes such as EITI. Where an EITI implementing country imposes general restrictions on civic freedoms, civil society participation in specific EITI activities will invariably be constrained. Considering a broader evidence base will allow validations to reflect the necessary interaction between the enabling environment for civil society and civil society engagement in the implementation of the EITI.

It should be noted that some validations to date have considered the broader environment for civil society in assessing Requirement 1.3 and the civil society protocol. However, these validations have been a minority. We would recommend that all validations begin by considering the enabling environment for civil society in EITI implementing countries in order to determine whether generally applicable restrictions are hindering the ability of civil society to participate in EITI implementation, including chilling participation in EITI processes, inducing self-censorship in reporting constraints on participation, and handicapping the development and activities of civil society more generally.

Against this background, we would like to illustrate the above with two examples that have been brought to our attention: the Republic of Congo and Myanmar.

REPUBLIC OF CONGO

The last validation report of the Congo illustrates the validator's resistance to addressing the wider context of civic freedoms. While mentioning the general restricted environment for civil society, the validators fail to adequately use it as a main indicator to assess its impact on civil society members as defined by the protocol. As a result, the validators form an inaccurate assessment, based on information that inadequately captures the situation on the ground. It is necessary to highlight here

that the below comments do not intend to provide an assessment on the *quality of the facts* mentioned in the report but rather focus on *the analysis* used by the validators leading to their conclusions and the subsequent decision taken by the Board.

The Final Validation Report dated 18.12.17 begins with information related to the early phase of the EITI implementation in the Republic of the Congo which was characterized by multiple attacks against civil society members advocating for EITI implementation. It then indicates that the government had made progress in creating an enabling environment for CSOs until 2015, corresponding to the period leading up to the referendum to amend the Constitution. From this date "evidence suggests that the space for civil society rapidly deteriorated". The report later details a series of severe civic space restrictions, following the definitions provided in the Civil Society Protocol, providing a general overview of the status of civic space in the Republic of the Congo. Nevertheless, in their assessment, the validators fail to establish a connection between the general constrained environment for civil society and the ability for civil society - as defined by the Civil Society Protocol - to operate independently, fully and meaningfully in EITI processes, including by expressing their views related to natural resource governance more broadly.

The report first looks at the situation of "expression" and indicates a series of allegations pointing out to "the government's respect for such freedoms is limited in practice", highlighting several instances of censorship of civil society activists that are substantially involved in EITI implementation. The International Secretariat concludes that civil society organizations cannot freely express their views related to natural resource governance and the practice of censorship and self-censorship is in violation of the civil society protocol 2.1, and requirements 1.3(d), 1.3(e)(i), 1.3(e)(iv). Nevertheless, validators note that: "While these general constraints on freedom of expression have affected CSOs' public expressions on sensitive topics like crude oil sales, there is evidence from MSG meeting minutes and press releases that CSO MSG members have brought up sensitive topics".

With regard to "operation" the report highlights general severe constraints on, including but not limited to "the freedom of movement, association, assembly, procession and demonstration" but indicates that "civil society representatives in the MSG have issued public calls for the release of civil society activists that were not MSG members". In addition, "despite these general constraints on CSOs' operations, there is no evidence that CSOs have faced challenges in attending EITI activities and there is extensive evidence of their participation at MSG meetings and leading EITI outreach dissemination events". The International Secretariat concludes that civil society can operate effectively in the context of the EITI.

The same rationale applies to "association", "engagement" and "access to public decision-making": the validators detail a series of severe general restrictions to civic rights and mention two incidents related to the right to freedom of peaceful assembly and the EITI process. In addition, CSOs, including MSG members, have faced backlash when denouncing corruption practices and engaging with local authorities on issues related to natural resource governance. Despite these findings, the validation report concludes that it "did not find any violations of the civil society protocol with regard to freedom of association, that civil society actors are adequately engaged in the EITI process and can promote public debate within the boundaries allowed by the Government and that civil society representatives have access to public decision making and their views are considered by decision makers and the industry".

The Validators later point out that civil society activists that are substantially involved in EITI implementation "are routinely exposed to intimidation, reprisal and censorship", and that members of the MSG seem to enjoy a certain degree of protection granted by their status.

Despite acknowledging the existence of major constraints on civic freedoms, the report fails to consider the connection between the broader restricted environment in which civil society operates and its impact on the ability of civil society to engage with EITI processes, resulting in a partial assessment of the situation of civil society as defined by the Protocol. Taking note of the Validator's findings regarding requirement 1.3 on civil society engagement and adherence to the civil society protocol, the EITI Board decided that the Republic of Congo had made meaningful progress.

- This assessment and subsequent rating raise serious concerns about the failure to link the broader closed environment in which civil society operates to its necessary impact and potential chilling effect over members of civil society as interpreted by the Civil Society Protocol.

- The scope of the analysis does not address the general situation of other natural governance activists who fall outside the very limited scope factored in by the validators and who might similarly be dissuaded from carrying out their activities by fear of reprisals.

- This general environment, and the general situation of civic freedoms, are the main indicators available to validators to determine whether self-censorship exists among civil society organizations in the Congo.

It must be highlighted that self-censorship generated by the chilling effect of the existing repressive environment might be exacerbated by the lack of accountability mechanisms within the EITI, such as protocols or safeguards to prevent reprisals against interviewees or whistleblowers.

In addition, despite existing challenges related to potential retaliations from the authorities, the self-censorship factor is often, and this is the case of the Republic of the Congo, also stemming from the fear that the country might be suspended as a result of the validation process. The letter sent by representatives of local civil society on 19 January 2018, illustrates this point. This situation is an additional factor indicating that the Validation process should be reviewed with a view to make progress on questions related to civic space and natural resource governance without compromising civil society's rights.

To conclude, the validator's consideration of information related to the general restrictions on civil society represented a positive first step in assessing the civil society protocol. Nevertheless, as highlighted above, the validator failed to integrate this information into the final assessment, and they should have relied instead on this information to evaluate the trustworthiness of specific information about participation in EITI processes and the extent to which civil society can meaningfully participate in these processes.

MYANMAR

The EITI validation process in Myanmar faced challenges similar to that seen in the case of the Congo, but more successfully considered the relationship between general challenges around Myanmar's civic space and its ability to meet the requirements under the civil society Protocol.

ICNL and its partners first heard mention of the draft EITI Validation Report during meetings with stakeholders and government officials in June 2019 in Yangon, Myanmar. At the time, it was noted by various parties (somewhat incredulously) that the Myanmar government was on track to receive the highest possible rating (of "satisfactory progress") on the EITI's civic engagement assessment.

This proposed rating came at a time when the government was under particular scrutiny, in the eyes of the international community, the UN, news media, and other bodies, for repression of the Rohingya and other minority ethnic groups, as well as a distinct uptick in draconian measures restricting civil society. Such measures included a wide and increasing application of criminal defamation, sedition, and a host of other laws against journalists and human rights activists, for objective reporting or anything perceived as critical of the government or military. Attempts for progressive reform of these laws had made little progress, with avenues for dialogue with civil society shrinking or closed, while further restrictive laws were being drafted.

The provisional EITI civic engagement rating was subsequently viewed circumspectly by many parties, including for-profit and government representatives.

Upon further discussion with local and international partners, ICNL undertook the opportunity to provide some additional considerations for the EITI Secretariat's review of Myanmar and its civic engagement assessment. Research for this analysis was provided by umbrella group and MSG civil society member MATA, as well as through independent field research involving interviews throughout the country with numerous civil society groups active in EITI and natural governance processes. A number of key concerns emerged, linking the general challenges around Myanmar's civic space to its ability to meet the requirements under the CSO Protocol. These included the following:

- The overall repressive civic space and fear of retribution limited the ability of CSOs to participate both in the MSG and in broader resource governance debates

- The EITI MSG process did not adequately integrate or reflect regional civil society or EITI processes in particular states (a critical concern, given the tendency of natural resources in Myanmar to be concentrated in outlying ethnic states)

- The disproportionate threat faced by environmental defenders and those working on resource issues in particular was reflected inadequately, if at all, in the Validation Report

In short, numerous incongruities emerged between what is publicly known regarding Myanmar's civic space and the ability of civil society to operate - particularly where extractive issues are concerned - and the EITI's original Validation Report. The revised Validation Report took into account many of these concerns, and in October 2019 adjusted the original assessment to "meaningful progress."

Section 4, Question 4

- "Currently the outcome of validating stakeholder engagement follows the same levels of progress as the assessment of disclosures ('no progress' to 'outstanding progress'). Does this adequately encourage and capture progress? If not, how would you improve the progress markers on stakeholder engagement?"

The "no progress" to "outstanding progress" scheme should be replaced by a scheme which considers whether stakeholders have the opportunity to independently and meaningfully engage in EITI processes: a status-based assessment, as opposed to a progress-based assessment. This assessment should be based in the first instance on information regarding general restrictions on civic freedoms, in order to account for the ways in which these general restrictions affect civil society engagement in the implementation of the EITI: discouraging relevant stakeholders from participating in EITI processes in order to avoid government or industry repression; generating self-

censorship in reporting challenges and violations encountered in the course of participation; and constraining the development and mobilization of civil society actors with the expertise, experience, and opportunity to specifically engage in processes such as EITI. The assessment can also be informed by information about the specific progress a member country has made in encouraging stakeholder engagement in EITI activities (where this information is trustworthy), or conversely, backsliding and undertaking activities that discourage stakeholder engagement. In summary, we propose a status-based assessment supplemented by information indicating 'direction of progress' since last Validation.

In carrying out this assessment, EITI can rely on existing resources, but should also enhance their expertise in this domain, either by systematically partnering with experts and involving them at the very early stage of the validation process or by developing in-house institutional expertise (including through recruitment of dedicated personnel on this issue).

Conclusion

We are concerned that the current methodology to assess the quality of engagement of civil society actors with the EITI, and in particular the overly narrow scope utilized in the context of the validation process, does not enable an accurate assessment of civil society's engagement in EITI processes.

Such a narrowing threatens the legitimacy of the civil society protocol, and the ability of the EITI to establish its public participation record under international law. A status-based assessment of both the general civic space environment and specific EITI processes would address this concern, and allow for a more holistic and effective approach to civic engagement in extractive processes.

As the Special Rapporteur on the rights to freedom of peaceful assembly and of association has noted, "civil society engagement policies are an important first step in ensuring the right to freedom of association at the multilateral level, but they are not enough by themselves."[2] The Special Rapporteur has added that the best practice is that multilateral institutions engage not only in centralized policy-making to ensure public participation and civil society engagement, but in day-to-day operational accessibility, improved outreach and communication efforts, local and regional consultations in addition to national ones, and a robust individual complaint mechanism, in order to ensure that civil society is effectively engaged.[3]

---

[2] Maina Kiai, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, para. 49, UN Doc. # A/69/365, (Sept 2014).
[3] *Id.* at paras. 25, 44, 45, & 47.

ICNL

For further information or in case of questions, please contact Nikhil Dutta of ICNL at ndutta@icnl.org, or Marion Mondain of PWYP at mmondain@pwyp.org.

We reiterate that we stand ready to engage with the EITI Secretariat to discuss these important issues further, and in particular to explore options for providing technical advice regarding the development of EITI processes in a way that enables the Secretariat to implement a robust mechanism which will protect and expand civic space in the natural resource governance sector in EITI implementing countries.