



CENTRE FOR LAW
AND DEMOCRACY

Open Government Without RTI?

The conspicuous weakness of
RTI reform within OGP
Action Plans

July 2012



Introduction¹

Effective legal protection for the right to information (RTI) is broadly understood as one of the main facilitators of government accountability, and a key mechanism for meaningful citizen participation in governance. Although the concept of open government extends beyond RTI, it is difficult to conceive of a strong open government system without effective RTI legislation. The importance of RTI, in its own right but also as an underpinning of open government and democracy, is also highlighted by its recognition in recent years by international human rights courts and other bodies as a fundamental human right.²

This is recognised in the structure of the Open Government Partnership (OGP),³ a major international movement for expanding transparency, accountability and civic participation in government, which includes legal protection for RTI among its four key eligibility criteria for States.⁴ It is also recognised in a more general way in the OGP Declaration of Principles,⁵ which sets out the four fundamental values to which all OGP Participating States much commit. One of these is to: “Increase the availability of information about governmental activities.” As part of this, the Declaration states: “Governments collect and hold information on behalf of people, and citizens have a right to seek information about governmental activities.” This is a classical statement of the very rationale for adopting RTI legislation.⁶

While the front-end OGP eligibility criteria and main OGP Principles recognise RTI, the commitment to meaningful RTI law reform is conspicuously weak in the Action Plans thus far submitted to OGP by Participating States. Indeed, just thirty per cent of those Plans include any meaningful commitment to RTI law reform (see Chart 1), and this figure drops to just 21 per cent if one excludes those countries without any RTI legislation (for which adopting an RTI law is almost mandatory). This is despite the fact that the RTI Rating,⁷ the leading global tool for assessing the strength of

¹ This Analysis was drafted by Michael Karanickolas, Legal Officer, Centre for Law and Democracy, and Toby Mendel, Executive Director, Centre for Law and Democracy. Additional research was carried out by Ahum Lee, Intern, Centre for Law and Democracy.

² See *Claude Reyes and Others v. Chile*, 19 September 2006, Series C, No. 151 (Inter-American Court of Human Rights), *Társaság A Szabadságjogokért v. Hungary*, 14 April 2009, Application No. 37374/05 (European Court of Human Rights) and the UN Human Rights Committee’s General Comment No. 34, 12 September 2011, CCPR/C/GC/34, para. 18.

³ See <http://www.opengovpartnership.org/>.

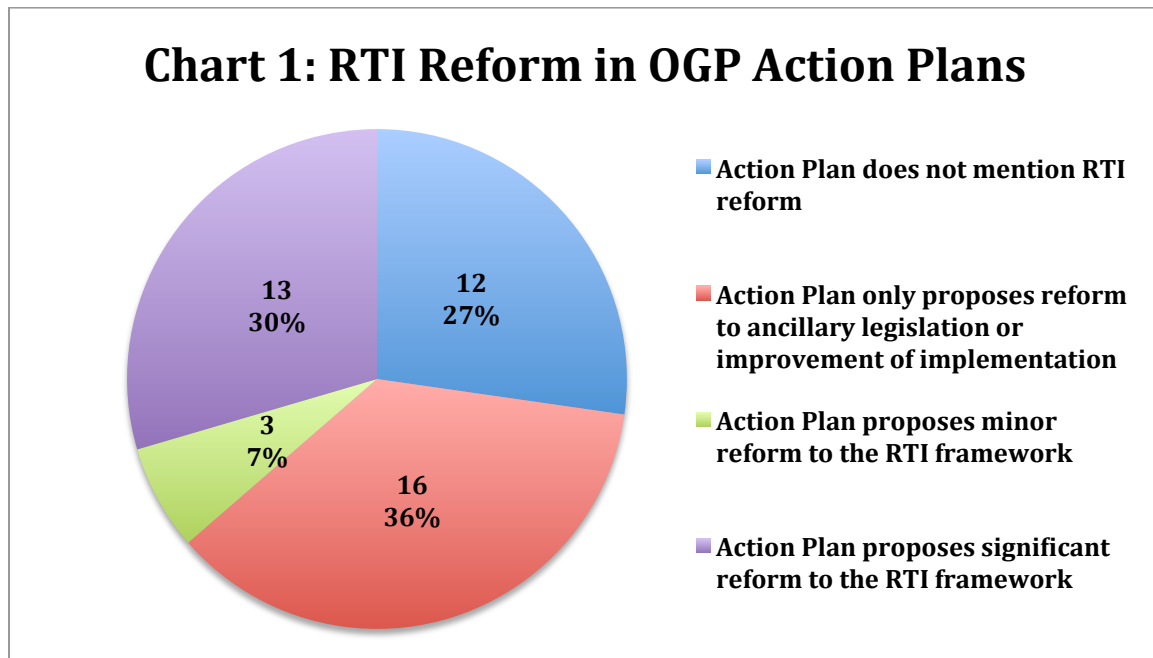
⁴ The eligibility rules for OGP participation are found at: <http://www.opengovpartnership.org/eligibility>.

⁵ Available at: <http://www.opengovpartnership.org/open-government-declaration>.

⁶ For example, the Introduction to the leading UNESCO publication on RTI, published in 2008, states: “The idea that public bodies hold information not for themselves but as custodians of the public good is now firmly lodged in the minds of people all over the world.” See Toby Mendel, *Freedom of Information: A Comparative Legal Survey*, 2nd Edition (2008, Paris, UNESCO).

⁷ The RTI Rating was developed by the Centre for Law and Democracy and Access Info Europe. An assessment of all national laws based on the Rating was launched in September 2011. See <http://www.rti-rating.org>.

legal frameworks for RTI, demonstrates that most OGP Participating States have significant room for improvement in terms of their legal frameworks for RTI.



The Action Plans are the key mechanism of the OGP process for fostering greater openness, as they map out the commitments that countries pledge to undertake. OGP Participating States make a commitment to improve their performance in three substantive areas – transparency, accountability and citizen participation – and to harness new technologies as a cross cutting theme to them help deliver their commitments. The Actions Plans detail their specific commitments in these areas.

This Report examines in detail the presence (and in most cases the absence) of a commitment to RTI reform in the 44 Action Plans that have so far been submitted to the OGP.⁸ While a small number of countries have bold plans for improving RTI, a significant majority (70 per cent) propose only ancillary or minor improvements to their legal framework or do not include any commitment in this area at all.

States Without an RTI Framework

The greatest need for RTI reform is in countries which do not yet have any RTI law on the books. CLD does not believe that it is credible for a country to remain in the

⁸ As of 20 June 2012, the OGP website's "Country Commitments" page (<http://www.opengovpartnership.org/countries>) listed 35 countries as having delivered their Action Plans. However, there are nine additional Action Plans which have been posted on the website's individual country pages, for the Czech Republic, El Salvador, Jordan, Kenya, Latvia, Lithuania, Paraguay, Tanzania and Turkey. We are counting these as Action Plans in our analysis, although their status is not completely clear. At the time of publication, the OGP countries that are still developing their Action Plans are Azerbaijan, Costa Rica, Ghana, Liberia, Macedonia, Mongolia, Panama, Russia, Serbia, South Korea and Trinidad and Tobago.

OGP if it does not make a clear and time bound commitment to adopt strong RTI legislation. Such legislation is a bedrock component of transparency, and the failure by a State to at least commit to adopting such legislation effectively makes a mockery of its claim to eligibility for membership of the OGP and commitment to the core principles of the OGP.

Of the 55 countries that have signed up to OGP, eight did not have a right to information law when they joined, namely Brazil, Costa Rica, Ghana, Kenya, Paraguay, Spain, Tanzania and the Philippines. Brazil included a commitment to adopt legislation in its Action Plan, presented to the OGP in September 2011, and it has since adopted an RTI law. Strikingly, both Tanzania and the Philippines are on the OGP's nine-member Steering Committee. In the case of the Philippines, it has been on the Steering Committee for nearly a year now, since September 2011, and yet it has still not adopted RTI legislation, a situation CLD believes is fundamentally incompatible with the leadership role associated with being on the Steering Committee. This is described, in part, in the OGP's Articles of Governance, adopted in June 2012, as being, "leadership by example for OGP in terms of domestic commitments".⁹

Five of the seven other countries without RTI laws – Kenya, Spain, Paraguay, Tanzania and the Philippines – have submitted Action Plans, four of which include a commitment to adopt an RTI law. The exception is Paraguay, and we believe it would be a serious problem to allow Paraguay to remain in the OGP if it is not prepared to make a commitment to adopt RTI legislation.

Paraguay has been without a law on RTI since Law 1728 on Administrative Transparency was repealed in 2004. Article 28 of the Constitution of Paraguay entrenches the right to information, but this has not been effective in protecting RTI in practice, and experience in other countries has demonstrated that while constitutional guarantees are useful, they need to be implemented through RTI legislation. Some of the proposals in Paraguay's Action Plan do refer to enhancing public access to information, such as the idea of creating an online information exchange for public authorities. However, the absence of a legal framework for RTI remains a serious Achilles heel for transparency in the country.

Kenya's Action Plan sets a target of November 2012 for adoption of RTI legislation, while Spain's Plan indicates that the law should be finalised by the end of 2012. Tanzania's plan makes a commitment to study global better practices in order to prepare a draft by July 2012, but it has yet to table a draft RTI law, suggesting that this timetable will not be respected.

⁹ Available at:

<http://www.opengovpartnership.org/sites/www.opengovpartnership.org/files/OGP%20ArticlesGov%20Final%20June%2011%202012.pdf>.

The other three countries have all presented draft laws. The Centre for Law and Democracy did an analysis of Kenya's draft Freedom of Information Bill in January 2012,¹⁰ and found that it scored a very respectable 114 out of a possible 150 on the RTI Rating, which would place it in tenth place globally. A rating by CLD of a recent version of the draft Philippine Freedom of Information Act, 2012, gave it a score of 102, which is also very respectable. The leading local group supporting the adoption of an RTI law in the Philippines, the Right to Know Right Now coalition, has supported the rapid adoption of the law in its current form.¹¹

This may be contrasted with the situation in Spain, whose Action Plan hypes the proposed Act as "an extraordinarily significant step forward" which will "fully implement" the right of access to information and place Spain "at the international vanguard as a benchmark of transparency, information access, and good governance." These are bold words, which the proposed Transparency, Access to Public Information and Good Governance Act fails to live up to. It has been sharply criticised, among other things for its limited scope, overly broad exceptions and lack of proper recognition of the right to information.¹² Despite these criticisms, the Spanish government has so far shown little willingness to substantially improve on the current version of the law.

It is welcome that five of the six Action Plans from Participating States of the OGP that still do not have RTI legislation have made a commitment to adopt legislation. It is also welcome that one country has already adopted an RTI law while the plans to do so in three other countries are time-lined, even if one of the deadlines has already effectively been breached. At the same time, it is a matter of serious concern that Paraguay has submitted an Action Plan which does not even make a commitment to adopt an RTI law. We call on the OGP Steering Committee to raise this issue with Paraguay, with a view to securing a promise from that country to amend its Action Plan to include this commitment.

States With a Weak Framework

Using the RTI Rating as a benchmark, many of the legislative frameworks for RTI in OGP Participating States are extremely weak. Not including countries without RTI laws, of the 55 Participating States in the OGP, fourteen attained a score of less than one-half (75 out of a possible 150 points) on the RTI Rating, namely Greece (which scored 40), Jordan (52), Albania (59), Italy (60), Russia (60), Lithuania (61), the

¹⁰ Available at: <http://www.law-democracy.org/?p=1600>.

¹¹ Comments by the Right to Know Right Now coalition on the Philippine draft Freedom of Information Act are available at: <http://www.freedominfo.org/2012/06/strong-senate-supports-bolsters-hope-in-philippines/>.

¹² Criticisms of Spain's draft Transparency Act by Access Info Europe can be found at: <http://www.access-info.org/en/spain-coalicion-pro-acceso/250-spain-transparency-law-minimal-changes>. An analysis of the Spanish law by the Centre for Law and Democracy in January 2011 also exposed serious problems with it. Available at: http://www.law-democracy.org/wp-content/uploads/2010/07/11.01.Spain_FOI_.pdf.

Dominican Republic (61), Malta (63), Turkey (64), Latvia (65), Denmark (66),¹³ Israel (68), the Czech Republic (69) and Panama (74). Twelve of these countries have submitted their OGP Action Plans so far (not including Russia and Panama).

Of the twelve which have submitted OGP Action Plans, only four, or one-third, are proposing meaningful reforms of their RTI laws. Jordan and Albania have promised to undertake broad reforms. Specifically, Jordan has committed to:

Improving access to information through adopting amendments to the existing Access to Information Law in view of further improving it and ensuring that it is consistent with international best practices.

For its part, the Albanian plan states:

This year, the Albanian government and the Ministry of Justice are committed to amending the law “On the Right to Information for Official Documents” (Law No. 8503, dated 30.06.1999), based on a broad consultation with civil society organizations, in order to improve and clarify the legal dispositions.

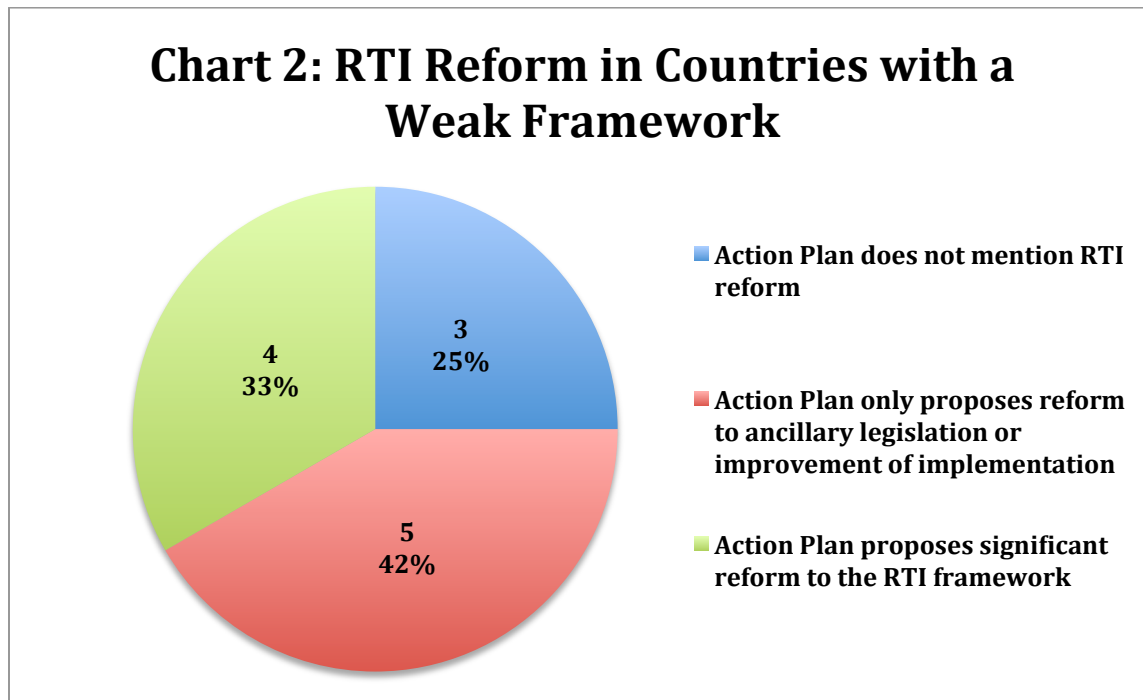
If they deliver on these commitments, these countries should significantly enhance their access to information systems, and also jump significantly in the RTI Rating.

Two other countries are proposing to address a major deficiency in their RTI framework. The Dominican Republic has promised to create an oversight body for the right to information, while the Czech Republic plans to introduce a public interest override for exceptions. These are certainly welcome improvements, but they only address one of the several serious shortcomings with the RTI frameworks in these two countries. In neither case would these reforms be likely to move these countries beyond the halfway point on the RTI Rating.

The rest of the countries scoring less than one-half in the RTI Rating, i.e. 67 per cent of these countries, are not proposing any significant reform of their seriously deficient RTI laws. Five of these countries are only proposing to reform ancillary laws or their implementation programmes. Israel’s Action Plan acknowledged “difficulties” with their Freedom of Information Law and pledged to improve implementation, but it makes no mention of the major problems within the framework itself, including an overly broad regime of exceptions and the lack of a specialised oversight body. Latvia’s proposals for RTI focus mainly on the reuse of public sector data, but fail to address their law’s limited scope or the absence of an effective mechanism for appealing against breaches of the right to information. Lithuania, which placed very low in the RTI Rating, included only a vague and unenforceable pledge to investigate and address “information shortages experienced by the public”. Turkey and Denmark’s Action Plans discuss ways to

¹³ It should be noted that the score for Denmark, unlike the vast majority of assessments, was not reviewed by a local expert, and it is therefore possible that their framework is undervalued in the RTI Rating assessment.

make disseminated information more user friendly, but give no consideration to improving their legal frameworks for RTI.



Three other countries are not proposing any reforms in the area of RTI. These include Greece, which scored just 40 points and came near the bottom in the RTI Rating, and Italy, which also performed very poorly on the Rating. It also includes Malta, which was not rated because its RTI law is not in force, although Malta did include a promise in its Action Plan to clean up its beaches.

States With a (Relatively) Strong Framework

The need for RTI reform is not limited to those countries that did poorly on the RTI Rating. The RTI Rating found room for improvement in every national RTI framework as measured against international better practices, and room for significant improvement in most Participating States of the OGP.

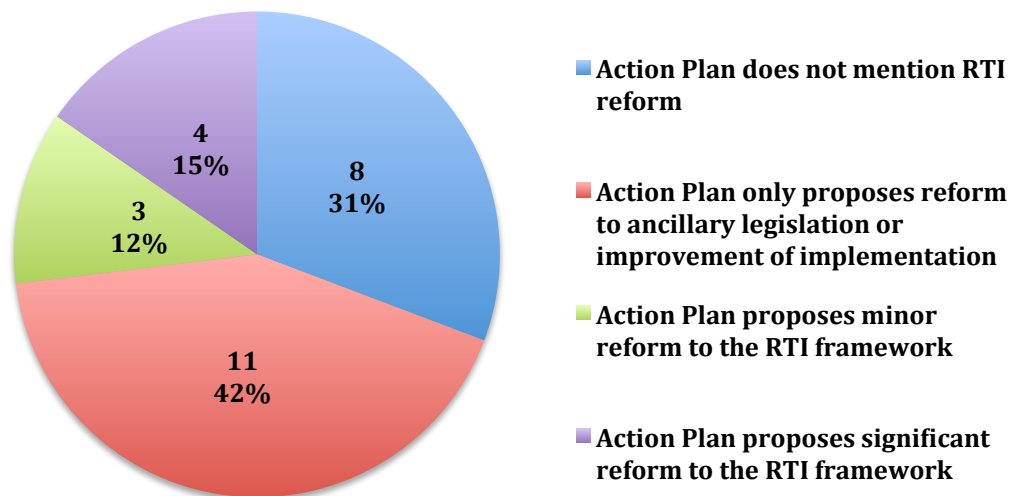
Of the 55 OGP Participating States, 33 have RTI laws that achieved a score of greater than 50 per cent on the RTI Rating, 26 of which have submitted Action Plans. Of these 26, only four (15 per cent) – Colombia, Montenegro, Peru and the Netherlands – made a commitment to significantly reform their legal framework for RTI. The boldest proposal for improvement comes from Colombia, which has pledged to pass a new RTI law to replace its current framework, which relies heavily on regulation and judicial treatment. Montenegro's Action Plan is also notable for some major promises of reform, including the establishment of an independent oversight body and an expanded proactive publication regime. However, an analysis by the Centre for Law and Democracy of the reforms (as proposed in March 2012) showed that

they represented a lateral move rather than a real improvement, because the government bundled a significant weakening of the exceptions regime into the amendments.¹⁴ In monitoring implementation it is important to be vigilant against this kind of a disconnect between the language of the Action Plan, which promised that any exceptions to the right to information would be “rare and justifiable”, and the reality of the path which the government seems to be pursuing.

Three of the Action Plans from countries with relatively strong frameworks (12 per cent) proposed minor improvements. These are Ukraine and Croatia, both of which promised to improve their regulatory structures and the United Kingdom, which proposed a cost cap for accessing some digital data and a maximum time limit for appeals against disclosure.

Nine countries – Armenia, Bulgaria, Canada, El Salvador, Honduras, Norway, Romania, the United States and Uruguay – only pledged to improve the implementation of their RTI laws. Two other countries, Moldova and the Slovak Republic, failed to promise any reform of their RTI regime, but did include reforms to ancillary legislation, targeting the reuse of public information and whistleblower protection respectively.

Chart 3: RTI Reform in Countries with a Relatively Strong Framework



The remaining eight countries – Chile, Estonia, Georgia, Guatemala, Indonesia, Mexico, South Africa and Sweden – completely failed to mention RTI, or proposed minor technological improvements that provide little in the way of substantial improvement.

¹⁴ The analysis is available at: <http://www.law-democracy.org/?p=1796>.

Several of the 26 countries covered in this section have very strong RTI frameworks, and so arguably do not need to focus on RTI reform at this point. Four, namely Croatia, El Salvador, Mexico and Ukraine, achieved RTI Rating scores of 115 or higher. Even excluding these countries, however, the rate of serious RTI reform in the group of countries discussed here remains very low, at 18 per cent.

Looking Forward

The adoption of a strong legal framework for RTI is essential to the proper delivery of the goals of the OGP. The importance of legal guarantees for this fundamental human right are recognised in the eligibility criteria for participation in the OGP and also in the core principles of the OGP, as reflected in its Declaration of Principles. Much can be done by States to advance openness even in the absence of RTI legislation. However, the experience of countries around the world has clearly demonstrated that RTI legislation is essential to move beyond *ad hoc* and largely discretionary disclosure of information by States to the true presumption of disclosure which is at the heart of open government.

Constitutional protection is part of a strong legal framework for RTI but, once again, experience in countries around the world has unequivocally demonstrated that constitutional rules, on their own, are not enough to guarantee RTI in practice. What is needed is legislation which establishes, in some detail, each of the many elements of an effective system for giving effect to RTI, in line with now well established international standards in this area. The RTI Rating provides a highly credible and precise tool for measuring the extent to which national legal frameworks reflect those international standards.

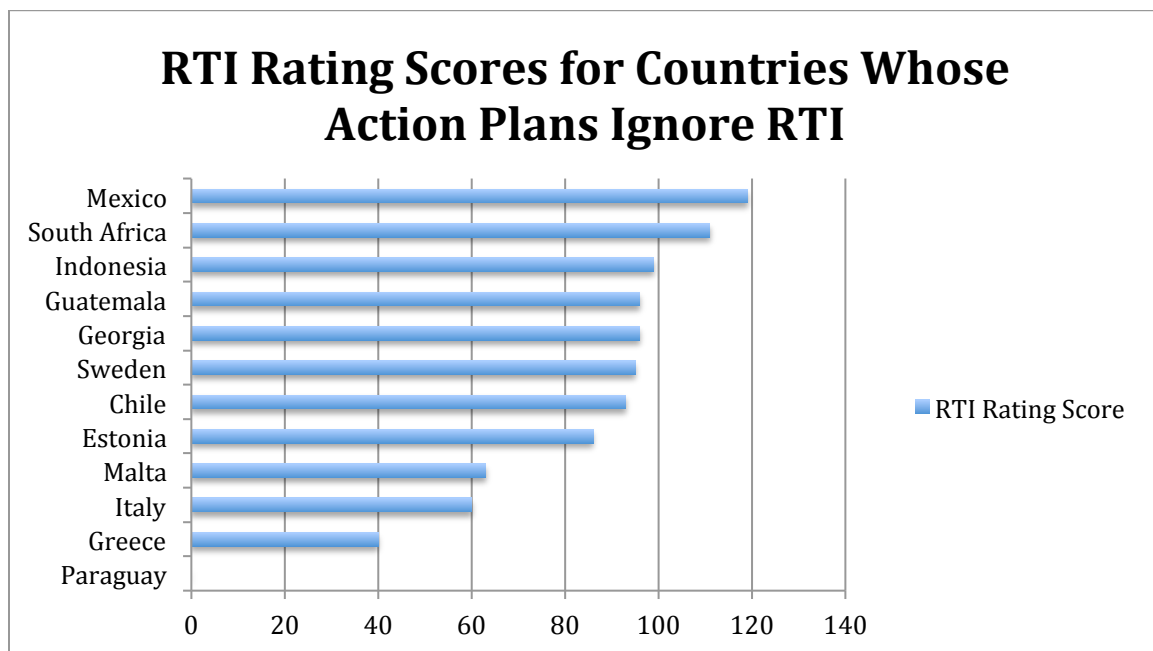
A good legal framework is not, of course, enough to ensure RTI in practice. For this, proper implementation of that framework is required, both in the formal legal sense and in the wider sense of implementation in good faith and with positive political will. Measuring implementation, however, is complex and so far no comprehensive and objective system for this has yet been developed which would meet the standards required for OGP review of a country's performance. In any case, outside of a very small number of exceptional cases, strong delivery of RTI in practice is not possible without a strong underlying legal framework.

The main mechanism within the OGP for evaluating a country's Action Plan is the Independent Review Mechanism (IRM). Although the full details of how the IRM will function have yet to be finalised, it has been determined that recommendations by the IRM should be technical in nature, and should only relate to the process for developing the Action Plan and its implementation.¹⁵ In other words, although the IRM may consider procedural issues, such as consultation with interested stakeholders, and implementation of the commitments set out in the Action Plans, it

¹⁵ See <http://www.freedominfo.org/2012/06/ogp-works-on-processes-faces-personnel-changes/>.

will not review the substance of Plans. In particular, it will not address the relevance and ambition of Action Plans, or consider whether they properly address a Participating State's needs in the areas of improving government openness and accountability and citizen participation.

This could become a major deficiency in the structure of OGP. In particular, the OGP will lose all credibility if States put forward Action Plans which are weak, which do not include new commitments, and/or which do not address the real needs of the country. This is a particular risk given that the current OGP framework fails to present defined goals for Participating States to work towards, other than the vague targets of transparent, accountable and participatory government. Our research establishes that, at least in one core OGP area, the legal framework for RTI, Action Plans are indeed weak and do not correspond to underlying need.



Our research demonstrates that few States have made any serious commitment to improve their legal frameworks for RTI, despite a very widespread need for this. Furthermore, there is no discernable connection between the strength or weakness of a State's legal regime for RTI and whether or not it is proposing significant improvements to its RTI framework. This is illustrated in Chart 4, which shows significant variation, in terms of their RTI framework, among those States that completely ignored RTI in their Action Plans.

Wildly different approaches to RTI legislation were taken in the different Action Plans. Jordan, with a very weak law, recognises the need to overhaul its legal framework to bring it into line with international standards. The United Kingdom, with a moderately strong RTI law, is content with making minor adjustments to the

cost structure and appeals mechanism. Greece, with an extremely weak RTI law, is proposing to do nothing.

There is, thus, a serious risk of States presenting weak Action Plans, and essentially taking advantage of the OGP to improve their images while doing little to enhance transparency, accountability and participation in practice. If the OGP does not take action to prevent this, its credibility will soon start to erode, and its ability to realise its massive potential will recede.

To avoid this problem, we believe that the OGP needs to develop minimum standards and expectations for Participating States in the three substantive areas covered by the Declaration of Principles, namely transparency, accountability and participation. Minimum standards could be developed by the Criteria and Standards Sub-committee, as part of its mandate to make recommendations concerning the “circumstances in which governments’ actions or record call into question their full participation in OGP”. Expectations could be developed as part of the same Sub-committee’s mandate to recommend “guidelines related to best practices for OGP participating countries”.¹⁶

CLD recognises that OGP Participating States have different problems and priorities, and so may legitimately take different approaches when advancing the goals of transparent, accountable and participatory government. For example, while Mexico and Italy include significant anti-corruption strategies within their plans, it would not make sense for Norway or Canada to plot that type of strategy. But this in no way argues against the OGP setting standards for States. It is simply a reflection of the fact that States have different challenges in relation to those standards, and that they need to prioritise areas of greater challenge.

As noted, we believe that minimum standards and expectations should be developed for all of the core commitments set out in the Declaration of Principles. Specifically in the area of the legal framework for RTI, we make the following recommendations:

1. The OGP should require States to adopt RTI legislation as a minimum standard. A Participating State without an RTI law should be expected to include a time bound commitment to address this in its first Action Plan, preferably within the first year. Where a country is failing to commit to, or to deliver on a commitment to, adopt RTI legislation in a timely fashion, the process for review of the ongoing participation of that State in the OGP should be engaged.
2. A very strong expectation should be established that countries with weak RTI laws (we recommend this be set as a score of less than 75 points, i.e. less than 50 per cent, on the RTI Rating) should commit to improving their legal framework for RTI in their Action Plans. Where a country claims to have

¹⁶ See the OGP’s Articles of Governance, note 9.

other overriding and immediate priorities which would justify some delay on this, it would be expected to indicate that in its Plan. Within a short timeframe, all countries with weak laws would be expected to take action to address this.

3. The OGP should adopt a clear level of achievement that it expects of Participating States in relation to their framework for RTI. We suggest that a reasonable standard would be a score of 100 or more on the RTI Rating. Currently there are twenty countries in the world, including ten OGP members, which meet this standard. However, several more are within “striking distance” of ten points or less. Discussion of the Action Plan within the OGP process should automatically include consideration of the legal framework for RTI for countries that fail to meet this standard. The OGP should make it clear that the expectation of action on RTI reform increases the further away a country’s framework is from the standard.

Conclusion

Since its launch in September 2011, the OGP has become the most high profile international movement for greater government transparency in the world. It is vitally important that the OGP push member States to adopt measures that will produce tangible results. With high profile backers such as United States President Barack Obama and Brazilian President Dilma Rousseff, the OGP has attracted significant publicity and support to the cause of open government. It is a tremendous opportunity for change, and one that must not be squandered. If States are allowed to enjoy the prestige associated with OGP participation while failing to deliver substantial progress towards open government, the whole process will lose credibility.

The very accountability that is one of the core principles of participation in the OGP must also apply to the OGP itself. For this to be achieved, it is necessary to flesh out the very general commitments reflected in the OGP’s Declaration of Principles, and to establish minimum goals that Participating States are expected to achieve over time. To this end, a framework of minimum standards and expectations should be developed for the three core substantive commitments in the Declaration of Principles, namely transparency, accountability and participation. While some flexibility is needed to accommodate different situations and priorities, the system should be designed to exert upward pressure on Participating States to achieve all of the standards in the framework over time.

In terms of the legal framework for RTI, no State should be allowed to remain in the OGP unless it is prepared to make a clear, time bound commitment to protect this fundamental human right and core OGP value. For States that have legislation, clear minimum benchmarks for the quality of their RTI framework should be set, and incorporated into the ongoing process of review of country Action Plans, with a view to promoting improvement over time. This will not only promote good performance

on this key governance issue, but it will also enhance the credibility of the whole OGP process.