Creating CSO-Enabling Environments: Using CSO- and Business-Enabling Models to Ensure CSO Resilience

Written by Owen Pell
President of the Board of the Auschwitz Institute for the Prevention of Genocide and Mass Atrocities
Executive Summary

- A growing number of states are restricting the space for civil society organizations (CSOs) to operate. To date, over 44% of countries have enacted restrictive CSO laws, and the pace of new laws is increasing. Rather than responding to particular circumstances, states (across regime types) appear to be enacting restrictions because they can, and generally are copying restrictions used by other states. CSO restrictions go well beyond restrictions on freedom of association—and go beyond restrictions generally applied to commercial enterprises, which, like CSOs, are legal entities organized and operating under state law. Restrictions involve statutes, regulations and administrative requirements that make it progressively harder for CSOs to incorporate, fund themselves and continue operating.

- CSOs are distinct from broader civil society. CSOs provide structures and services to support rights-related activity, as distinct from individuals or groups generally being able to engage in speech, expression, media or associational activities. Although CSOs need rights granted to civil society, CSOs are distinct because, similar to many business enterprises, numerous CSOs also focus on providing services to society. These services include measuring, monitoring, reporting on, training about, and enhancing social, political or economic rights and access to justice while also challenging the processes of impunity that diminish those rights. CSOs provide infrastructure for other civil society activities, which can help civil society contribute to social and economic benefits that flow from higher levels of rights and democracy.

- Benefits seen as flowing from business-enabling environments also could relate to CSO activity, further calling into question CSOs being subject to greater restrictions than business enterprises. For example, the UN has repeatedly recognized that CSOs play a distinct role in meeting SDG and ESG challenges, in how governments and businesses address those challenges, and with respect to the participation of and engagement with affected stakeholder communities. Recognizing how CSOs contribute to rights-related processes highlights parallels between the benefits of CSOs and businesses, and why similar standards of assessing enabling environments should apply to CSOs. The importance of CSOs has been recognized by the United Nations, and in international agreements like the 1998 Aarhus Convention and 2018 Escazu Agreement (discussed below, and relating to access to information and justice in environmental matters), which mandate that states enable and protect CSOs.

- Data measuring the quality of democracy and civil society fail to isolate data on the CSO enabling environment, lumping that in with data on freedom of speech,
expression and association. Other data sets that do focus on aspects of CSO enabling environments do not compare states to one another, or test CSO restrictions against laws and regulations applied to business enterprises. These approaches prevent a full assessment of how states are restricting and degrading CSO space, and how states compare with one another in the CSO-enabling space.

- Operationalizing assessments of CSO enabling environments (CSO-EE) would not be difficult and has two components. First, operationalizing an index focused on assessing and ranking the CSO-EE of each nation. Existing CSO-related analyses, especially the Monitoring Matrix, provide robust methodological approaches, and could be enhanced using assessment categories applied by the World Bank and Transparency International. Second, communicating with key actors on using a CSO-EE index effectively. Ranking CSO-EE would impose economic and political costs on states that restrict CSO space, and create a basis for pressing governments and businesses on issues of CSO and affected community engagement across the full range of SDGs and ESGs.

**Governments are Systematically Disabling CSOs**

States have been steadily restricting the space for CSOs to operate. To date, over 44% of countries have enacted restrictive CSO laws. That is more than five times the level in 1990, and more than double the level as of September 11, 2001.\(^1\) The data also show that, rather than responding to particular circumstances, states are enacting restrictions because they can (not due to a specific threat) and are copying restrictions used by other nations.\(^2\) Restrictions tend to spread within regions, and notwithstanding governmental forms—i.e., authoritarian regimes are not the only regimes enacting CSO restrictions.\(^3\)

Restrictions on CSO space go well beyond restrictions on freedom of association. Rather, the restrictions involve statutes, regulations and multi-layered administrative requirements that, by definition, make it progressively harder for CSOs as legal enterprises to incorporate, fund themselves and continue operating.

In terms of how they form and operate, CSOs resemble commercial enterprises in that they are legal entities organized and operating under state law. Like commercial enterprises, CSOs have boards, capital needs, employees, employment contracts, leased

---

1 See generally Sian Herbert, “Restricting space for civil society,” 5 (GSDRC August 2015); www.gsdrc.org/publications/restricting-space-for-civil-society/.


3 Glasius, supra at 457-59, 460-61. That the phenomenon cuts across regime types highlights the seriousness of the problem. See Herbert, supra at 3 (collecting sources).
or owned premises, bank accounts, and use business accounting to keep track of their finances. Based on work done by the World Bank as to commercial enterprises, however, it is clear that many, if not most, CSO restrictions go beyond restrictions generally applied to commercial enterprises. Indeed, states imposing these types of restrictions on businesses would risk downgrading by rating agencies and bad rankings by the World Bank, and being branded as at greater risk for corruption and investment risks.⁴

Restrictions on CSO space often fall within four areas (i) burdensome legal requirements; (ii) restrictions on foreign funding and affiliations; (iii) counterterrorism laws and policies that can amplify other restrictions; and (iv) threats and violence (which may go uninvestigated and/or unprosecuted).⁵ Examples of the types of restrictions imposed on CSOs (and not on commercial enterprises) include:⁶

- Requiring CSOs to register with multiple agencies or ministries before opening and to renew registrations more often than commercial entities.
- Allowing agencies to deny incorporation or registration for any reason and without stating reasons for denial.
- Requiring notarization or filing fees as part of the incorporation, registration and/or re-registration processes, including across multiple agencies or multiple filings.
- Requiring minimum capitalization of CSOs.
- Restricting receipt of capital or donations from abroad.
- Prohibiting CSOs from being branches or agencies of foreign CSOs.
- Requiring CSOs to file multi-year work plans, lists of objectives or intended activities, which are then subject to review and approval by government agencies—which agencies can then revoke CSO licenses or place CSOs under government monitoring.
- Restricting CSO board members or leadership to meet strict citizenship or domicile requirements.
- Restricting CSOs from owning or renting property.
- Requiring CSOs to be subject to inspection by government officials at any time for any reason.

⁶ See extensive data collected at www.icnl.org/resources/civic-freedom-monitor; Glasius, supra at 465-66; Herbert, supra at 4-5.
Making CSO funding and operations subject to ongoing government monitoring.

Requiring CSO financial and banking records to be open to inspection at any time for any reason.

Limiting CSO access to bank loans from abroad.

Requiring CSO leaders to be subject to home inspections at any time for any reason.

Requiring CSOs to update records relating to use of funds on a monthly basis.

Making CSOs subject to deregistration for any alleged regulatory derogation.

Verbal and physical attacks on CSOs and CSO personnel, which attacks do not result in prosecutions or arrests.

These restrictions not only have made it progressively harder for CSOs to incorporate and carry out their work, but have driven many CSOs to change the way they portray their missions to governments or to move their operations off-shore.

CSOs are Distinct from Broader Civil Society and Should be Assessed Separately

There are tremendous amounts of data showing that societies with higher levels of democracy have the capacity to deliver both better social and human rights, and enhanced economic performance and opportunities to their populations including enhanced returns on business investment (as measured across rates of investment return, GDP or GNP). High levels of democracy also correlate to comparatively lower levels of corruption and state-sponsored violence—which includes a lower likelihood of mass atrocity violence. An integral factor in assessing the quality of democracy is the strength and resilience of civil society, defined broadly.

Civil society is the “area outside the family, market and state.” As defined by the European Union, civil society is “all forms of social action carried out by individuals or groups who are neither connected to, nor managed by, the State.” Assessing civil society generally involves understanding a broad array of qualitative data that goes beyond express assurances of certain rights in constitutions or legal codes. For example, various


democracy measures collect under civil society-related data information on a broad array of civil and political rights, including freedom of expression, freedom of speech, freedom of association, freedom of assembly, freedom of public communication, equality of opportunity for political speech and parties, guarantees of personal integrity and security, and guarantees of civil and political rights. But, these measures do not isolate the unique aspects or value of CSOs as infrastructure and service enterprises, and do not test these CSO-specific factors against levels of corruption, quality of rights and democracy, or economic and investment returns.

Civil society, broadly defined, includes individual and mass movements and mass media, as well as a broad array of CSOs, which are “groups including non-governmental organisations (NGOs), trade unions, social movements, grassroots organisations, online networks and communities, and faith groups.” Examples of distinct roles played by CSOs (as compared to individuals, protest groups or media groups) include:

- Providing services (e.g., running schools or clinics, organizing disaster relief)
- Advocating on rights issues (both publicly and to governments or businesses)
- Monitoring (e.g., as to corruption, human rights compliance, working conditions)
- Building active citizenship (motivating civil engagement, voting, etc.)
- Training (e.g., on CSO issues or operations)
- Participating in global governance processes

As such, there are important qualitative differences between CSOs and the rest of civil society. Although CSOs need speech, expression and associational rights—like individuals and the media—CSOs are distinct. Thus, CSOs often drive the ‘business’ of measuring, monitoring and implementing rights, including by holding governments and businesses accountable with respect to rights. The ability of one or more individuals to engage in speech, expression, media and associational activities—whether spontaneously or over time—is distinct from the business of CSOs, which are formally incorporated, organized

---

10 Rachel Cooper, “What is Civil Society, its role and value in 2018? (UKAID 2018); http://assets.publishing.service.gov.uk/media/5c6c2e74e527a72bc45240e/488-What-is-Civil-Society.pdf. CSOs should be understood as distinct from so-called GONGOs (CSOs organized, largely funded, and/or controlled by a political party or government entity) or CONGOs (CSOs organized, largely funded, and/or controlled by business entities or trade/business associations).
11 Id. at 2. It is important to note that CSOs can vary dramatically from state to state. This is due to social, cultural, political, economic and historical factors that shape the CSO environment. These factors will affect the breadth of CSO missions, and the willingness of CSOs to challenge government or private sector actors. Nonetheless, as entities that depend on legal and regulatory frameworks to organize, capitalize, exist and continue operating, all CSOs depend on enabling environments, absent which their ability to exist or survive will decrease or cease.
12 Id. at 9-12.
and designed to have an intentional, planned and ongoing existence focused on providing services tied to their missions, which activities may outlive any given protest or movement.\footnote{Id. at 7-8. For example, with respect to access to justice issues (e.g., SDG 16.3), see generally Task Force on Justice, Justice for All (Final Report, May 2019); www.justice.sdg16.plus [hereinafter Justice for All Report].}

**Applying Business Enabling Standards to CSOs**

According to World Bank data, countries that make it easier for businesses to form and operate will have less corruption and smaller unofficial economies, and will be more likely to spread economic benefits more equitably across society.\footnote{See generally Simeon Djankov, Rafael La Porta, “The Regulation of Entry,” 117 Qtly. J. Econ. 1 (2002); World Bank Doing Business Archive, http://archive.doingbusiness.org/en/doingbusiness (collecting sources).} More recently, the World Bank has said that enhancing the “business enabling environment” helps drive private sector development to yield greater growth, equality of opportunity, and sustainability, while also lowering corruption.\footnote{See generally World Bank, Pre-Concept Note, Business Enabling Environment (BEE), 1, 9 (Feb. 2022); http://worldbank.org/content/dam/doingBusiness/pdf/BEE-Pre-Concept-Note---Feb-8-2022.pdf (collecting sources).}

The World Bank has identified three benefits emanating from private sector development. The private sector:

- Promotes economic growth through innovation and entrepreneurship;
- Increases equality of opportunities among market participants; and
- Ensures the general sustainability of the economy in the long term.\footnote{Id. at 1-2. A review of the Doing Business Archive, supra, shows that the World Bank approach encouraged states to reduce restrictions on business incorporation and operations. For example, many states reduced capitalization requirements, eliminated the need for notarizations (and corresponding notarization fees), streamlined and shortened incorporation and registration requirements, reduced the number of agencies or ministries with approval power, eliminated citizenship and domicile restrictions, eliminated requirements relating to background information on local executives and managers, loosened credit and banking restrictions, eliminated restrictions on business entities owning or leasing property, and reduced post-registration fees and procedures.}

These benefits could apply equally to CSOs. Even though the principal purpose of CSOs is not profit, CSOs can deliver these same benefits, which are integral to government and business engagement and progress on SDG and ESG issues—including the positive economic ramifications that are seen as flowing from that progress. Under these circumstances, it is unclear whether there is a valid rationale for subjecting CSOs to greater restrictions than business enterprises.

SDGs and ESGs involve complex, long-term challenges that will take years to measure, understand and address. CSOs, like businesses, are at the heart of the long-term activities required to solve these SDG and ESG problems. Among other things, the presence and
resilience of CSOs is integral to how governments and businesses will engage with stakeholder groups (e.g., workers, consumers, or affected and vulnerable communities or indigenous populations) in understanding and solving SDG and ESG problems.\textsuperscript{17} Indeed, as part of moving forward on the SDG 2030 Agenda, the UN Secretary General has called on all UN entities to establish a dedicated focal point for civil society so that CSO actors can actively participate in UN work.\textsuperscript{18} By providing data, engaging with affected communities and populations, and monitoring how governments and businesses are performing on SDG (and related ESG) implementation, CSOs enhance public participation and "SDG Accountability."\textsuperscript{19} Recognizing how CSOs contribute to rights-related processes again highlights parallels between the benefits of CSOs and businesses, and why similar standards of assessing enabling environments should apply to CSOs.

Like businesses, CSOs engage in innovation and entrepreneurial activity. For example, CSOs work to understand and collect data relating to marginalized and underserved communities most in need of SDG-related progress (which can include documenting how rights are recognized, respected, enforced, and/or remediated).\textsuperscript{20} CSOs often are in the best position to collect data and evidence defining the precise scope and extent of SDG or ESG problems and issues, including because governments and businesses may not be entirely trusted (including because they are viewed as part of the problem). CSOs also have demonstrated abilities in developing and testing innovative approaches to SDG problems that are tailored to specific community needs.\textsuperscript{21} CSOs can assist governments and businesses in developing and deploying potential solutions and in measuring implementation and progress because their measure of success is alleviating the problem not profiting from the solution. Finally, CSOs can help governments and businesses understand cost-effective approaches to solving problems because they are closer to those affected, something that also often allows CSOs to help develop innovative approaches to financing solutions for SDG or ESG problems.\textsuperscript{22}

These CSO activities increase equality of opportunity for affected communities, both by enhancing opportunities for effective participation and making the workings of society more transparent and open (i.e., examples of SDG Accountability). While they do not sell goods, CSOs routinely deliver social, economic and political services that benefit communities, governments and the private sector. Like business service entities, CSOs

\textsuperscript{17} See generally European Financial Reporting Advisory Group, \textit{Draft European Sustainability Reporting Standards}, ESRS S3—Affected Communities, 4-7 (Nov. 2022).
\textsuperscript{20} See, e.g., \textit{Justice for All Report} at 22-24, 30-42 (on measuring the ‘justice gap’ under SDG 16).
\textsuperscript{21} See, e.g., \textit{Justice for All Report} at 60-90 (collecting examples relating to access to justice).
\textsuperscript{22} See, e.g., \textit{Justice for All Report} at 44-58, 60-90.
can deliver positive economic and social benefits, including in the form of transparency, rights recognition, and rights enhancement. Moreover, absent a robust CSO space, governments and businesses are less likely to factor CSOs (and the benefits they can generate) and the communities that CSOs serve into their policies and actions. This, in turn, can undermine SDG and ESG progress, including by making it harder to measure outcomes as to affected communities and populations.

To the extent robust business-enabling environments can make governments less corrupt and more accountable, robust CSO-enabling environments should have the same effect, while also enhancing sustainability by making it more likely that governments and businesses pursue and achieve SDG and ESG standards and engage effectively with stakeholders. Specifically, a major component of evolving ESG standards is that businesses affirmatively assess the needs of, and then engage with, communities affected by business operations. CSOs are crucial to that process. Indeed, it is difficult to see a path to effective community engagement without CSOs because governments and businesses will always have some degree of competing and conflicting interests—and indeed, data suggest that as CSO restrictions have grown, government engagement with CSOs has deteriorated.

International Agreements and UN Action Highlight CSO Importance

Recent international agreements and UN actions have highlighted CSO importance to sustainable development, access to justice, and effective public participation in SDG and ESG processes. Under these circumstances, imposing restrictions on CSOs that go beyond those imposed on business enterprises runs counter to important international legal trends.

The UN has repeatedly recognized the importance of civic space and CSO-enabling environments to the UN’s human rights and development goals. For example, the World Bank has stated:

---

23 Further evidence of business/CSO parallels is the project by the International Federation of Accountants to develop standardized financial disclosure rules for CSOs (akin to IFRS used for commercial entities). See the IFR4NPO project at www.ifr4npo.org.

24 See, e.g., Cooper, supra at 10-12.

25 See, e.g., European Financial Reporting Advisory Group, Draft European Sustainability Reporting Standards, ESRS S3--Affected Communities, 4-7 (Nov. 2022) (requiring companies to disclose the process by which they have engaged with affected communities, including with respect to free, prior and informed consent with respect to the risks of negative impacts from business activities).

26 Herbert, supra at 6. The draft EU ESG diligence and disclosure rules do not provide guidance on how companies should engage with CSOs or affected communities, but does require disclosure of how engagement is being accomplished. See generally European Financial Reporting Advisory Group, Draft European Sustainability Reporting Standards, ESRS S3--Affected Communities (Nov. 2022).
Economic development and service delivery are undermined by institutions which are unaccountable and not inclusive and poor governance in general. Corruption, exclusion, and lack of participation and accountability can indicate unfulfilled human rights. Empowering all groups and individuals to participate in public affairs in a meaningful way can promote inclusive institutions and accountability and discourage corrupt practices.\textsuperscript{27}

The UN High Commissioner for Human Rights also has stressed the importance of an active civic space that includes CSOs to achieving development and human rights progress. In a 2020 Guidance Note, the OHCHR recognizes that an open civic space yields a “variety of voices; options tailored to needs; candid feedback; better responses; stronger buy-in; more sustainable peace; better development outcomes; and more resilient societies.”\textsuperscript{28}

As such, “[c]ivil society was at the core of the development of the Sustainable Development Goals and should be at the center [sic] of implementation, follow-up and review processes.”\textsuperscript{29} But the UN High Commissioner went further, stressing that there must be an enabling environment for civil society: “At the same time, simply engaging with civil society is not enough. Given the centrality of civic space to the ability of the United Nations to achieve its objectives, the United Nations system has an important role to play in both the protection of civil society actors and the promotion of civic space.”\textsuperscript{30}

Addressing CSOs specifically, the UN High Commissioner cited steps that can be taken to ensure meaningful civil society engagement with international organizations like the United Nations, including:

1. Fair rules on access to information and participation modalities.
2. Transparent and fair accreditation and registration processes.
3. Diversity of civil society, including underrepresented populations.
5. Mechanisms through which civil society can contest restrictions.\textsuperscript{31}

\textsuperscript{29} Id. at 4.
\textsuperscript{30} Id. at 5 (emphasis in original).
\textsuperscript{31} Id. at 8. Indeed, the High Commissioner stressed “protecting those at risk is a precondition for a vibrant civic space.” Id.
With this background, the 2018 Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (the Escazu Agreement) provides powerful proof for why CSOs are crucial to achieving SDG and ESG objectives.\(^\text{32}\) The Escazu Agreement applies to environmental matters (both public and private) in 24 Latin American and Caribbean states. Its mandate is to make environmental matters more transparent, more open to public participation, and more likely to afford access to justice for communities affected by projects that affect the environment.\(^\text{33}\) The treaty requires each state party to “guarantee the right of every person to live in a healthy environment and any other universally-recognized human rights related to the [Escazu Agreement],” thereby applying to any person complying with national environmental laws and regulations, whether public or private.\(^\text{34}\)

The impetus for the Escazu Agreement was the 1992 Rio Declaration. Specifically, Principle 10 concerns public access to and participation in matters concerning the environment and communities, and Principle 22 recognizes that Indigenous people and their communities play a vital role in environmental management and development, and that states should enable those people and communities to participate in achieving sustainable development.\(^\text{35}\)

The Escazu Agreement was so “ground-breaking” that the UN Secretary General hailed it as “a historic achievement.”\(^\text{36}\) Although a milestone, it is important to understand that the Escazu Agreement built on a strong foundation of international legal precedent relating to environmental rights, and the importance of civil society and civil society protection for the realization of human and environmental rights.

For example, the 1998 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the Aarhus Convention) began developing what participation, information access and access to


\(^{\text{33}}\) The signatories are Antigua and Barbuda, Argentina, Bahamas, Barbados, Belize, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Suriname, Trinidad and Tobago, Uruguay and Venezuela. The treaty took effect upon the eleventh country ratifying the agreement. See Arts. 21-22 & Annex 1.

\(^{\text{34}}\) Escazu Agreement, Art. 4(1). “Universally-recognized” human rights relating to the environment arguably call into play widely ratified international agreements relating to biodiversity, biomass preservation, the rights of indigenous peoples, and social, political and economic rights relating to the environment.


justice means in environmental matters. The Convention also recognized the importance of protecting CSOs and rights defenders, stating that those exercising their right to participate “shall not be penalized, persecuted or harassed in any way for their involvement.”

The Aarhus Convention recognized that CSOs “have an important role to play in contributing to making the public more aware of questions relating to all human rights and fundamental freedoms.” CSOs also are recognized as playing a role in “safeguarding democracy, promoting human rights and fundamental freedoms and contributing to the promotion and advancement of democratic societies, institutions and processes.” Subsequently, the 1999 U.N. General Assembly Resolution on Human Rights Defenders, expressly recognized the importance of CSOs and CSO enabling environments. The resolution provides that states “shall take all necessary measures” to protect anyone, including CSOs and their personnel from “any violence, threats, retaliation, de facto or de jure adverse discrimination, pressure or any other arbitrary action as a consequence” of their exercising their rights of participation. The Aarhus Convention and UN Resolution on Human Rights Defenders set the stage for the Escazu Agreement to delineate further the role for CSOs in the process of realizing environmental rights to information, participation and access to justice.

The Escazu Agreement defines “access rights” to include “the right of access to environmental information, the right of public participation in the environmental decision-making process and the right to access to justice in environmental matters.” The “public” expressly includes CSOs—i.e., “one or more natural or legal persons and the associations, organizations or groups established by those persons, that are nationals or that are subject to the national jurisdiction of the State Party.” Moreover, as to CSOs, the treaty expressly provides that each state party “shall guarantee an enabling environment for the work of persons, associations, organizations and groups that promote environmental protection, by recognizing and protecting them.”

---

38 Aarhus Convention, Art. 3.8.
39 Aarhus Convention, Art. 16.
40 Aarhus Convention, Art. 18.
42 Id., Art. 12.
43 Escazu Agreement, Art. 2(a).
44 Escazu Agreement, Art. 2(d).
45 Escazu Agreement, Art. 4(6) (emphasis added).
Underscoring the importance of CSOs, the agreement also recognizes that some communities will face challenges in benefiting from the treaty. “Vulnerable” persons are “those persons or groups that face particular difficulties in fully exercising the access rights recognized in the [treaty], because of circumstances or conditions identified within each [State] Party’s national context.” States are required to “facilitate access by persons or groups in vulnerable situations to information that particularly affects them.”

To ensure better transparency, public participation and access to justice, including for vulnerable communities, the Escazu Agreement then takes the unprecedented step of expressly acknowledging the importance of active CSO engagement by mandating that state parties guarantee the safety of CSOs and their personnel. Thus, in addition to providing an enabling environment, states “shall guarantee a safe and enabling environment for persons, groups and organizations that promote and defend human rights in environmental matters, so that they are able to act free from threat, restriction and insecurity.” With respect to attacks on CSOs, the treaty mandates that states

> shall take adequate and effective measures to recognize, protect and promote all the rights of human rights defenders in environmental matters, including their right to life, personal integrity, freedom of opinion and expression, peaceful assembly and association, free movement, as well as their ability to exercise their access rights . . . .

Moreover, each state “shall also take appropriate, effective and timely measures to prevent, investigate and punish attacks, threats or intimidation that human rights defenders in environmental matters may suffer while exercising the rights set out in the [treaty].”

The strong connection between the Escazu Agreement and the environmental and social objectives of the SDGs and ESGs, suggest an evolving international legal consensus that CSOs and a CSO enabling environment serve a distinct and important role in achieving these objectives. State restrictions on CSOs will undermine and stymie implementation of agreements like the Escazu Agreement and Aarhus Convention. As effectively recognized by both treaties, CSOs are important in combating processes of impunity that drive corruption, reduce democratic rights and access to justice, and feed the spectrum of social and human rights violations that flow from state systems in which impunity is the norm.

---

46 Escazu Agreement, Art. 2(e).
47 Escazu Agreement, Art. 6(6).
48 Escazu Agreement, Art. 9(1).
49 Escazu Agreement, Art. 9(2).
50 Escazu Agreement, Art. 9(3).
51 “Impunity” is the impossibility, de jure or de facto, of bringing perpetrators (who are not limited to state actors) of human rights violations to account—whether in criminal, civil, administrative or disciplinary proceedings—since they are
Given that business and CSO-enabling environments are both recognized as important to achieving important societal and economic goals, there again appears to be no valid rationale for assessing more complex or difficult restrictions on CSO formation, funding and operation differently than restrictions on business formation, funding and operation. Indeed, based on the role that CSOs play in furthering the economic benefits flowing from SDGs and ESGs, CSO enabling environments (CSO-EE) should be measured—and ranked—in the same ways that the World Bank measures Doing Business standards or, now, the Business Enabling Environment (BEE) of all nations.52

**Existing Methods for Assessing CSO Enabling Environments**

Traditional measures of the quality of democracy and civil society tend to lump together data relating to civil society generally, and data relating to how CSOs organize, fund themselves and operate. For example, data on freedom of speech and press, on civil and political rights, on the training of police and security forces, on peaceful assembly, on regulation of digital rights and the media, generally is combined with data on freedom of association that often contains CSO-specific data.

Based on extensive work by USAID, there are data sets focusing on different aspects of CSO enabling environments. This data focus on an array of legal, economic, political, social and cultural factors. The USAID Civil Society Organizations Sustainability Index (CSOSI) assigns qualitative scores across seven factors (as of 2017, 84 countries were analyzed), but does not compare or rank states. The factors are:

- **Legal Environment**: Does the legal and regulatory environment facilitate CSO formation, limit government interference and allow for ongoing business activities, and provide CSOs with the legal basis to engage in fundraising income-producing activities?

---

52 See World Bank, Pre-Concept Note, Business Enabling Environment (BEE), 9 (Feb. 2022); http://worldbank.org/content/dam/doingBusiness/pdf/BEE-Pre-Concept-Note---Feb-8-2022.pdf (collecting sources including as to the Doing Business Archive).
• Organizational Capacity: Are CSOs transparently governed and publicly accountable; are they capably managed; and do they have the technical resources to do their work?
• Financial Viability: Can CSOs engage in self-financing and generate donations from foreign and local sources?
• Advocacy: Can CSOs access the public and the government; can CSOs monitor government activities and accountability, and influence public policy (presumably, without harassment, threats or violence—although this is not specified)?
• Service Provision: Can CSOs provide services to the constituencies they serve, and can they recover any of their costs for services provided from government?
• Infrastructure: Are there local resources for informing, training and advising CSOs and assisting them in building networks?
• Public Image: Do CSOs have public awareness and credibility, can they recruit local volunteers and donors, will government officials engage with CSOs, and are CSOs subject to fair media coverage?53

The CIVICUS Enabling Environment Index is a global composite index that gathers qualitative data on the capacity of citizens to participate in civil society based on assessments of freedom of speech, expression and association. Data are analyzed to assess whether a given factor has gotten better or worse over a reporting period. Although the CIVICUS methodology includes data on threats and violence directed against CSOs and CSO defenders, it lumps legal and regulatory issues (e.g., the risk of CSO deregistration) into the overall freedom of association assessment.54

The Hudson Institute Philanthropic Freedom Index uses local experts to analyze legal barriers to philanthropy across a group of countries. The index analyzes qualitative assessments of seven factors as to each country:

• To what extent can individuals form and incorporate CSOs?
• To what extent are CSOs free to operate without excessive government interference?
• To what extent is there government discretion in shutting down CSOs?
• To what extent is the tax system favorable to making charitable donations?

To what extent is the tax system favorable to CSOs receiving charitable donations?

To what extent is the legal regulatory environment favorable to receiving cross-border donations? (It is unclear whether this would include cross-border capitalization, as opposed to donations.)

To what extent is the legal regulatory environment favorable to sending cross-border donations? (It is unclear whether this would include cross-border capitalization, as opposed to donations.)

The Hudson Institute index does not appear to have been updated since 2015.

Significantly, many of the CSO-specific principles in these three indices then are incorporated into the more recent Tool Kit for the Monitoring Matrix on Enabling Environment for Civil Society Development. The Monitoring Matrix was developed by USAID with various CSOs, including the International Center for Not-for-Profit Law and European Center for Not-for-Profit Law. The matrix has three broad areas, (i) basic legal guarantees of freedoms; (ii) framework for CSOs' financial viability and sustainability; and (iii) government-CSO relationship. Sub-areas then collect data on a broad range of CSO-specific legal and regulatory factors. The matrix is significant because it consolidates CSO-specific factors and separates them from broader freedom of speech, media and association measurements. The matrix also seeks data on attacks on CSOs and CSO personnel, and in a few categories asks whether legal requirements applied to CSOs are equivalent to those imposed on commercial enterprises.

Finally, Transparency International is collecting granular CSO data that appears to parallel data they and the World Bank collect on commercial entities, but they do not segregate this data into separate categories that focus on the parallels between CSOs and commercial enterprises. It is unclear when and how Transparency International will publish this data.

---

57 For example, Transparency International’s (TI) corruption index contains six sub-categories of CSO-specific data. See TI, National Integrity System Indicators and Foundations – Annex 3, Civil Society Pillar, Indicators 12.1.1, 12.1.2, 12.1.3, 12.1.4 (as to verbal and physical intimidation and attacks), 12.3.1 and 12.3.2, available at www.transparency.org. TI collects more granular data for businesses in the context of its corruption index, which data goes deeper into transparency and anti-corruption compliance—categories that could apply to CSOs. Compare id. with id. at Indicators 13.1.1-4, 13.2.1, 13.2.2, 13.2.4-6. None of the CSO data categories are like Indicators 13.1.3-.4 or 13.2.1. In addition, TI is building a project relating to business integrity. The Business Integrity Country Agenda (BICA) “seeks to create a body of evidence on business integrity in a given country…. BICAs will assess the status of key factors in a given
Operationalizing CSO-EE Engagement

As shown above, methodologies exist to operationalize a CSO-EE index and ranking system. Effectively addressing the degradation of CSO space would have two components:

1. Operationalizing a CSO-EE Index and Ranking System:
   - The Monitoring Matrix represents the most current set of principles for assessing CSO-EE, and appears to do the best job at separating CSO-EE data from civil society data broadly relating to freedom of speech, expression and association.
   - The CSO-EE index must include data on attacks directed at CSOs and killings of CSO defenders (data various CSOs already gather). This data also must include the extent to which physical attacks do or do not result in investigations or arrests/prosecutions.
   - Monitoring Matrix factors should be compared to BEE categories used by the World Bank and Transparency International to ensure that there will be as much comparability as possible between BEE and CSO-EE.
   - The goal of the CSO-EE index should be to rank states on some basis, as is done by Transparency International. Rankings have proven effective because banks and rating agencies use them to compare countries and regions with respect to business and corruption risks.

2. Convene meetings and engage with key actors on using a CSO-EE Index:
   - Ask the World Bank, Regional Development Banks, and Rating Agencies to deploy CSO-EE standards as an independent and important factor in sovereign risk and debt ratings. This will make it more likely that sovereigns face questioning on their CSO-EE.
   - Ask companies to publicly pledge to factor CSO-EE into their investment and ESG decisions. Companies also should be asked to publicly pledge to monitor and factor into their decision-making verbal and physical attacks on CSOs and CSO personnel, and whether attacks resulted in prosecutions.

---

country that enable the private sector to act with integrity and accountability…. [TI] envisions that the BICA will become an important reference point for preventing, detecting and responding to corruption in business practices within countries and around the globe.” See Ti, Business Integrity Country Agenda (BICA), Conceptual Framework for BICA Assessment, Suppl. #2: Indicators for Private Sector Assessment, available at www.transparency.org. BICA is significant because it is readily adaptable to CSOs, and would respond to the perceived need by nations that restrict CSO space to apply special alleged anti-corruption and anti-terrorism requirements to CSOs and not businesses.
• Ask Rating Agencies assessing ESG disclosure and claims to commit to questioning companies on steps being taken to enhance CSO-EE where they operate, including with respect to lobbying and government relations activities. Rating Agencies also should be asking companies how CSO-EE factors into their community engagement activities. Companies should be asked whether they advocate for CSO-EE to be no more restrictive than BEE and whether they discuss with government officials threats and violence against CSOs, including the number of unresolved attacks.

• Training should be provided to companies, Rating Agencies, and CSOs on the CSO-EE advantages of board-level advisory committees that include CSOs, and on including CSOs in industry associations and conferences.

Implementing these steps would make it easier for CSOs to do business and find funding, while creating financial and business pressure on governments to reduce CSO restrictions. By making CSO-EE more robust, it would become more likely that governments and companies would engage with CSOs, and that meaningful community engagement could occur across SDG and ESG issues.