

Observations Report for 2018

**Cowater
Sogema**

Global Validator for the 2018 EITI Validations

CowaterSogema International Inc.



INTRODUCTION

CowaterSogema was contracted on 12 May 2018 to be the independent validator for EITI in fifteen countries: Afghanistan, Chad, Colombia, Democratic Republic of the Congo, Ethiopia, Guatemala, Guinea, Indonesia, Malawi, Myanmar, Papua New Guinea, Seychelles, Sierra Leone, Trinidad and Tobago and the UK. In accordance with EITI Board decisions, Afghanistan's Validation was delayed to 2019 (<https://eiti.org/BD/2017-43>) and Germany's Validation was moved forward (<https://eiti.org/BD/2018-47>). In addition, Guatemala's Validation has been ongoing since 1 April 2018. The eruption of Guatemala's Volcán de Fuego on 3 June delayed a Validation mission, which was one of the causes of the delay to the data collection work..

For each country, CowaterSogema first responded to the initial assessment with any initial queries to the file. Once clarification from the International Secretariat was received, CowaterSogema prepared the draft validation report and commented on the initial assessment, using the guidance provided in the Validation Guide in each case. The final validation report was prepared after considering feedback from the country MSG, with a response to the MSG's comments being prepared alongside the final report.

In addition to the country assessments, the contract also requires a final report which provides a review of the process, assesses the level of effort required, outlines the main areas of disagreement and provides recommendations for an updated validation guide. What follows below is intended as constructive criticism aimed to strengthen the validation process.

1 PROCESS REVIEW

1.1 There is a potential conflict of interest at the International Secretariat regarding the validation process: the person writing (or leading on) the initial validation report and gathering the data are the secretariat members who are also providing implementation support. They should ideally be separated so that the assessment is prepared from a neutral perspective. However, the Validator did not encounter any evidence that the initial assessments for 2018 were affected by this potential conflict of interest. In addition, the Validator is mindful of the cost implications of this suggestion: setting up a separate Validation Unit within the International Secretariat with sufficient language competency.

1.2 It is important for the International Secretariat to keep the appointed validators in the loop when new information is issued. In the case of Germany, it appears that the final report assessment of four requirements with meaningful progress was reviewed and those requirements upgraded to satisfactory by the validation committee (thus Germany became compliant) based on data published after both the initial assessment and the final validation report. It would also be helpful if the International Secretariat provided updates on the suspension and de-suspension of countries, to enable better resource planning.

1.3 New information may include EITI Board decisions. The Validator only discovered the board decision regarding criteria to consider developments and information disclosed after the commencement of validation¹ (dated 27th February 2019) via an episodic in-depth search of the EITI website. This board decision appears to introduce discretionary decision making into the validation process, beyond the review powers of the independent validator. As in the case of Germany, the independent validator may not be involved in the assessment of the additional information. Even though the Board Decision 2019-15/BM-42 requires the new information to be specific and verifiable, it means that some data relevant to the validation process does not go through the same independent assessment process.

¹ <https://eiti.org/BD/2019-15>

For full transparency, there is therefore a need to publicly document when the Board exercises discretionary decision making regarding Board Decision 2019-15/BM-42 so that all stakeholders understand any deviations between the final Validation Report and the Board decision, including the Validator.

1.4 There needs to be more guidance on what constitutes a policy on contract transparency. 2.4b refers to requiring the government's policy on the disclosure of contracts and licences to be included in legal provisions. There is a wide variance of interpretations available here – countries which publish contracts but have no discernible policy; countries where there are explicit legal constraints on contract disclosure being counted as a “policy” etc. Are legal provisions (either positively or negative) on the disclosure of contracts sufficient for a satisfactory finding on contract transparency?

1.5 There should be more clarity regarding supplementary material over and beyond the initial assessment prepared by the International Secretariat. For example, for certain countries, there were submissions from civil society regarding constraints on activity that lie outside engaging with the EITI process. There was no requirement for the validators to review or query this additional material or re-consider requirements 1.3 and 1.4 in light of it. In the case of Myanmar, the submission regarding civil society constraints outside of the EITI process from MATA was read but not assessed or spot-checked. It is recommended that the guidance be that the Validator *must* consider all information, but only must respond to the MSG feedback.

1.6 There should be examples of and better guidance in the Validation Guide in terms of what “going beyond” the satisfactory requirement entails, specified for each requirement.

1.7 Reference to assessing “systematic disclosures” has crept into some of the more recent initial assessments. There should be a specific update of the validation guide on this.

1.8 There should be an independent assessment of the validation process that considers these process issues, the findings of this report and gathers stakeholder assessment to further strengthen the validation process.

1.9 The guidance for validators on company engagement in relation to requirement 1.2 could be improved. Although evaluating the governing environment is reasonably clear, it was not always so easy to evaluate industry engagement. Specifically, guidance on situations where there are one or two very highly engaged companies but a wide pool of completely disengaged companies would be helpful. Some guidance on the relative importance of government ensuring a lack of barriers to industry involvement and actual commitment on behalf of industry would also help.

2 LEVEL OF EFFORT

2.1 The CowaterSogema team were satisfied with the level of effort required per country. Two team members were assigned to each file, dividing up the requirements so that requirements 1-3 and 7 are allotted to one consultant and 4-6 to the other (a financial specialist). The two consultants used four days of level of effort, 2.5 for the lead consultant and 1.5 days for the second consultant. While this resourcing is generally sufficient, it does restrict resource available for detailed follow-up or spot checking on specific requirements.

3. PROPOSED CHANGES TO THE EITI STANDARD

Civil Society

3.1 Civil Society is not defined in the EITI Standard (either in the main requirements section in requirement 1.3 or in the Civil Society Protocol). This is problematic because it is important that different forms of civil society find representation on the MSG, or at least have their voice and concerns communicated via the MSG. A definition of civil society would at least mark these issues, if not provide any substantive compliance requirements. A definition should include international NGOs, national-level NGOs, community-based groups as well as other sub-sectors of civil society: academia, the media, unions, religious groups as well as trade/professional groups.

3.2 There is a narrow definition of civic space in the civil society protocol – that only when civic space constrains engagement in the EITI-process is it relevant – that is problematic. This means that other civil society constraints in the extractive sector (outside the EITI process) cannot be considered by the validator. This inadvertently reinforces a power imbalance between often marginalised community-based organisations campaigning in areas effected by extractive operations and INGOs and NGOs based in capital cities. The EITI Board should consider broadening the definition of civic space to go beyond constraints to participating in the EITI process to the extractives sector as a whole.

3.3 There is currently no requirement for assessing how well CSO MSG members communicate with the broader CSO constituency. Requirement 1.4biii simply states that, “Members of the multi-stakeholder group should liaise with their constituency groups.”^[SEP] The Validation Guide provides no specific guidance here – and refers to the Civil Society Protocol. Again, there is no specific guidance on constituency liaison in the protocol.

This lack of specific guidance may inadvertently reinforce centre-periphery power dynamics and favour highly capacitated INGOs and national-level NGOs over community-based organisations.

Data Period

3.4 Related to 1.3 above, it is important to specify which data beyond/after the commencement of validation is being considered as part of the validation process. In addition, if the most recent EITI report is being considered alongside other information released post that report and pre validation commencement, it is important to specify in the initial assessment what that additional information is and why it is considered material and subject to review and assessment. At the moment, initial assessment reports do not always explicitly reference the evidentiary material under consideration.

Legal Framework and Fiscal Regime

3.5 In terms of requirement 2.1, there should be more substantive requirements for the description of the legal and fiscal regime. As examples:

- a) A requirement that EITI Reports include a calculation of the overall effective tax rate demanded by the fiscal regime (disaggregated by mineral type if required).
- b) That the analysis of the legal framework goes beyond sectoral laws to consider contextually significant legislation such as freedom of information, civil society regulation, beneficial ownership and transfer pricing rules – to provide just four examples.
- c) The description of the fiscal regime should also specifically set out company-specific exemptions which differ from standard practice (i.e. fiscal terms in contracts which deviate from the fiscal regime).

Production and Export Data

3.6 Requirement 3.1 is vague. The requirement to provide “an overview of the extractive industries” should be better specified, to for example require that total proven reserves in volume and value should be provided, presented in aggregated and also disaggregated by mineral type.

3.7 Requirement 3.2 and 3.3. The methodology for calculating values for both production volumes and export volumes should be disclosed. At the moment, this is an optional requirement. Given that production data may often simply be disclosed by the company (and not subject to independent verification by the relevant government agency), this is an area where the EITI Standard and Validation Guide needed to be tightened and the bar raised.

Contract Transparency

3.8 As noted in point 1.4 above, requirement 2.4b is slightly out of line with precedent – pointing to legal provisions is insufficient. This needs to be clarified in the updated EITI Standard and Validation Guide. It is also important to stress that contract transparency also includes *licence* transparency – in the case of countries where contracts are rare or non-existent. In other words, in such jurisdictions, there needs to be an explicit/standalone policy on licence transparency.

Public Debate

3.9 The current precedent is that a country can publish EITI reports, ensure the reports are in open data format and are clearly written and comprehensible and not, according to stakeholders, lead to any significant public debate and yet be compliant with this requirement. The Validator suggests that the bar for this requirement is currently set too low, that EITI Reports must genuinely and substantively stimulate public debate and that the requirement shifts from being output-based to outcome based. Measuring the outcome could be in terms of an assessment of national and local media representation, for example.

Discrepancies and Recommendations

3.10 The EITI Standard currently focuses on a narrow version of acting on lessons learnt. There should be more of a focus on EITI supporting reform efforts and national priorities in this requirement, linking back to requirement 1.5.

Outcomes and Impact

3.11 There is frequent messaging across the Initial Assessments for 2018 to link EITI outputs to national priorities and reforms. However, Requirement 7.4 is weak in its demands to do so. 7.4 could be more strongly linked to 1.5a and the need to reflect national priorities. In its turn, requirement 1.5 mentions the work plan reflecting national priorities, but does not explicitly mention the work plan being aligned with a reform agenda. There could do with being explicit reference to national reforms as well as national priorities across requirements 1.5 and 7.4.

3.12 A general limitation of the current version of the EITI standard (which may be remedied in the 2019 version) is not identifying opportunities for better government use of EITI data (for example, linkages with enhanced public financial management of the extractive sector, as well as linkages with anti-corruption functions), as well as a more inclusive approach to the role of horizontal accountability actors (such as parliamentary committees, audit functions, ombudsmen agencies and the like).