

Validation Committee Paper 79-3

Submitted by: EITI International Secretariat on: 16 May 2019

Validation of Myanmar

For decision

For discussion

For information

The International Secretariat recommends that the Validation Committee recommends:

1. That the EITI Board agrees that Myanmar has made *meaningful progress* in implementing the 2016 EITI Standard. Noting dissenting views within the Committee on the assessment of “satisfactory progress” on Requirement 1.3 related to civil society engagement, the Validation Committee recommends that adherence to the Civil Society Protocol is reassessed in Myanmar’s second Validation. In accordance with requirement 8.3.c, Myanmar will be requested to undertake corrective actions before the second Validation on *<date of Board decision + 12 months>*.
2. That the Board undertakes a review of the Validation of Requirement 1.3 in all cases to date, and considers opportunities to clarify the Validation of the Civil Society Protocol as part of its elaboration of revisions to the Validation Guide and procedures after the Board’s 43rd Meeting in Paris.

Supporting documentation

Initial assessment by the International Secretariat [[English](#) | [Burmese](#)].

Draft Validation report [[English](#) | [Burmese](#) | [French](#)].

Comments on the draft Validation Report by the MSG [[English](#)].

Validation report [[English](#) | [Burmese](#) | [French](#)]

Letter from MATA [[English](#)]

Has the EITI competence for any proposed actions been considered?

The Articles of Association mandate the Board to classify implementing countries as candidate countries or compliant countries (Article 5(2)(i)(a)). The EITI Standard ([Requirement 8.3](#)) addresses [EITI Validation deadlines and the consequences](#) following Validation.

Financial implications of any actions

The recommendation implies a second Validation commencing in mid 2020. The cost of second Validations varies depending on the complexity of the extractive industries and the number of corrective actions. In this case, a second Validation is expected to cost circa 25 000 USD, including staff time and travel (if needed).

Document history

Draft Board Paper <i>for discussion</i> reviewed by the Validation Committee	6 February 2019
Validation Committee agreement on a Board Paper <i>for discussion</i>	7 February 2019
Draft Board Paper <i>for decision</i> reviewed by the Validation Committee	27 February 2019
Draft Board Paper <i>for decision</i> reviewed by the Validation Committee	4 April 2019
Draft Board Paper for decision reviewed by the Validation Committee	10 April 2019
Draft Board Paper for decision reviewed by the Validation Committee	25 April 2019
Draft Board Paper for decision reviewed by the Validation Committee	23 May 2019
Validation Committee agreement on a Board Paper <i>for decision</i>	[TBC]

VALIDATION OF MYANMAR

Table of Contents

Proposed Board decision on the Validation of Myanmar	3
Background	4
Assessment card.....	9
Corrective actions.....	10

Proposed Board decision on the Validation of Myanmar

While there were different views on the Validation Committee regarding the assessment of requirement 1.3, the Validation Committee recommends that the EITI Board takes the following decision:

Following the conclusion of Myanmar's Validation of 2018, the EITI Board concludes that Myanmar has made meaningful progress overall in implementing the EITI Standard.

The Board commends Myanmar for its impactful EITI implementation, evident in the progress in introducing policy reforms, improving transparency in extractives data, stimulating robust public debates and creating a platform for dialogue among stakeholders. The Board acknowledges the EITI's centrality in the government's reform agenda, particularly related to public finance management and the gemstone sector. It also recognised the MSG's accomplishments in ensuring effective multi-stakeholder oversight of EITI implementation and aligning EITI objectives with national priorities. The Board congratulates Myanmar for the unprecedented disclosures of extractives data in a country with a nascent democratic process and recent history of economic liberalisation.

The Board nonetheless encourages Myanmar to further improve public disclosures, particularly related to license management, gemstone production data and state-owned enterprises (SOEs), while strengthening the comprehensiveness of its EITI reporting. These improvements could help Myanmar ensure that this growing transparency translates into greater accountability in the governance of its extractive industries, key to its broader economic development.

*Taking into account the complexity of the extractive sector in the country and the good faith efforts undertaken by Myanmar to meet requirements of the EITI Standard, the Board has determined that Myanmar will have 12 months, i.e. until **<date of Board decision + 12 months>** before a second Validation to carry out corrective actions regarding requirements relating to industry engagement (#1.2), license allocations (#2.2), license register (#2.3), state participation (#2.6), production data (#3.2), export data (#3.3), in-kind revenues (#4.2), SOE transactions (#4.5), distribution of revenues (#5.1), mandatory social expenditures (#6.1), and quasi-fiscal expenditures (#6.2). Noting concerns regarding broader constraints on civil society's freedoms of expression and of operation, the Board agreed to reassess adherence to the civil society protocol during Myanmar's second Validation.*

Failure to achieve meaningful progress with considerable improvements across several individual requirements in the second Validation will result in suspension in accordance with the EITI Standard. Pursuant to the EITI Standard, Myanmar's MSG may request an extension of this timeframe, or request that Validation commences earlier than scheduled. The Board's decision followed a Validation that commenced on 1 July 2018. In accordance with the 2016 EITI Standard, an initial assessment was undertaken by the International Secretariat. The findings were reviewed by an Independent Validator, who submitted a draft Validation report to the MSG for comment. The MSG's comments on the report were taken into consideration by the independent Validator in finalising the Validation report and the independent Validator responded to the MSG's comments. The final decision was taken by the EITI Board.

Furthermore, the Validation Committee recommends that the EITI Board agrees to undertake a review of the Validation of Requirement 1.3 in all cases to date, and considers opportunities to clarify the Validation of the Civil Society Protocol as part of its elaboration of revisions to the Validation Guide and procedures after the Board's 43rd Meeting in Paris.

Background

The Government of Myanmar committed to implement the EITI in 2012 and was accepted as an EITI Candidate in July 2014. The Validation process commenced on 1 July 2018. In accordance with the Validation procedures, an initial assessment [[English](#) | [Burmese](#)] was prepared by the International Secretariat and a draft Validation report was prepared by the Independent Validator [[English](#) | [Burmese](#) | [French](#)]. Comments from the MSG [[English](#)] were received on 12 February 2019. The Independent Validator reviewed the comments and responded to the MSG, before finalising the Validation report [[English](#) | [Burmese](#) | [French](#)].

Independent Validator review of documentation: The initial assessment [[English](#) | [Burmese](#)] was submitted to the independent Validator for review on 10 December 2018. The Validator submitted a draft Validation report [[English](#) | [Burmese](#) | [French](#)] on 24 December 2018. Comments from the MSG [[English](#)], including comments and separate annexes [[English](#)] from the Myanmar Alliance for Transparency and Accountability (MATA), were submitted to the independent Validator on 14 February 2019. The independent Validator reviewed these documents, responded to the MSG [[English](#) | [Burmese](#)] and completed the final Validation report [[English](#) | [Burmese](#) | [French](#)] by 19 February 2019. On 4 April, the MATA coalition sent a letter [[English](#)] to the Validation Committee, which provided additional detail to the MATA comments included in the MSG's response to the draft Validation report. This letter was not reviewed by the independent Validator, as it was addressed to the Validation Committee subsequent to the completion of the independent Validator's work.

Validation Committee review: The Validation Committee reviewed the case on 6 February, 7 February, 27 February, 4 April, 10 April, 25 April and 23 May 2019. On 27 February, the Validation Committee mandated the International Secretariat to provide additional background information on allegations of restrictions on civil society space in relation to EITI implementation at the subnational level, highlighted in the MSG's comments on the draft Validation report and initial assessment. On 4 April, the MATA coalition sent a letter to the Validation Committee reiterating its position that civil society in Myanmar faces challenges regarding its engagement in the EITI process. At its 25 April teleconference, the Validation Committee mandated the International Secretariat to provide further updates on the documentation reviewed by the independent

Validator and details of the allegations in MATA's letter.

The Validation Guide requires the International Secretariat, the Validator and the Board to assess adherence to the provisions of the Civil Society Protocol in relation to the EITI process and implementation. In assessing these provisions, the Board has been careful to make a distinction between activities related to the EITI process and those that are conducted beyond the scope of EITI implementation. In Kazakhstan, for example, the Board decided that Requirement 1.3 should be assessed as "satisfactory progress" despite stakeholder views that there was some self-censorship in the broader civil society. The Board noted that civil society organisations were engaged fully, actively and effectively in all aspects of EITI implementation. In evaluating provision 2.5 of the Civil Society Protocol, the Board considered that the initial assessment and Validation report showed that civil society had sufficient access to opportunities and forums for engaging in public decision-making around the extractive sector and related to the environment for civil society. The Validation of the Philippines is similar in that Requirement 1.3 was assessed as "satisfactory progress" despite documented killings of anti-mining activists in Southern Mindanao, based on its assessment that the civil society constituency was able to contribute to public debate and influence public decision-making, despite these incidents.

In the case of Myanmar, civil society representatives from the MATA coalition, who are members of the MSG, alleged constraints in civil society's freedom of expression and freedom of operation.

Freedom of expression: The 4 April letter from MATA highlighted two instances of alleged constraints on freedom of expression:

1. That on one occasion, the papers of a MATA member about a coal electric power station were seized by government authorities on the grounds of illegal publication. The documents were entitled "Burning the green future" and "Basic knowledge related with coal power station." In support of this allegation, MATA submitted a notarized affidavit explaining the facts of the case. There is no indication that the MATA member's public advocacy was related to disseminating findings of EITI Reports or other EITI-related outreach activities.
2. That the townships of Hpa-An and Loikaw have issued regulations requiring NGOs to secure prior approval from the state before conducting public activities. Copies of these regulations were submitted to the Validator by MATA. There is no indication that these regulations have been invoked to refuse authorisation for EITI-related outreach and dissemination activities in the townships of Hpa-An and Loikaw.

Freedom of operation: The 4 April letter from MATA alleged the following: the existence of regulations that require civil society to secure prior approval from government before conducting a public meeting; the alleged "crack down" by government on peaceful demonstrations conducted by civil society to object to the operations of the coal powered company, Section 66 (d) of the 2013 Telecommunications law which penalises defamatory statements made through a telecommunications network, and cases filed under the Peaceful Assembly Law. In addition, MATA cited pending litigation cases against civil society representatives for opposing a coal power plant and a copper mine. It is worth noting that most of these allegations by MATA refer to incidents that have previously been considered in the initial assessment and in the Validator's report.

The Validation Committee reviewed the International Secretariat's update on the incidents related to civil

society engagement at its 25 April 2019 teleconference. Views of Validation Committee members on the assessment of Requirement 1.3 were split. Civil society members of the Committee considered that restrictions on civic space should be viewed in the wider context, noting concerns over broader challenges of fear of reprisal and self-censorship on expression and alleged constraints on civic space at the subnational level. They further argued that the mere existence of laws criminalizing certain types of speech supports their position that there are breaches of the CSO protocol. They also noted that the case of Myanmar was different from previous assessments of Requirement 1.3, given that automatic suspension had since been removed as a consequence of assessments of Requirement 1.3 as “meaningful progress” in line with the Board’s interpretation of the application of Requirement 8.3.c.i.

Other Validation Committee members considered that the evidence presented in MATA’s letter did not relate to restrictions on civil society freedoms in relation to EITI activities and considered that the final Validation report’s assessment of Requirement 1.3 as “satisfactory progress” should be maintained. The International Secretariat clarified that the Board’s decision on the interpretation of the [application of Requirement 8.3.c.i](#) did not include changing the evidence required to achieve satisfactory progress, but related rather to the consequences of assessments of less than “satisfactory progress”.

The International Secretariat presented precedents on Requirement 1.3 to illustrate the Board’s consistent interpretation of breaches of the Civil Society Protocol as relating only to EITI activities:

Freedom of expression: A number of previous Board Decisions on Validation set precedents for assessing freedom of expression in relation to EITI implementation in the case of Myanmar:

- In Mongolia, Validation highlighted stakeholder concerns over the use of the Criminal Code’s provisions on defamation, which criminalises defamation even in cases where a statement is true. However, Validation concluded an assessment of “satisfactory progress” on Requirement 1.3 given that stakeholders did not highlight specific cases of the use of defamation prosecutions in cases related to the EITI.
- In the Philippines, Validation noted that the revised Penal Code and the 2012 Cybercrime Prevention Act criminalises libel. However, Validation concluded an assessment of “satisfactory progress” on Requirement 1.3 given the lack of evidence of libel cases related to EITI activities.
- In Kazakhstan, Validation concluded on an assessment of Requirement 1.3 as “satisfactory progress”. Despite evidence of broader censorship and self-censorship, Validation found no evidence of censorship or self-censorship in relation to civil society’s engagement in EITI implementation. While noting a regressive trend in civil society’s freedom of operation more generally, and concerns regarding legal amendments resulting in bureaucratic reporting requirements for NGOs, Validation considered that there was no evidence that these laws had restricted civil society organisations’ engagement in the EITI.
- In Azerbaijan, Validation concluded that civil society had freedom of expression in relation to EITI issues despite broader challenges of fear of reprisal and self-censorship on expression related to non-EITI-related issues. Validation’s assessment of “meaningful progress” on Requirement 1.3 was linked to constraints on freedom of operation (see below) and access to public decision-making.
- In the Republic of Congo, Validation concluded that specific instances of censorship and self-censorship in relation to EITI implementation warranted an assessment of “meaningful progress” on Requirement 1.3.

Freedom of operation: A number of previous Board Decisions on Validation set precedents for assessing freedom of operation in relation to EITI implementation in the case of Myanmar:

- In Cameroon, Validation found evidence of administrative delays in seeking the required advance authorisation for peaceful public protest, although none of these instances related to protests on EITI-related issues. In addition, Validation highlighted the statutory requirement for government approval of foreign funding for civil society organisations, but found that this rule was not implemented in practice. The assessment of Requirement 1.3 was ‘satisfactory progress’ in light of the lack of evidence of restrictions on civil society’s freedom of operations in relation to EITI implementation.
- In the Republic of Congo, Validation noted that a new NGO Law had been approved by Parliament in 2016 (but not yet signed into law by the President at the time of Validation), which included provisions that could be used to restrict civil society organisations’ freedom of operations. However, Validation considered that there had not yet been any instances of such restrictions in the application of this new law.
- In Azerbaijan, Validation found that the 2014 amendments to the NGO law and its implementing regulations in 2015-2016 had directly impacted civil society’s engagement in EITI implementation, noting that several civil society coalition members had seen their applications for registration rejected, hindering fund raising and other activities. Thus, Validation concluded on an assessment of “meaningful progress” on Requirement 1.3 given constraints on civil society’s freedom of operation in relation to EITI implementation.

The International Secretariat’s view is that the constraints on civil society’s freedoms of expression and of operation alleged by MATA are not clearly linked to EITI implementation. While there are well-founded concerns about a decline in broader civic space, the International Secretariat continues to support the Validator’s assessment that there is no evidence of restrictions on civil society’s freedoms of expression, operation, association, engagement or access to decision-making *in relation to EITI implementation*. It should be further noted that MATA, through the EITI process, is able to contribute to discussions on natural resource governance and thus has access to public decision-making, as reflected in its participation in the formulation of the gemstone sector policy and its inputs to recommendations in EITI Reports. Considering the foregoing, the International Secretariat recommends that the Validator’s assessment of “satisfactory progress” on Requirement 1.3 is maintained.

[In light of the above, the Validation Committee agreed to recommend a review of the Validation of Requirement 1.3 in all cases to date, and to consider opportunities to clarify the Validation of the Civil Society Protocol as part of its elaboration of revisions to the Validation Guide and procedures after the Board’s 43rd Meeting in Paris].

[Based on the findings above, the Validation Committee agreed to recommend the assessment card and corrective actions outlined below. Given concerns from civil society, the Validation Committee agreed to reassess adherence to the Civil Society Protocol during Myanmar’s second Validation].

The Committee agreed to recommend an overall assessment of “meaningful progress” in implementing the 2016 EITI Standard. Requirement 8.3.c. of the EITI Standard states that:

- ii. **Overall assessments.** Pursuant to the Validation Process, the EITI Board will make an assessment of overall compliance with all requirements in the EITI Standard.
- ...
- iv. **Meaningful progress.** The country will be considered an EITI candidate and requested to

undertake corrective actions until the second Validation.








The Validation Committee agreed to recommend a period of 12 months to undertake corrective actions. This recommendation takes into account that the challenges identified are significant and seeks to align the Validation deadline with the timetable for Myanmar's 2018 and 2019 EITI Reports.

Assessment card

The Validation Committee recommends the following assessment:

EITI Requirements		LEVEL OF PROGRESS				
		No progress	Inadequate	Meaningful	Satisfactory	Beyond
Categories	Requirements					
MSG oversight	Government engagement (#1.1)					
	Industry engagement (#1.2)					
	Civil society engagement (#1.3)					
	MSG governance (#1.4)					
	Work plan (#1.5)					
Licenses and contracts	Legal framework (#2.1)					
	License allocations (#2.2)					
	License register (#2.3)					
	Policy on contract disclosure (#2.4)					
	Beneficial ownership (#2.5)					
	State participation (#2.6)					
Monitoring production	Exploration data (#3.1)					
	Production data (#3.2)					
	Export data (#3.3)					
Revenue collection	Comprehensiveness (#4.1)					
	In-kind revenues (#4.2)					
	Barter agreements (#4.3)					
	Transportation revenues (#4.4)					
	SOE transactions (#4.5)					
	Direct subnational payments (#4.6)					
	Disaggregation (#4.7)					
	Data timeliness (#4.8)					
	Data quality (#4.9)					
Revenue allocation	Distribution of revenues (#5.1)					
	Subnational transfers (#5.2)					
	Revenue management and expenditures (#5.3)					
Socio-economic contribution	Mandatory social expenditures (#6.1)					
	SOE quasi-fiscal expenditures (#6.2)					
	Economic contribution (#6.3)					
Outcomes and impact	Public debate (#7.1)					
	Data accessibility (#7.2)					
	Follow up on recommendations (#7.3)					
	Outcomes and impact of implementation (#7.4)					

Legend to the assessment card

	No progress. All or nearly all aspects of the requirement remain outstanding and the broader objective of the requirement is not fulfilled.
	Inadequate progress. Significant aspects of the requirement have not been implemented and the broader objective of the requirement is far from fulfilled.
	Meaningful progress. Significant aspects of the requirement have been implemented and the broader objective of the requirement is being fulfilled.
	Satisfactory progress. All aspects of the requirement have been implemented and the broader objective of the requirement has been fulfilled.
	Beyond. The country has gone beyond the requirements.
	This requirement is only encouraged or recommended and should not be taken into account in assessing compliance.
	The MSG has demonstrated that this requirement is not applicable in the country.

Corrective actions

The EITI Board agreed the following corrective actions to be undertaken by Myanmar. Progress in addressing these corrective actions will be assessed in a second Validation commencing on **<date of Board decision + 12 months>**:

1. In accordance with Requirement 1.2.a, Myanmar must ensure that companies particularly the military-affiliated companies, as well as oil and gas companies outside of the MSG are fully, actively and effectively engaged in the EITI process. If there are barriers to the participation of these companies, the government must, in accordance with Requirement 1.2.b ensure that there is an enabling environment for company participation with regard to relevant laws, regulations, and administrative rules as well as actual practice in implementation of the EITI.
2. Considering the concerns raised on the broader civic space in Myanmar, and to further strengthen implementation in accordance with Requirement 1.3 and the civil society protocol, the MSG is encouraged to closely and regularly monitor whether there is a continued enabling legal, regulatory and administrative environment for civil society to effectively engage in all aspects of EITI implementation, including by reviewing legal provisions considered by many CSOs to be obstacles to the constituency's broader freedom of expression and operation. The government could consider amending laws that impose restrictions to civic space, including the right to assembly and to free speech. It could further expand the opportunities for constructive dialogue with civil society to address perceptions of restraint to freedom of expression and fear of reprisal.
3. In accordance with Requirement 2.2.a.ii of the EITI Standard, Myanmar is required to disclose the technical and financial criteria used in awarding licenses in the mineral and gemstone sector. The MSG should also include a discussion of non-trivial deviations from the applicable legal and regulatory framework governing license awards pursuant to Requirement 2.2.a.iv. Lastly, the MSG should clarify the rules on transfer of licenses, particularly whether it is allowed in the mineral sector. The MSG is encouraged to systematically disclose all information required by Requirement 2.2 of the Standard, in accordance with the level of detail required by the Standard.

4. In accordance with Requirement 2.3 of the EITI Standard, Myanmar is required to publicly disclose the following information that were missing the EITI Report: the coordinates of several ME3 blocks, the dates of application, awards and duration of all oil and gas and mining licenses, and the commodities for each oil and gas block. To strengthen implementation, Myanmar should ensure that license information as required under Requirement 2.3 of the Standard are disclosed through a public register as part of the government's routine and systematic disclosure of information.
5. In accordance with Requirement 2.6, Myanmar is required to disclose the details regarding the terms attached to the equity stake of all SOEs in extractive projects. It should also disclose the SOE's responsibility to cover expenses at various phases of the project cycle, including the details of payment of taxes in behalf of joint venture partners and miscellaneous revenues in the case of oil and gas. MOPF should also disclose the details of the loan guarantees it provided to SOEs as well as prevailing rules on retained earnings. Finally, Myanmar is required to clarify whether UMEHL and MEC are government- owned corporations. If they are, the MSG is required to engage them in the EITI process in accordance with Requirement 1.2, include them in the scope of the EITI reporting process and assess the comprehensiveness of its interests in extractive projects as disclosed in the MEITI Report. To strengthen implementation, the MSG is encouraged to consider examining the alleged miscellaneous revenues of MOGE.
6. In accordance with Requirement 3.2 of the EITI Standard, Myanmar is required to disclose production volume and value by commodity for jade and gems. To strengthen implementation, the MSG should consider including export data from transactions outside of the gems emporium in the scope of the EITI Report. Government is encouraged to regularly disclose this information through government platforms.
7. In accordance with Requirement 3.3 of the EITI Standard, Myanmar should disclose comprehensive data for export volumes and value for gems and jade, disaggregated by commodity. To strengthen implementation, the MSG should consider including export data from transactions outside of the gems emporium in the scope of the EITI Report. Government is encouraged to regularly disclose this information through government platforms.
8. In accordance with Requirement 4.2, Myanmar should categorically assess the materiality of in-kind payments for the three sectors. It should also be clarified in the next report whether there are in-kind payments for oil and gas. The sales of the state's share for oil and gas should be disclosed including the volumes sold and revenues received. For mining and gems, in-kind payments should be disaggregated by paying company to the SOE, and by buying company in the case of sales of the government's share. To strengthen implementation, the government is encouraged to systematically disclose data on on-kind revenues through government platforms.
9. In accordance with Requirement 4.5, government should ensure that all transfers from government to SOEs are comprehensively and publicly disclosed in government platforms. Myanmar should review the comprehensiveness of information disclosed regarding SOE transactions in view of what is revealed from other sources of information, including whether there are material transfers made between the SOE's other accounts to other entities.
10. In accordance with Requirement 5.1, Myanmar is required to provide further explanation regarding the extractive revenues that are not recorded in the national budget. The MSG should consider expanding the scope of EITI reporting to further examine the details of these Other Accounts, such as tracing the exact extractive sector revenues that go to these accounts and how these revenues are spent, as well as explaining the rules in maintaining these accounts.

11. In accordance with Requirement 6.1 of the EITI Standard, companies are required to disclose social expenditures when mandated by law or contract. Where such benefits are provided in-kind, it is required that companies disclose the nature and deemed value of the in-kind transaction. The beneficiaries and their functions should also be disclosed. Where possible, these payments should be reconciled. The companies are further encouraged to disclose discretionary social expenditures where material. The MSG is encouraged to develop a reporting process with a view to achieving a level of transparency commensurate with the disclosure of other payments.
12. In accordance with Requirement 6.2, Myanmar is required to include disclosures from SOE(s) on their quasi-fiscal expenditures including SOE(s) payments for social services, public infrastructure, fuel subsidies and national debt servicing, etc. outside of the national budgetary process. The multi-stakeholder group is required to develop a reporting process with a view to achieving a level of transparency commensurate with other payments and revenue streams, and should include SOE subsidiaries and joint ventures.

The government and the MSG are encouraged to consider the other recommendations in the Validator's Report and the International Secretariat's initial assessment, and to document the MSG's responses to these recommendations in the next annual progress report.