

NEITI'S RESPONSE TO THE EITI VALIDATOR'S ASSESSMENT

It is necessary to state from the very beginning that we submitted a 35-page response to the Initial Assessment by the EITI Secretariat with the understanding that the appointed Validator would read both the initial assessment and our response together to come to an informed and fair conclusion. We are surprised and disappointed that this did not seem to have happened. We consider this a grave negation of the foundational values of due process, fairness and justice, with serious implications not only for the validation exercise but also for the EITI enterprise. As a country committed to the relevance, impact, and sustainability of EITI, we therefore, with full sense of responsibility, crave the indulgence of the EITI Board to consider this response alongside the more detailed response that we submitted earlier, a copy of which is hereby attached for ease of reference.

Permit us to make four general observations, before delving into a point-by-point response to the report by SDGS.

1. Procedural Errors

Below is the procedure stated in EITI Guidance Note 23- Requirement 8.3 of July 2016:

- i. EITI Secretariat's Assessment (desk review, mission and reporting)
- ii. NSWG response to Secretariat initial assessment
- iii. Validators' review (report) to EITI Board
- iv. NSWG invited to comment on the Validation Report.

We find the procedure adopted by SDGS to be contrary to Guidance Note 23 and other communications from and clarifications by the EITI Secretariat. As a matter of incontrovertible fact, we are aware that SDGS wrote a zero-draft way before our response was ready. To our greater chagrin, there is not a shred of evidence that SDGS took time to read our response not to talk of considering the points raised therein. This amounts to changing the rules in the middle of a game, a subversion of due process that is against the spirit of EITI that Nigeria signed on to 12 years ago and has religiously prioritized, despite challenges. SDGS not only stuck to the one-sided position in its zero draft, it did not make a single reference to our response in its 3,825-word, 9-page report. We stand to be corrected, but if we are right, this will be a very flippant and unfair way to approach a serious exercise that has real consequences for EITI-implementing countries and for EITI itself. The rationale behind the NSWG response to the Secretariat Assessment was for SDGS to evaluate both sides on a balanced scale and to provide an objective opinion based on the tilt of the scale. There is no evidence that this happened, and this we consider an unmerited waste of the precious time we invested in putting together our response and a total contempt for the time-honoured principle of the right-of-reply. Apart from being riddled with misrepresentations and glaring errors of fact (some of which are highlighted below),

the SDGS report exhibited scant regard, contempt even, for national context and laws. Once the foundation is weak, it is our considered view that the whole process can be deemed to lack credibility. The procedure was not adhered to. We deserve to have the NSWG's response admitted in the Validation Report for fair and objective balance.

2. Errors of Fact and Misrepresentations

There are some very glaring errors of fact that really undermine the integrity of the Validation Report by SDGS. These errors might be regarded as errors of form rather than of substance but for a report that should appraise a subject as nuanced as the implementation of EITI in a country as complex as Nigeria, these errors leave much to be desired. The errors do question the core of the Validation Report, particularly given the further fact that such obligatory validation under the EITI Standard comes but once in four years. If SDGS cannot get right simple things that can easily be fact-checked, how credible could its judgment be on complicated matters?

Below are a few of the glaring, unpardonable errors:

- i. A two-person team visited Nigeria and not a five-person as claimed in line 3, page 1 under "Comments on the Initial Assessment" in the Validation Report by SDGS. This avoidable error of fact and this sloppiness, in our considered view, questions the seriousness with which the consultants approach an assignment with consequences for implementing countries and thus undermines the credibility of their report.
- ii. There is no organisation or agency known as the Federal Reserve Service in Nigeria as stated line 9 page 2 under "Impact of EITI Implementation" of the Validation Report. This is another avoidable error that painstaking fact-checking and proof-reading could have spotted; another reason to conclude that the report was not accorded the seriousness it deserved by its authors.
- iii. The stakeholders visited by the team from the International Secretariat were according to the wishes of the EITI team. NEITI only assisted with the logistics where necessary without any interference whatsoever. Assuming it is true, the statement that "there does not appear to be evidence of wider outreach to, and consultations with, stakeholders not involved in the EITI process, aside from some conversations with taxi drivers" should not be attributed to the NSWG. Besides, the claim is not true. The team met with the members of the media, with the Economic Adviser to the President, with the Secretary to the Government of the Federation, and with the President of the Senate. The last time we checked, these groups and individuals are not directly involved with EITI implementation in Nigeria. Also, the team had all the opportunities to meet whosoever it needed to meet with (via different channels, including by email, phone and Skype). And indeed the team met with a broad set of stakeholders listed in Appendix D on pages 206 to 211 of the Initial Assessment. In addition, the fact that taxi drivers spoken to by the team were aware of NEITI and its activities should be regarded as a big positive. We worry about the

- mindset that sees this as a problem, a mindset that is possibly more interested in ticking boxes and nitpicking than in measuring real impact.
- iv. It is also very disheartening for NEITI to learn that, as stated in lines 1-3 on page 1 (comments on the Limitations of the Assessment, “the most significant challenge for the Validation Team is the compressed time frame within which to undertake its review of EITI implementation in Nigeria. Stakeholder outreach was not practicable and detailed review of documentation beyond the Initial Assessments is necessarily limited”. A weighty exercise that comes once in four years should not be reduced to such mundane plea or tepid alibi. An assignment of this gravity should be thorough, fair and just. More fundamentally, such an assignment should not be undertaken in such a way as to penalize a country for what it has no control of over: the compressed time-frame for SDGS.

3. EITI Standard 2016 versus NEITI Act 2007

The activities/operations of the EITI in Nigeria are governed by the following documents in the order of precedence:

- i. The 1999 Constitution of the Federal Republic of Nigeria;
- ii. The NEITI Act 2007;
- iii. Other ancillary statutes of the Nigerian Parliament;
- iv. Rules and regulations constituted under powers vested in an act of the Nigerian Parliament; and
- v. The EITI Standard.

It is worthy of note that the EITI Standard is voluntary and does not have the compulsion of law. Also, it doesn't have the status of an international treaty that has been domesticated by the Parliament and which can be said to have the same force as a duly passed law of the land.

We find it very worrisome and a mark of the rigidity that after many discussions, the EITI validation mission to Nigeria fails to appreciate the fact that the EITI Standard cannot be adjudged to be superior to all extant laws in Nigeria. For the avoidance of any doubt whatsoever, NEITI re-states herein that compliance with Nigerian laws takes precedence over the EITI Standard and that under no account would NEITI flout Nigerian laws for the EITI Standard. As the harbinger of the EITI principles, the International Secretariat would agree that NEITI, as a transparent and accountable organization and a product of law, needs to be a law-abiding agency. In consonance therefore, NEITI further states that all areas of conflict such as the composition of the NSWG, participation of Civil Society in the choice of its representative in the NSWG, etc. should be appraised first on the basis of compliance with a national law that predated the new EITI Standard by nine years and how well the subsisting system has produced desired outcomes, rather than in a box-ticking, rigid way that totally ignores local realities and the impact of EITI implementation in Nigeria. Until the EITI International Secretariat can assist NEITI to make the

“additional efforts required to comprehensively align NEITI with the requirements of the Standard,” we urge the EITI to adjudge Nigeria with the extant laws of Nigeria in the areas of conflict between the EITI Standard and Nigeria laws.

4. Contradictions

We will also like to point out glaring contradictions in the reports. In one breath the Secretariat’s Assessment notes that, “Nigeria has appropriated EITI implementation to such a degree that it has helped shape development of the EITI Standard and developed one of the most extensive EITI reporting processes globally”. In addition, it stated that “over more than a decade of implementation, NEITI process has gone well beyond the minimum EITI Requirements by including assessments of physical and process flows alongside the reconciliation of financial payments. Nigeria was also the first country to enact legislation institutionalising EITI implementation and remains one of only three countries with a dedicated EITI law. Nigeria continues to lead the way in turning recommendations from EITI reports into concrete action.”

Furthermore, the Validation Report acknowledges that “NEITI has an impressive history of over a decade of implementation, contributing to a national debate regarding governance of extractive industries, greater public understanding of the extractives sector, and a culture of transparency and accountability in the sector. As noted in the Initial Assessment, NEITI Reports have led to recovery of more than USD 2.4 billion for the Federal Government of Nigeria. NEITI has also increased multi-stakeholder collaboration and led to improved governance in the extractives sector.”

Therein lies the relevance and essence of the EITI process: “to deliver sustainable benefits from the extractives sector, including poverty reduction”.

However, in another breath the Secretariat’s Assessment and the Validation Report are in total and absolute contradiction with these statements. NEITI finds it extremely difficult to reconcile these contradictory positions. May we also recollect that only a couple of years ago in Sydney Australia, Nigeria was adjudged the “Best EITI implementing country in the World”. Has Nigeria retrogressed so far now that issues such as stated in paragraph 5 on page 2 to wit, to become an albatross: “NEITI has yet to conform many of its procedures to the EITI Standard. This includes, among others, the need to review NEITI’s institutional structure; to update the strategic plan and objectives of EITI implementation, ensuring that they are aligned with national priorities; and others, as noted in the Initial Assessment and in the Recommendations below”.

If we may ask, what structural reviews are we talking about here? What national priorities does NEITI need to align with? In terms of structure, it seems there is a fixation with fixing what is not broken. NEITI has a strategic plan that covers the period 2012 to 2016. Apart from the fact that this is still in force till December 2016, a new strategic plan (for the period 2017 to 2021) is being developed in active consultation with stakeholders. And talking about alignment with

national priority, may we remind that President Muhammadu Buhari singled out NEITI for mention in his address to the UN General Assembly in September 2016.

For the record, this is what President Buhari said about EITI in Nigeria:

“We voluntarily signed up to EITI because we are convinced that transparent governance is an imperative for resource-rich developing countries like ours. Through the work that our national chapter of EITI has done over the years, it is clear that our faith is not misplaced.

The National EITI has been empowering citizens with critical information they can use to hold government and other players in the extractive industries to account, and make recommendations that drive reforms in these strategic sectors of our national life.”

In addition to our response to the Secretariat’s Assessment, we reiterate thus:

- i. NEITI’s institutional structure is governed by Nigerian laws. The EITI standard is a voluntary adjunct which due to its evolving nature may be infused through a legislative process as appropriate.
- ii. If there is need to amend the NEITI Act 2007 to align it with the EITI Standard 2016, this will have to go through legislative process, which takes time and should not be a ground for punitive action against the country.
- iii. NEITI’s strategic plan and objectives are well aligned with national priorities. The Transformational Agenda of the previous government and the Strategic Plan of the NSWG for the period 2012 – 2016 are well linked. The Strategic Plan focused on accountability and the use of the revenues derived from the extractive industry in line with transforming the use of those revenues to the lowest tier of government (Local government councils). This was basis of the first Fiscal and Statutory Disbursement Allocation (FASD) audit, the first for any EITI- implementing country in the world.

Point-by-Point Response to Appraisal

Permit us to now undertake a point-by-point response to SDGS report:

- 1.1 **Government engagement.** We did not comment on this in our response to the Secretariat Assessment because we agreed with the assessment of satisfactory. We also now agree with the Validator’s Report.
- 1.2 **Company engagement.** NEITI did not respond to this assessment by the Secretariat Assessment on this requirement because NEITI was adjudged Satisfactory by the

Secretariat Assessment. However, the Validator's Report downgraded the Secretariat Assessment to Meaningful Progress. We maintain that Satisfactory is the correct position. We cite the Validation Report here for ease of reference.

Validator's Report: *We disagree that Nigeria has made satisfactory progress and find that Nigeria has made MEANINGFUL progress. Based on the evidence presented in the International Secretariat's Initial Assessment, we find that companies are not fully, actively, and effectively engaged in the EITI process. The Initial Assessment notes, "Industry representatives on and off the MSG confirmed that except for a yearly workshop to improve the design of the reporting templates, the broader constituency was otherwise not engaged in deciding questions of scope, workplans or other decisions by the MSG." The Initial Assessment also notes, "When asked whether it was possible for companies to influence NEITI's advocacy activities, for example through the work plan, stakeholders from all constituencies expressed concerns that this could affect the independence of NEITI. When asked further what means companies have to halt an information campaign they considered harmful or untrue, more than one company representative made reference to their lawyers." The Initial Assessment discussion of Requirement 1.4 provides additional information that is also relevant here, including that "Industry in particular does not currently see itself as a stakeholder in Nigeria's EITI process." This is not evidence of full, active, and effective company engagement. We note creation of the Company Forum as a step in the right direction and one avenue NEITI may utilize to deepen and broaden company participation in the EITI process.*

NEITI's Response: Once more we note, the inconsistencies and contradictions in the Secretariat Assessment and the complete adoption of it by SGDS without courtesy of a fair assessment from statements such as "The Initial Assessment also notes, "When asked whether it was possible for companies to influence NEITI's advocacy activities, for example through the work plan, stakeholders from all constituencies expressed concerns that this could affect the independence of NEITI. When asked further what means companies have to halt an information campaign they considered harmful or untrue, more than one company representative made reference to their lawyers." How do you reconcile a statement that says that companies are not involved in NEITI's advocacy drives because the companies do not deliberately want to interfere with NEITI's independence and then draw a far reaching conclusion that there are not fully active in the EITI process? If anything NEITI has provided avenues for engagement through the companies' representative in the NSWG. It is also pertinent to note that NEITI especially at the initial stages has been working under the threat of litigation. This much was admitted in the above reference quotes. We also point to statements made in the Secretariat's Assessment which the Validation Report discarded without reasonable application: "NSWG members and NEITI secretariat staff stressed that all constituencies

are given an opportunity to express their views on the workplan, annual progress report, NEITI Reports and other documents of the NSWG through their representatives. Industry representatives on the NSWG confirmed that this was the case. With one exception, industry representatives consulted outside the NSWG did not recall having been consulted except on the development of the reporting templates” –page 27 of Secretariat Assessment. Such conclusions should be on a balance of probabilities. The most probable and logical conclusion is embedded in the structure of the NSWG and the NEITI Act. The company representative represents the companies and he is expected to convey all full NSWG discussions/decisions to his constituency. This is the mechanism for the wider consultation so sought by the EITI Secretariat. There are over 1,000 companies in the extractive industry in Nigeria. NEITI cannot reach every company. It should also be noted that unlike in the West where strong institutions and norms ensure automatic compliance by companies, this is not the case in Nigeria and many other developing countries. The companies merely tolerate NEITI because it is backed by law. Using the opinions or perceptions of companies as a measure of the engagement of companies in the EITI in Nigeria betrays a limited understanding of the context. There is need for a more nuanced metric for gauging participation/engagement beyond the perception of some companies. There are platforms for engagement with the companies, ranging from their representation on the NSWG, to the NEITI-Company Forum, and regular consultative workshops of audit templates and new areas such as automation, beneficial ownership disclosure, strategic plan development etc.

- 1.3 **Civil Society Engagement.** We maintain the stance stated in our response to the Secretariat Assessment. We maintain the assessment should be satisfactory.
- 1.4 **MSG Governance and Functioning.** We disagree with the Secretariat Assessment (meaningful progress) and the wholesale adoption of same by the Validator’s Report (without reference to our response) for reasons stated in our response to the Secretariat Assessment. Nigeria has complied satisfactorily.
- 1.5 **Work-plan.** We had disagreed with the Secretariat Assessment (meaningful progress) in our response. NEITI had insisted on satisfactory progress. However, SDGS without consideration to our response downgraded NEITI to inadequate for reasons not comprehensible. We appeal to the EITI Board to review these two assessments. We stand by our response to the Secretariat’s Assessment in addition to our earlier statement in “Contradictions” of this response to embolden our appeal. We believe Nigeria has complied satisfactorily.
- 2.1 **Legal framework and Fiscal Regime.** Agree.

- 2.2 **License Allocations.** Agree.
- 2.3 **Register of Licences.** Agree.
- 2.4 **Contracts.** We stand by our earlier response to the Secretariat’s Assessment. Once more we bring to the attention of the EITI Board another inconsistency in both the Secretariat’s Assessment and the Validator’s Report. This is an area that at best is only encouraged in the EITI Standard. In requirements #5.3 Revenue Management and Expenditure and #7.2 data accessibility which are also encouraged, the Validation Report stated that “Disclosure under this requirement is encouraged and is thus not taken into account in the overall assessment of compliance”. Why the inconsistency?
- 2.5 **Beneficial Ownership.** Agree
- 2.6. **State Participation.** We maintain the stance stated in our response to the Secretariat’s Assessment. The assessment should be satisfactory.
- 3.1 **Exploration.** We did not comment on this in our response to the Secretariat Assessment because we agreed with the satisfactory assessment. We also now agree with the Validation Report.
- 3.2. **Production.** We maintain the stance stated in our response to the Secretariat’s Assessment. The assessment should be satisfactory.
- 3.3. **Exports.** We maintain the stance stated in our response to the Secretariat’s Assessment. The assessment should be satisfactory.
- 4.1 **Comprehensive Disclosure of Taxes and Revenues.** We maintain the stance stated in our response to the Secretariat’s Assessment. The assessment should be satisfactory.
- 4.2 **Sale of the State’s Share of Production or Other Revenues Collected in Kind.** We maintain the stance stated in our response to the Secretariat’s Assessment. The assessment should be satisfactory.
- 4.3 **Infrastructure Provisions and Barter Arrangements.** We maintain the stance stated in our response to the Secretariat’s Assessment. The assessment should be satisfactory.
- 4.4 **Transportation Revenues.** Not only do we reiterate our stand in our response to the Secretariat’s Assessment that we have made meaningful progress but also to state that the progress of Nigeria was/is well appreciated in the document published by the EITI Secretariat and freely distributed at the EITI global conference in Peru February 2016

titled “Reports to Reforms”. The EITI Secretariat stated on page 9 of the document that “given these findings, Nigeria has followed up with the government and NNPC to improve the monitoring and measuring of oil product production”. Meaningful progress has been made and the progress trend continues.

- 4.5 **Transactions Related to State-Owned Enterprises.** We maintain the stance stated in our response to the Secretariat’s Assessment. The assessment should be satisfactory.
- 4.6 **Subnational payments.** We stand very strongly on our stance in our response to the Secretariat’s Assessment. Long before this became part of reporting under EITI Standard, the pioneering effect of the NEITI Act 2007 laid a foundation for the first conduct of subnational reporting in the EITI. Nigeria should be commended with an assessment of satisfactory.
- 4.7 **Level of Disaggregation.** Agree.
- 4.8 **Data Timeliness.** We rely on our response to the Secretariat’s Assessment to state that Nigeria fulfilled this requirement satisfactorily. We shall continue to underscore the contradictions with the Validation Report because of the failure to refer to our response to the Secretariat’s Assessment and to the peculiarities of Nigeria. The data was timely. However, EITI requires the NSWG should approve the EITI Reports. But there was an interregnum and there was no NSWG in place when the EITI reports were concluded. How then do you approve something when the authorising power is not in existence? Mindful of this, the NEITI Secretariat wrote a letter to the Chair of EITI dated 19 December 2015 seeking for an extension to publish the EITI Reports. But NEITI was not accorded the courtesy of a reply by the EITI Secretariat. The natural legal assumption “qui tacet consentit” (Silence gives consent) under the common law of most countries became applicable. It is therefore not correct that Nigeria was suspended, technically or otherwise.
- 4.9 **Data Quality and Assurance.** We maintain the stance stated in our response to the Secretariat’s Assessment. The assessment should be satisfactory.
- 5.1 **Distribution of Extractive Industry Revenues.** Agree.
- 5.2 **Subnational Transfers.** We maintain the stance stated in our response to the Secretariat’s Assessment. The assessment should be satisfactory.
- 5.3 **Revenue Management and Expenditure.** Agree with Validation Report and aligned with contracts disclosure and data accessibility which are all only encouraged.

- 6.1 **Social Expenditures by Extractive Companies.** We maintain the stance stated in our response to the Secretariat’s Assessment. The assessment should be satisfactory.
- 6.2 **Quasi-Fiscal Expenditures.** We maintain the stance stated in our response to the Secretariat’s Assessment. The assessment should be satisfactory.
- 6.3 **The Contribution of the Extractive Sector to the Economy.** We maintain the stance stated in our response to the Secretariat’s Assessment. The assessment should be satisfactory.
- 7.1 **Public Debate.** Agree.
- 7.2 **Data Accessibility.** Agree with Validation Report and aligned with contracts disclosure and revenue management and expenditure which are all only encouraged.
- 7.3 **Lessons Learned and Follow-up on Recommendations.** Agree
- 7.4 **Outcomes and impacts of EITI Implementation.** Agree

Conclusion

As earlier stated, we wish to adopt in addition to this memo, NEITI’s response to the Secretariat Assessment as NEITI’s response to the Validation Report also, more so that SDGS did not seem to have bothered to read NEITI’s response to the Secretariat’s Assessment. We appeal again that the EITI Board should take the pains to consider the two responses that we have taken a lot of efforts to put together.

It is also vital to state that whilst Nigeria is not asking for any special consideration under the EITI Standard, we strongly believe that the EITI process must take into account the contexts, the complexities and peculiarities of implementing countries in its assessments. A one-size-fits-all approach will be self-defeating. There is also the need for developing metrics that measure real impact rather than have a set of indicators that leave implementing countries at the whims and caprices of assessors who might be too pressed for time to read all the documents made available to them and could be more interested in quickly ticking boxes than in appraising challenges and outcomes. It is pertinent and imperative to ask this simple question: would Nigerians be more interested in the obvious impact achieved by the NEITI so far or be more interested in a set of requirements that merely give the semblance of complying with a standard without impact? Nigeria already has the NEITI Act 2007 to ensure the implementation of transparency and accountability in the extractive industry. Clearly, there is need to amend the NEITI Act, a process that is ongoing and should be supported by EITI, not used as a reason to unfairly mark down the country. In sum, the EITI Standard should be made for implementing countries and not the implementing countries for the EITI Standard.