CONTRIBUTION SOUTH KIVU CIVIL SOCIETY TO THE ANALYSIS OF the 2012 EITI- DRC REPORT

I. INTRODUCTION

The Carter Center works in partnership with the *Maison des Mines du Kivu* (MMKi – a civil society organization) in South Kivu for transparency and accountability in the Congolese mining sector through capacity building in the fields of human rights, transparency, accessibility and revenues. In this context, from the February 13-16, 2015 a group of South Kivu civil society members involved in the process of transparency and good governance of the Congolese mining sector participated in a training workshop organized by The Carter Centre in Bukavu on analyzing the 2012 EITI-DRC Report. Pursuant to this meeting, these actors opted to record the results of their analysis in this memo.

Contrary to the text drafted at the end of the workshop held from December 12-13, 2014, this contribution of South Kivu civil society is not intended to improve the quality of 2012 EITI-DRC Report, which is already published. But it is intended, through the analysis of the data published in the report, to assess the level of progress made or achieved on transparency in the Congolese extractive sector and assess the level of consideration of the recommendations made by the South-Kivu civil society in December 2014.

The in-depth analysis of the 2012 EITI-DRC Report identified new challenges that the transparency process continues to face in the DRC. Negative findings were identified as sprains in the process. Possible solutions have been converted into recommendations to the government, to the EITI Technical Secretariat as well as to the South Kivu civil society.

II. METHODOLOGY USED

South Kivu civil society members who attended the workshop combined various techniques with the support of The Carter Centre to scrutinize the information in the 2012 EITI-DRC Report. The structure of the 2012 report was discussed by comparison with data previously published in the 2011 report.

The overview of these two reports was used to assess the quality of contextual information reported in the 2012 report and to evaluate at the same time the level of consideration of recommendations issued by the South Kivu civil society in December 2014. The literature review of 2011 and 2012 EITI-DRC Reports facilitated exchanges and brainstorming discussions on the situation of mining in the province of South Kivu. The recommendations related to the problems observed in this eastern region of the DRC were presented in plenary for validation.

III. <u>GLOBAL OVERVIEW OF 2012 EITI-DRC REPORT</u>

3.1. Presentation of the major issues identified

South Kivu civil society members met in an analysis workshop to scrutinize the data published in the 2012 EITI-DRC Report. Without ignoring the great progress achieved thanks to the considerable efforts of stakeholders to comply with the 2013 EITI Standards, civil society has identified several obstacles to the current transparency process in the DRC.

To better understand the magnitude of these obstacles, South Kivu civil society preferred to interpret the data in the EITI report of 2012 through the situation of mining in the South Kivu province. Among impacts that may undermine the transparency process in the DRC, the group identified the following main problems:

- The lack of reporting of actual social payments;
- The improper reporting of two flows paid by Namoya Mining Sarl to the *'Direction des Recettes du Katanga,'* also known as (DRKAT)- (*Katanga Department of Revenues Collection*);
- The difficulty understanding the amounts of the disparities;
- The lack of precision of the reliability criteria defined by the Executive Committee;
- The non-inclusion in the 2012 EITI-DRC Report of the value of the extractive sector's revenue compared to the state budget;
- The lack of comprehensive reporting on sub-national transfers between the central government and the provinces in 2012; and
- Thedifficultyindeterminingtheoperationalphasesofthecompaniesinthe2012scope.

3.2. Problem analysis

For more details and information, the above issues were analyzed under the EITI Standard, the data published in the report, and recommendations issued in December 2014.

3.2.1. The absence of reporting of actual social payments (4.1.e)

At the national level, South Kivu civil society notes that several mining and hydrocarbon companies reported payments made to INSS (Social Security) instead of actual social payments. This is also the case of relocation expenses paid by TFM as part of compensation for relocated populations; this not a "social payment" but rather a social obligation to repair the damage caused to third parties. In addition, the group also notes the proportion of social payments compared to the cash flow generated by the extractive sector is too low (estimated at 2% for 2012).

At the provincial level, the group noted with regret that among the four subsidiaries of Banro Corporation namely Twangiza Mininig SARL, Kamituga Mining SARL and Lugushwa Mining

SARL, only Namoya Mining Ltd declared social payments to the INSS in 2012. The group believes that social payments should reflect expenses related to the realization of projects of community interest. It is also along the same lines as the Mining Code requires mining companies to contribute to the development of local communities living in and around their site of establishment.

Moreover, the group notes that some mining companies such as Banro Resources Corporation and its subsidiaries have 4 social clauses in their agreement (Banro, Amendment 2, of the 13th of July, 2010: Article 6 paragraph 1), forcing them to make compulsory payments to local communities.[1] It is abnormal to see several companies including those in South Kivu reporting no payment made through social investment for the benefit of local communities in 2012.

The group wants the Government to ensure that the Mining Code is fully respected by the extractive industry and to put in place enforcement mechanisms to reduce the imbalance which persists between the income generated by the extractive sector and social payments.

3.2.2. The reporting of two flows improperly paid by Namoya Mining SARL to DRKAT

The group of South Kivu civil society found in the detailed statement published on the website of the EITI-DRC in 2012 that Namoya Mining SARL paid to DRKAT two provincial flows, namely: the surface rights of mining and hydrocarbons concessions as well as the taxes on roads and drainage for a total of $ 11,662 USD. The group of stakeholders considers that this statement does not conform to reality because Namoya Mining Ltd. is a mining company based in Maniema Province.

Under the principle of territoriality of taxes, this company should not be subject to provincial taxes charged by the Katanga DRKAT (*Katanga Department of Revenues Collection*) unless it holds mining assets in Katanga. The Civil Society of South Kivu asks for either further explanation on this, either the correction of this error in the detailed statement available on the website of EITI- DRC.

3.2.3. Difficulty of understanding the amounts of disparities

The group noted that the format presenting the discrepancies adopted by the 2012 EITI-DRC Report does not allow good estimation of the true proportion between positive and negative disparities. Therefore, the reasons for the amount of the differences are difficult to articulate well.

[1] Banro Resources Corporation is bound by article 6 paragraph 1 of the 2nd Amendment of the 13th of February 1997 Convention to spend 4% of its annual benefits on social expenditure on behalf of its four subsidiaries.

The group therefore hopes that in future reports, the understanding of the differences will be facilitated by a format similar to the one in the 2011 EITI report.

3.2.4. The lack of precision of reliability criteria

The group welcomed the EITI Executive Committee for having defined the three non-cumulative criteria for the reliability of data to be reported in the 2012 report. In addition to this obvious flexibility of the criteria adopted, the group of actors from the South Kivu Civil Society notes that the number of companies who have audits of their accounts has increased from 79 in 2011 to 86 in 2012, an increase of 8.86%. For companies whose accounts have not been audited, their number increased from 4 in 2011 to 7 in 2012, an increase of 75%.

Given the need to integrate quality data in the EITI report, the group recommends to the Executive Committee to strengthen levels of reliability of data by requiring a minimum accumulation of two conditions to reach reliability, with the obligation of an external audit. Thus, the group of actors of the Civil Society of South Kivu suggests a double validation of extractive companies by their respective Managers and an external audit as reliability tests; and for Financial Agencies of the State (AFEs), a validation of the manager and another of the General Inspectorate of Finance.

3.2.5. The non-inclusion in the report of the amount of the extractive sector generated revenue compared to the state budget

The group of South Kivu civil society notes that the 2012 EITI report is silent on the value of revenues generated by the extractive sector compared to the state budget. It wants the future reports to include the value of the contribution of the mining sector to the national budget.

3.2.6. The lack of detailed data on sub national transfers in 2012.

The group noted that in financial year 2012, transfers were made by the central government to the provinces in violation of Articles 175 of the Constitution and 240 of the Mining Code. While finding regrettable the non compliance with the law on sub-national payments that have to be declared according to the EITI Norm (4.2.e), the Group noted that the 2012 EITI-DRC report only mentions the reporting of payment made by the Central Government for the benefit of the Katanga Province for a value of 13%, or $12 million out of the $93 million received by the Treasury.

The group wants the next EITI reports to mention all of transfers from the central government for the benefit of the Provinces of the DRC and not only to the Province of Katanga.

3.2.7. The difficulty in determining the operational phases of the 2012 scope.

In analyzing Annex 10, found on page 177 of the 2012 EITI report, the group of actors of the South Kivu Civil Society notes the omission of Twangiza mining company SARL on the list of mining export companies. The group had hoped that even if all companies involved in production do not necessarily export, an explanation could be provided to assist in understanding the table of mining exports.

Furthermore, the group notes that the presentation format of companies' phases does make a distinction between companies in exploration and companies in production phase. Indeed, in the table set out on pages 81-82 of the report, companies are classified between different categories: Exploration, Production, Companies of the Government Portfolio, also known as (EPEs) and JV participating in the scope of the previous EITI report. If we stick only to this table, it is difficult to say how many mining companies were in the production or exploration phase in 2012.

It is the same for the operational phases of Companies of the Government Portfolio (EPEs). Most of them are not in an actual mining operational phase. Some of them are neither at the exploration phase nor at the production phase while they are 100% owned by the DRC government. In general, EPEs are a category apart and escape several enforcement provisions of the 2002 Mining Code on several levels, especially environmental obligations and those relative to the validity of mining titles that they almost freeze without using. This deserves an explanation in the coming EITI reports and the group asks for a more comprehensive way of presenting the actual phases of operations of extractive companies.

IV. <u>RECOMMENDATIONS</u>

After reviewing the 2012 EITI-DRC report and the contribution of the South Kivu Civil Society in order to improve the quality of draft EITI-DRC report, participants identified the problems relative to social payments, to improper reporting, to imprecision in the criteria evaluating the reliability of data, to evaluating the revenues generated by the extractive sector, to determining the operational phases of companies and to retrocession withholding. The analysis of the aforementioned problems led the group to make recommendations to the Government of the DRC, to the EITI Secretariat and to the South Kivu civil society.

4.1. To the Government of the DRC

1. Make social payments mandatory for all mining and hydrocarbon companies and determine a percentage for the social contribution rate for local community development by a law;

2. Respect and strictly implement the requirements of the Constitution of the Republic and the Congolese Mining Code as to retrocession.

4.2. To the EITI Technical Secretariat

1. Require mining companies not to report fees paid to the INSS (Social Security) as social payments, because the latter's real beneficiaries are local communities and not their staff;

2. Describe payments made to the INSS as a specific flow by disaggregating it by company, number of national and expatriate staff, amounts paid;

3. Require mining companies not to record relocation as social payments, but to report them, if any, in the section for other flows while specifying: the company which relocates, the province, the villages relocated, the timeline, the number of people affected, the type of compensation, the value of the offered compensation with a link to the relocation plan that has been applied;

4. Determine, per social payments made, the foundation or source of social achievements of mining and hydrocarbon companies indicating a link leading to the specifications ledger for Communities or to any relevant source justifying the said social payments;

5. Provide explanations about why the mining company of the Maniema Province, Namoya Mining Ltd reported flows paid towards the DRKAT regarding the payment of tax of roads and drainage and of surface rights of mining concessions and hydrocarbons. See the detailed statement of Namoya Mining SARL sheet published on the website of EITI DRC;

6. Present the differences clearly specifying the amounts of negative and positive discrepancies as in the format used in the 2011 EITI report;

7. Ensure that the reliability criteria emphasize at least two basic requirements, namely: for companies, an external audit and certification of the manager; and for Financial Agencies of the State (AFEs), an external audit and certification of the General Inspectorate of Finance;

8. Mention the value of the contribution of the extractive sector revenue to the national budget in the EITI report, disaggregated per company, per province, per substance, per amount and percentage (%), with an internet link to the financial law in force;

9. Present an updated table of payments by the central government constituting the retrocession (Article 240 of the Mining Code) and / or tax withholding (Article 175 of the DRC Constitution) for all provinces, as well as those paid by the latter to Territorial Decentralized Entities, also known as ETD in the EITI report. This table will be disaggregated per province, per type of payment, per amount and period. It will be the same for the payment made to the ETD, which will be disaggregated per provinces, per ETD, payment types, amount and period.

10. Clearly identify the phases that the companies in the scope are in (production, research, exploration), as in the 2011 report.

4.3. To the South Kivu Civil Society

1. Ensure the monitoring of the recommendations of the Independent Administrator for companies, of the Technical Secretariat and the Congolese Government;

2. Follow up on social payments made by mining companies in favor of local communities of South Kivu.

Done at Bukavu, 17th February, 2015.

For the Maison des Mines du Kivu (MMKi -NGO)