19/10/2017

The Republic of Congo Validation

Comments on the report of the International Secretariat of EITI on the initial data collection and stakeholder consultation (dated 27/09/2017)

→ Do the context and diagnosis presented conform to our vision?

Overall, the report seems faithful to the views expressed by Publish What You Pay - Congo. We note many references to publications by Publish What You Pay - Congo since 2014 and to the opinions and concerns of representatives of civil society in general. We also note that other civil society organizations have been consulted in the course of data collection and have provided valuable additional information (particularly Public Eye).

The many references to the Transparency Code are also welcomed, especially interpretations of articles that directly link application of this law with better implementation of the EITI. In this regard, one can note at first sight, however, a divergence of viewpoint on the scope of the transparency code between the authors of the report and Publish What You Pay - Congo, whose analysis up to now has been that the law was not equal to the ambitions of EITI (see point 14).

While the report correctly summarizes the challenges linked to EITI, certain points require clarification or raise questions.

Background

1. We note that the authors have not commented on the new element of the Hydrocarbons Code on the share granted to domestic private companies. This measure does, nonetheless, bring risks for the governance of the sector. These procedures should be described in the EITI reports covering the years from when the code came into force. In this validation exercise, however, this change in the legislative framework should have been the subject of attention and of a recommendation. Similarly, the lack of participation that characterized revision of the code could have been mentioned.
2. In the review of Requirement 1.3, the law on the functioning of associations is expressly presented as a threat to the free working of CSOs, yet the authors quote the measure preventing foreign financing when it is no longer in the text (p.28).
3. *"EITI-Congo has agreed a three-year roadmap for beneficial ownership and the transparency law of March 2017 codifies Government policy on beneficial ownership"* (p.53) = policy is codified in the sense that it is written in to the code, but not in the sense that it lays down the terms of disclosure. Yet, there is real difficulty in implementation of this measure, in addition to political will.
4. The agreement between the SNPC and the State on the management of State assets and shares in the hydrocarbons sector is cited (especially p.57) but it is not mentioned that **it is difficult to access this agreement**. It is certainly impossible to find it on the Internet. On the other hand, the Independent Administrator seems to have had access to it.
5. *"The report presents the value of the proceeds from the sale of income in kind of the State that have been transferred to the Treasury, **the value of proceeds transferred off-budget to the China Exim Bank escrow accounts** [...]"* (p.80): **It should be noted that in the 2014 EITI report, the value of the proceeds transferred to Exim Bank is only estimated and is not the result of a declaration by the Treasury or by SNPC**, which corresponds to a real weakness of the EITI declarations.
6. *"While about 21 million barrels of crude oil were sold for XAF 634 billion and then transferred to the Treasury, the approximately 17.3 million barrels sold for the benefit of China Exim Bank were sold for XAF 811 billion. According to these representatives, this indicated that the proportion of State revenue in kind*

sold for the benefit of the Treasury was sold at a price that was lower than the current US$ 95 stated in the 2014 EITI report." (p.82): The method of calculation is not valid in my opinion, because account must be taken of the remuneration of the SNPC, which reduces the revenues paid to the Treasury. **We cannot, therefore divide the cash consideration paid to the Treasury by SNPC (flow 30) by the number of barrels to find the SNPC sale price.** The real problem is that the SNCP report does not, in fact, give any information on the performance of SNCP in the sale of the State share. The KPMG reports show us, for example, that SNPC takes much more on the proceeds of sales to be redistributed to the Treasury than it does from the proceeds of sales paid to the Exim Bank of China. *"Nevertheless, several CSO representatives questioned this explanation, saying that it did not justify the approximately US$30 per barrel average margin stated in the 2014 EITI report":* If the conclusion remains the same, this is not a case of a gap of US$30, but rather of several dollars below the fiscal price (the fiscal price representing the sale price operated by other exporters from the Congo). **However, the conclusion remains the same: SNPC is probably selling cheaper than it should.**

7. *"Several CSO representatives categorically stated that the agreement between the Republic of Congo and the People's Republic of China did not involve the delivery of crude oil to Chinese State buyers." (p.85):* What are the data that enable us to say this?

Diagnosis

8. Progress on the requirements with regard to public debate, follow-up on recommendations and the results and impacts of implementation was judged to be significant or even satisfactory in the report. The analysis of the efforts of the MSG to raise awareness of EITI and publish results is, however, more open to question. It does seem clear that the MSG is expecting civil society to take that in hand. This may be justified in part because this is the core business of CSOs, but the Government side has to play its part and could, for example, develop activities with State actors, such as training or raising the awareness of parliamentarians, etc.
9. It is interesting to note that the authors consider that *"The Transparency Code of March 2017 enacts the main EITI Requirements in national legislation, including those relating to the transparency of contracts, declarations by State-owned enterprises, disclosure of beneficial ownership, the publication of production data, the procedures for auditing and reconciling government revenues, the transparency of the allocation of resources and off-budget spending, declaration by project and open data. On certain aspects, the law exceeds the minimum EITI Requirements, by imposing the reporting of production data disaggregated by project and oil field."* (p.132). **Why is our analysis so different? Should we re-read the text to understand the real meaning of the articles? Is there still a risk that these articles may not be totally applied if the references to the EITI are not sufficiently explicit?**

→ **On which issues could the report have gone further? Could additional recommendations be made?**

10. *"Section 3.1.2 describes the SNPC mechanism for setting the prices of oil sales, disaggregated by load."* (p.57): The EITI report (and previous reports) clearly describes the trading commission of 1.6% per load charged by SNPC and then mentions the charging of "miscellaneous costs" linked to the marketing or transportation of crude. However, it does not give any further detail and does not state whether the agreement itself gives any more or not. **And yet, the KPMG reports highlight the many issues raised by the**

remuneration of the SNPC: the nature of the miscellaneous costs is not given more detail in these reports, even though they amount to 36% of the total of SNPC remuneration on sales of the State share for 2013.

11. In the same vein, the Independent Administrator recalls in the EITI report that it is expected that the SNPC should report to the Minister of Finance on the value of cargoes sold, but no check is made, when this has a direct impact on the revenues of the State from oil. **The evaluators could have highlighted shortcomings - or at least pathways for the improvement of the work of the Independent Administrator.**
12. The report does mention that Publish What You Pay - Congo is against the recommendation (2014 report) of the Independent Administrator for a unilateral declaration of mining sector payments by the State (p.100). However, the authors do not offer their own analysis of this recommendation.
13. Does the evaluation give a sufficiently detailed report on the mining and forestry sectors? Is the political will to advance transparency in these two sectors sufficiently analysed? Of course, oil revenues represent a much bigger volume of income, but the mining and forestry sectors suffer from a lack of transparency and their contribution to the revenues of the State could be revealed as being much greater than what they are stated to be today if there were to be genuine transparency.
14. With regard to the **maritime shipping fee** (*taxe maritime*): *"According to the initial assessment of the International Secretariat, this Requirement was not applicable to the Republic of Congo for the year under review. While there are indications that the Multi-Stakeholder Group has evaluated the materiality of the taxe maritime as a form of revenue from transport, it is a payment made by oil and gas companies to a private enterprise, which is not passed on to the Treasury."* This conclusion on the part of the authors is quite disappointing, as they do not seem to be taking the particular features of the situation into account. This does not encourage the Government to resolve this problem, which is one of the misuse of revenues from the extractive industry.

What has been learnt? What can we take from this for our advocacy?

- The KPMG reports were removed from the websites (including the 2012 report). What justification do the authorities have for this? We must continue to ask that they be put back on line.
  - We have also learnt that: *"Several Government representatives confirmed that KPMG had prepared quarterly reports on oil sales for 2014, but that their publication had not yet been approved.* (p.81)
- *"Although the rules governing retained earnings, reinvestments and third-party funding of SNPC* ***are not explicitly set out****, the legal commercial status of SNPC and confirmation in the EITI report of its financial and management independence imply that its* ***Board of Directors has complete autonomy to decide on its own rules."*** **How can we access these rules?**
- *"The official also said that each year, SNPC submitted copies of its audited financial statements to the Registrar of the Commercial Court and that these documents were considered public [...]"* (p.60). **Could we request these documents?**
- Coraf-SNPC contract: *"A Government representative noted that it could be important to disclose the performance contract to the Multi-Stakeholder Group in order to ensure improved coverage of future EITI reports."* (p.60).
- *"Nevertheless, some elements also demonstrate the existence of three joint venture companies that SNPC has established in Hong Kong, of which it holds 15%, the remaining 85% being held by Queensway Group: SNPC Asia Holding Ltd. and two of its subsidiaries, SNPC Asia Development Ltd. and SNPC Asia Trading Ltd., which appointed the son of the Congolese president, Denis-Christel Sassou Nguesso, as director (Mailey, 2015)." "More recently, in January 2015, SNPC established an oil marketing office in Singapore to target*

crude oil buyers from South-East Asia (Reuters 2015), although there is no certainty around whether this office was formed as a separate subsidiary." (p.61)

- **There are many reference to the Transparency Code. This is positive. With these references, the authors are expressing their interpretation of the EITI perspective of the scope of these measures, which may constitute a kind of reference in the event of future difficulties of interpretation.** For example:
    - *"Nonetheless, Article 16 of the Transparency Law of March 2017 introduces penalties (through the invalidation of transactions) for failing to publicly disclose all sales of Government assets (Republic of Congo, 2017), which could also be applied to oil revenues in kind accruing to the State."* (p.80)
    - *"Article 15 of the Transparency Law of March 2017 provides that relations between the Government and State-owned enterprises are governed by publicly-accessible provisions in order to prevent any confusion between the assets of the State and those of State-owned enterprises (Republic of Congo, 2017)."* (p.58). This can be used to request clarifications on the relationship between the SNPC and the State.

- *"It is also worrying that less attention was paid in 2014 to the safeguards required from Government agencies in relation to the 2012 and 2013 EITI reports. This could reduce opportunities for EITI to lobby for promoting the improvement of audit practices in the public sector."* (p.100). **It is therefore important to be alert to this aspect in our analysis of the next report.**