



Update 4 – April 2008

DRC Mining Contract Review: Overview and State of Play

1. A long overdue promise fulfilled: the publication of the mining contract review

On the 20th of March, the government of the DRC published on the [website of its Ministry of Mines](#) the long-awaited final report of the interministerial commission charged with reviewing mining contracts signed between private companies and the state or state-owned enterprises. With this step, the DRC government gave in to a long-standing demand from Congolese and international civil society, who had been demanding publication of the report since the interministerial commission finished its work in mid-October 2007. The fact that the government published the whole report, and not only a summary as had been leaked earlier to the press, can be considered a small victory. Civil society welcomed the publication of the report (see [Publication of Congo mining contract review welcome; renegotiations should be fair and transparent](#)) but expressed at the same time concerns about the next phase of the review process, that of the actual renegotiations. A similar reaction came from the side of the Belgian government, who expressed in a [press release](#) its wish that the process of renegotiations proceed in an open manner, emphasizing that there should be “no taboos”.

The publication of the report was an essential precondition for restoring the legitimacy of the review process. This legitimacy had been severely undermined by the lack of transparency, the unrealistic time frame and the limited involvement of civil society in the work of the interministerial commission. However, the publication of the report is far from sufficient to address the deficiencies in the review process. Furthermore, it remains unclear why the report was released only months after the commission had finished their work. Even more importantly, it is not known whether the government agrees with or will implement all the commission’s recommendations.

2. The run-up to the publication: the mining Indaba and civil society pressure

The long silence that followed the completion of the commission’s work has been interpreted by observers as a sign that the DRC government had no clear idea of how to proceed with the review. At the beginning of 2008, the DRC government also had competing priorities: it was understandably fully absorbed with the Goma peace conference, causing a further delay in the proceedings. This ongoing silence did not only nourish speculations and suspicions, it also spoilt the investment climate as companies were left in uncertainty.

On February 5th, at the beginning of a large Mining Conference in Cape Town gathering all the important players in the Congolese mining sector, a coalition of NGOs appealed to the DRC Government to break the silence and provide clarity about the next stage in the review process (see [NGOs fear that DRC Mining Review has been Hijacked](#)). They also drew attention to the financial audits conducted by the legal firm Ernst and Young (available on [www.freewebs.com/contratsminiers](#)) which were commissioned by the World Bank. The audits document

serious deficiencies in the accounting practices and financial management of many of the companies involved in the review process. According to the NGOs, this should be a sufficient incentive for stock exchange regulators and prosecutors to start investigations in order to decide whether prosecutions are justified.

The NGO appeal was immediately followed by a declaration of Vice Minister of Mines Victor Kasongo, who stated in his speech at the Indaba that the DRC government was determined to proceed with the review process in a transparent, but fast manner. His announcement that all of the contracts reviewed needed some degree of modification caused panic at the stock market, wiping out 2 billion USD of share holder value in one day. In reaction, NGOs criticized the remaining lack of clarity about the continuation of the process. In a press release issued on 18th of February (see [DRC Mining contract review: fast track or false trail?](#)) they raised doubts about the DRC government's intention to institute a "brief and open administrative appeal process" before "a specially constituted panel". According to the NGOs, a valid process can only take place if the government provides clarity about the composition, terms of reference and operating procedures of such a panel.

3. Between hesitant transparency and complete secrecy: the reactions of the mining companies

At the last day of the Indaba, the DRC government announced that it would communicate the summary findings of the commission to the companies involved within two weeks. On the 18th of February, it declared it had completed this process. Companies had been granted little more than one week to react. Around 16 companies have acknowledged publicly that they received such a communication. However, only very few amongst them have revealed its contents; others have remained completely silent. In a rather surprising move, the DRC government published at the beginning of April the contents of the notifications to all companies on [the website of the Ministry of Mines](#), thus apparently confirming a degree of commitment to transparency.

The reactions of the companies to the DRC government's letter have varied: most have downplayed the scope of the proposed changes to their contract and emphasized their belief in its juridical validity, whereas others such as First Quantum Minerals have hinted at the possibility of international arbitration. There is a clear threat that major companies who will not reach an agreement with the DRC Government will resort to international arbitration or litigation. The possible termination of contracts seems to be reserved for smaller-scale companies. Recently, the research centre IPIS issued an [update](#) on the review process which provides a brief analysis of the problems with a number of contracts of some of the biggest mining companies.

4. Towards a transparent next phase?

In a press release dated 18th of March, the DRC Government announced that it would set up a task force that would guide the next phases of the review process. In addition to the Chief of Staff of the President of the Republic, the task force is comprised of 8 senior ministers. It will be charged with analyzing the commission's recommendations, the companies' reactions to these and the "development of an efficient procedure" for dealing with the problems identified. Finally, it will be charged with identifying "those contracts in relation to which there are clear and unambiguous grounds for termination". This announcement has provoked grave concerns among numerous civil society organizations, who doubt that the composition of this taskforce guarantees impartiality or independence. In their [press release](#) of 25th of March, they insisted that independent international experts and civil society representatives be part of the task force. The NGOs also pointed to the necessity of clarity about the criteria that will be used for the renegotiations, as well as the need to publish the renegotiated contracts entirely.

Furthermore, they expressed concerns about the absence of the voice of those most directly touched by the review process-the local communities affected by mining operations.

At present, there are no guarantees that the review process will be completed in a fair, participatory and transparent manner. It is not known whether international legal experts will be recruited and under what terms. So far, no bilateral or multilateral donors have committed to providing funding for the next phase. Although the Minister of Mines has stated that information that was not included in the Commission's report can still be submitted, no provisions have been made for official involvement of civil society or parliament. Therefore, it is important that civil society continues to closely monitor the events and exert pressure in order to enhance the transparency of the process.

Other Developments in the Mining Sector

1. The Mining conference in Kinshasa

Although the mining contract review was frequently referred to during the Etats-Généraux des Mines, a big mining conference which took place from 14th to 17th of March in Kinshasa, the main topic under discussion was the Mining Code. This Code was created under the supervision of the World Bank and has been in force since 2002. The general conclusion of the Mining conference was that only minor modifications to the Code are necessary, the core still being valid 6 years after its adoption. Most importantly, the Code needs to be adapted to the new institutional architecture which will result from the process of decentralization. Such an adaptation will result in a new division of responsibilities between the national and the provincial ministers of mines as well as the decentralization of the Cadastre Minier (CAMI).

However, some of the few civil society groups that were present demanded further reaching changes to the Mining Code. Ferdinand Muhigirwa from [CEPAS](#) (Centre d'Etudes pour l'Action Sociale) pointed for example to the need to adapt the Code to the principles of the Extractive Industries Transparency Initiative (EITI). The [Fecodi](#) (Fédération congolaise de l'or et du diamant) was also highly critical towards the Code, arguing that it does not allow for creuseurs (artisanal miners) to make a proper living and should therefore be radically revised. Finally, some participants were of the opinion that the levels of taxation and royalties that the Code imposes are too low and do not take fluctuations in the world market prices of mineral commodities into account.

Whereas opinions differed on how and to what extent the existing Code should be modified, there was consensus that the poor level of its application and the continuing corruption in the mining sector constitute the biggest problems. The lack of adequate control and supervision mechanisms, especially in the areas of taxation and customs control, gravely diminish the mining sector's contribution to the state coffers. It is therefore not surprising that the Minister of Mines stated that the mining sector still hardly contributes to national development. Furthermore, local communities often profit only temporarily, if at all from the activities of the mining industry. It was therefore recommended to strengthen the social obligations of mining companies by creating a model social agreement which describes the relations between the holder of mineral rights and the local population.

Another major problem that was discussed at the Mining conference was the failure of many holders of exploration permits to invest in geological research of the territory under their control. Instead, they use their permits for speculative purposes. As a result, of the 4542 exploration permits granted, which covers 33.8 % of the land surface of the DRC, only 411 have been converted into exploitation permits up till now. In the majority of

cases, the legally prescribed term for conversion into exploitation permits has been exceeded by far. Additionally, many permits have been traded without knowledge or permission of the land registry, causing the state to miss out on any taxes that could have been levied on the profits made out of those deals. In order to end this illegal situation, the Minister of Mines announced at the end of the Mining conference a freeze on exploration permits. This offers new perspectives for replacing rogue mining operators by those that seriously want to invest in development for the benefit of the Congolese population.

In conclusion, the Mining conference exposed the many weaknesses in the current regulations and structures governing the Congolese mining sector. The urgent need for improving supervision of the application of the Mining Code was clearly recognized and some concrete measures were proposed to accomplish this. However, certain participants like [Licof](#) (Ligue contre la fraude et la corruption) remained skeptical about the Mining conference, as they doubt that the concluding recommendations will be adequately implemented. According to Licof, the problem is not so much in the texts of the recommendations, but rather in the political will to properly implement these.

2. Criticizing the mining sector: still risky business

One of the civil society representatives who was vocal at the Mining conference was the human rights activist Hubert Tshiswaka, who is a staff member of [OSISA](#) (Open Society Institute for Southern Africa). Renowned for his expertise on the pillage of natural resources by international companies, Tshiswaka had demanded the immediate publication of the report of interministerial commission charged with reviewing the mining contracts.

Three days after the Mining conference, on Friday March 21st, Tshiswaka was arrested in Lubumbashi by the Congolese intelligence services (ANR). After interrogating him for several hours, he was released on the same day. The stated ground for his arrest was the dissemination of leaflets which were critical of the Congolese government.

Immediately after his arrest, many Congolese and international NGOs mobilized and urged the Governor of the province of Katanga to release him immediately. The fact that he was released the same day without being charged is a clear indication that this pressure has a direct effect. In a [press release](#) issued the next day, the NGO Global Witness strongly condemned Tshiswaka's arrest, placing it in the long tradition of harassment, intimidation and attacks against civil society organizations and journalists in the DRC. Those who have been critical towards the Government's handling of the mining sector have been especially targeted, on numerous occasions. Tshiswaka's arrest cast serious doubts on the sincerity of the government's promises to promote transparency and good governance in the mining sector.

3. Chinese deals: what standards of transparency?

In November 2007, the Congolese government signed a protocol agreement with three Chinese state-owned companies: Eximbank, Sinohydra Corporation and the Chinese Railway Engineering Company (CREC). The agreement provides for the creation of a public-private company named Socomin (Société Congolaise Minière) which will have 32% Gécamines and 68% Chinese ownership. In return for a multibillion dollar loan agreement, which will be used for infrastructural projects and investments in the mining sector, Socomin will receive mining rights to copper and cobalt reserves that are mainly located in the area of Likasi in Katanga.

On 8th of February, it became clear that this deal not only cover new mining rights, but also existing concessions. Katanga Mining (Forrest International/Nikanor Plc) announced that day that it would grant the very rich deposits of Dikuluwe and Mashamba (DiMa) to Gécamines, which would subsequently bring these into the joint venture with the Chinese companies. In exchange, the company will receive either 825 million USD or two new concessions by 2015.

It remains unclear how this deal should be interpreted and whether it affects the renegotiation of Katanga Mining's contract. According to some observers, the Forrest Group has come under pressure from the Congolese government, which feels emboldened by strong Chinese interest in the mining sector. There is clear evidence that Western diplomats are getting increasingly nervous about the contract review in the context of China's increasingly important role in the mining sector. Recent remarks by George Forrest that the West is "loosing ground" to China and imposing too many conditions with respect to good governance are revealing in this respect.¹

Civil society organizations have repeatedly expressed concern about the lack of transparency in the way the Chinese deals have been concluded. They see the granting of the DiMA concessions as an indication that renegotiations of contracts are already taking place under the table. However, according to Gécamines CEO Paul Fortin, who was in charge of part of the negotiations with the Chinese, the whole process took place in full transparency. While searching for an additional 2.5 million tons of copper to cover the 6 billion investments in infrastructure, he simply approached Katanga Mining to ask for concessions in the same area as the other deposits that were part of the deal.

The Socomin mega-deal is not the only mining contract concluded with Chinese actors: the DRC government recently also granted the private Shanghai Pengxin Group LTD a large number of mining concessions in exchange for 1 billion of investments in mining and infrastructure and direct budget support. Again, there is not much clarity about the exact conditions of this deal. This seems to contradict the government's intention to manage the mining sector in a more transparent way. Therefore, NGOs have pointed to the need that all new mining deals comply with Congolese legislation and are being subjected to the same scrutiny as the contracts that are currently being revised.

4. Tenke Fungurume Mining: mired in controversy

On January 14th, serious unrest broke out in the village of Fungurume in the province of Katanga. An estimated 4000 people took to the streets to protest the employment practices of a sub-contractor of the mining company Tenke Fungurume Mining (TFM), whose majority shareholder is US mining giant Freeport McMoRan. In a [press release](#) issued on January 21st, the NGO ACIDH (Action contre l'Impunité pour les Droits Humains) expressed its concerns about the fact that the local population sees no other way to persuade TFM to live up to its social commitments than by protesting.

A [report](#) from IPIS and SWEDwatch revealed the numerous problems in the execution of the social and community development plans of the TFM project. Many people that have been resettled in the first phase of the works have received inadequate compensation for their loss of livelihoods. Additionally, alternative housing for a part of the resettled households has not been finished in time, forcing many families to live under plastic sheets

¹ AFP: l'Europe perd encore du terrain face à la Chine, 15.02.2008

for a prolonged period. There are also doubts about the extent to which the project will contribute to sustainable and equitable development.

Furthermore, the report pointed to the dubious circumstances in which the TFM deals were negotiated and signed. It also briefly discussed the problems with the terms of the contract. In February, TFM received a letter from the DRC government in which it demanded far-reaching changes to the contract, such as an increase of the shares of Gécamines from 17.5% to 45%. According to a coalition of NGOs, these problems make the decision of the European Investment Bank (EIB) to grant this project a 100 million dollar loan very controversial. In a [press release](#) issued on March 13th, they called upon the Bank to improve transparency and accountability for its support to projects in the extractive industry in Africa.

5. EITI: not a sufficient guarantee for transparency

[The Extractive Industries Transparency Initiative](#) (EITI) is a mechanism developed to improve good governance in the extractives sector by setting a global standard for companies to publish what they pay and for states to disclose what they receive. It is a multi-stakeholder initiative involving state authorities, companies, investors and national and international civil society. Since it signed the Initiative in 2005, the Congo has made considerable progress in its implementation. This progress includes the creation of an EITI Committee and Secretariat as well as the adoption of an annual work plan and budget. As a result of these efforts, the DR Congo was officially accepted as a candidate country to the Initiative on the 22nd of February.

In January, a [conference](#) was organized in Kinshasa with the aim of evaluating the state of affairs concerning the implementation of EITI in the Congo and discussing the work plan and budget for the upcoming year. Amongst other objectives, the work plan for 2008 mentions the establishment of EITI representations at the provincial level, strengthening the capacities of stakeholders including MPs and a research into payments from the extractive industries to the State. The participants of the conference all signed the “Declaration of Kinshasa”, to confirm their commitment to revenue transparency and to ensuring that the exploitation of natural resources is benefits the Congolese population.

At the conference, it was emphasized by several speakers that EITI is only one instrument amongst many others to enhance transparency and accountability in the natural resources sector. They underlined especially the importance of reforming and strengthening the capacities of customs control and tax agencies, as well as the overall need to combat fraud and corruption. Furthermore, several speakers singled out the importance of the transparency of the process of the mining contract review. This process can be seen as an indicator of the DRC government’s true commitment to improving governance in the natural resources sector. The implementation of EITI cannot be judged to be fully successful until other measures, in particular the contract revision, are concluded in an open and accountable manner.

Conclusion

The struggle for giving the Congolese population a fair share of the revenues of the DRC’s immense natural resources is far from being won. The mining contract review, which is an essential part of this struggle, has now entered a new phase. However, its outcomes remain uncertain. Furthermore, the review is not only of importance for its contribution to fighting economic injustice, it is also a test-case for both the DRC government’s and the

international community's commitment to promoting good governance and sustainable development in the DRC. Given these high stakes, "A Fair Share for Congo" will continue to closely monitor the process.