Global Witness's recommendations for Democratic Republic of Congo's new mining law

October 2015

The Democratic Republic of Congo is in the process of reviewing its 2002 mining law. The 'Loi N° 007/2002…Portant Code Minier' was drawn up amid the final stages of the Second Congo War and sought to secure investment and stabilise the country's economy as it prepared for post-war recovery. Over a decade later, Congo has become Africa's largest copper producer,[1] and statistics published by the Extractives Industry Transparency Initiative (EITI) for 2013 show that the mining sector is a key driver of the economy, providing some $1.3bn in one year to the Congolese state.

However failures of governance and transparency in the sector has increased the potential for corrupt political elites to benefit personally from their country's assets, while brutal armed rebel groups and members of the army in the east have been able to finance their activities on the back of the artisanal mining sector. Five secret deals struck between 2010 and 2012, in which the Congolese state lost out on at least $1.36bn, exposed the dangers of an opaque mining sector: it is imperative that the mining law revision improves governance and closes down space for corruption and conflict financing.

The latest proposed amendments to the mining law[2] have weakened the existing law in certain crucial respects. The most pressing areas of concern in the latest proposed amendments are:

- Conflict of interest;
- Publication of contracts;
- Transparent tender process;
- State-owned enterprises;
- Beneficial ownership;
- Conflict financing and army involvement in the minerals trade.

Despite these flaws, the new bill does contain the potential for substantive reform of Congo's mining sector. One proposed article dealing with transparency (article 7ter) could lay the groundwork for future regulations governing mineral traceability schemes and the publication of contracts, beneficial owners, and the tax payments made to the state.

What follows is largely a set of recommendations for ways in which to elaborate on this positive start and lay down in law – rather than in unspecified future regulations – some articles that enshrine the principles of transparency and good governance. Where specific language is discussed, references to articles will appear as follows: the number of the article in the 2002 law, then in parentheses the number of the article and its page number in the proposed 2015 modifications.

1. Conflict of interest – keep officials out of the mining sector

Recommendation: The proposed amendments to conflict of interest rules are retrograde, removing language from the 2002 law that prevents political actors and other decision-makers from taking financial interests in private companies in the mining sector.

The most recent proposed changes seek to modify article 27 (art. 32, p. 15) by removing the stipulation that the proscribed list of persons cannot hold mining rights.

The original 2002 text of article 27 reads: « Ne sont pas éligibles pour solliciter et obtenir <u>*les droits miniers et/ou de carrières*</u>, les cartes d'exploitant artisanal, de négociants ainsi que l'agrément au titre de comptoir d'achat et de vente des substances minérales d'exploitation artisanale… »

In the proposed changes, the underlined text in italics above has been removed.

We propose the following insertion, which returns the above deleted text and adds the stipulation that the list of proscribed persons cannot have a direct or indirect financial interest in a mining company or subcontractor – this is a broader definition than simply limiting the article to banning proscribed persons from having equity interests in mining companies, though that is also explicitly banned with the final sentence.

This suggestion also expands the list of ineligible persons to include "Les membres de familles, collègues et amis proches des dites personnes ne sont également pas éligibles":

> *Ne sont pas éligibles pour détenir un intérêt direct ou indirect dans des entreprises minières et leurs sous-traitants, ou solliciter et obtenir les droits miniers et/ou de carrières, les cartes d'exploitant artisanal, de négociants ainsi que l'agrément au titre de comptoir d'achat et de vente des substances minérales d'exploitation artisanale :*
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> *a) les agents et fonctionnaires de l'Etat, notamment le Président de la République, les membres du Gouvernement national et des Gouvernements provinciaux, les magistrats, les membres des Forces armées, de la Police et des services de sécurité, les employés des organismes publics habilités à procéder aux opérations minières, ainsi que les membres de familles, collègues et amis proches desdites personnes.*

Rationale: Unless politicians, military, civil servants and others in or close to positions of decision-making power are prohibited from profiting from Congo's mining sector, the door is left open for corrupt officials to make decisions (allocation of mining rights at knockdown prices, for example) that are favourable to themselves or their family/friends and which drain Congo's natural resource wealth from the Treasury into private bank accounts.

2. Publication of contracts – release new contracts within 60 days

Recommendation: Article 7ter (in art. 10, p. 11) provides vague guarantees of transparency including publication of contracts but no detail. Here we recommend inserting language used in the recently-passed oil law; this insertion would harmonise the governance of Congo's two key natural resource sectors:

> *Les contrats miniers sont publiés au journal officiel de la République Démocratique du Congo et sur le site web du ministère des Mines endéans 60 jours à dater de leur approbation.*

Rationale: A prime ministerial decree from 2011 already demands the publication of mining contracts. While this was a positive development, that decree must now become enshrined in law. Not publishing contracts means that basic information related to the sales of mining assets – such as the amount paid or the companies involved – remains secret, which increases the risks of corruption. The hydrocarbons law has provided for the publication of contracts so the mining law should do likewise.

3. **Tenders – publish the names of companies bidding for mining rights**

Recommendation: The modification of article 33 (in art. 37, p. 16) is largely positive in providing for a regulated tendering process. However there is still insufficient transparency and scrutiny, with too much discretion left to the Mines Minister, so we suggest inserting the following text:

> *La liste des personnes morales de droit congolais ou de droit étranger soumissionnaires et celle des sélectionnées sont publiées dans la presse locale et internationale, au journal officiel de la République Démocratique du Congo et sur le site web du ministère des Mines.*

Once again, this language is taken from the hydrocarbons law. However our recommendation here does go further than the oil law in requiring the beneficial owners of companies bidding for mining rights to be disclosed on the Ministry of Mines website and elsewhere (this is included in the section on beneficial owners – see below).

We also support the following insertion, as suggested by Congolese civil society organisations, with the addition of language that excludes companies linked to individuals who have committed crimes:

> *Sont exclues de toute procédure d'appel d'offres, les personnes morales qui ne sont pas en mesure de démontrer leur expertise technique ou ne disposant pas d'une capacité financière avérée, ainsi que les personnes morales auteurs de faits de corruption, d'évasion fiscale et de toute autre activité illégale commis en RDC et dans d'autres pays ou dans lesquelles des personnes physiques auteurs des mêmes faits ont un intérêt direct ou indirect.*

Rationale: In order to ensure that Congo receives a fair price for its mining assets it is essential that mining rights are allocated via a fully transparent process. The key information in the tendering process must be made available online and in the press as well as in the official journal of Congo.

Provisions for this have been made in Congo's recently-approved hydrocarbons law; it is crucial that the same standards are applied to the mining industry. Thus the list of companies applying for mining rights, and the list of those which succeed, must be made public to allow for the requisite scrutiny by parliament and civil society, to ensure that the process is transparent, competitive and free from corruption or favouritism.

In the same vein, it is crucial that the companies without the requisite technical and financial expertise are excluded. Recently-incorporated shell companies based in secrecy jurisdictions are often used to secure assets at knockdown prices and 'flip' them for a huge private profit to major extractives companies, raising concerns about the potential for corruption. This was the mechanism behind the loss to Congo estimated to be at least $1.36bn in the secret sales deals between 2010 and 2012.

4. State Owned Enterprises (SOEs) – regulate and audit state mining companies

Recommendation: Articles on tenders should also be adapted to solve some of the transparency issues around the sale of assets by state-owned enterprises (SOEs). We recommend integrating the following language into article 33 or, alternatively, creating a new article:

> *Toute vente d'actifs ou titres miniers détenus par les entreprises du portefeuille est également soumise à appel d'offres conformément à l'article 33.*

Rationale: Where shell companies have secured and flipped assets, they have sometimes received the asset via a sell-off by a state owned enterprise (again, as in the secret sales scandal). Enforcing a transparent and public tender process for state-owned enterprise asset sales would allow for scrutiny in this process and limit the scope for potentially corrupt asset transfers.

Recommendation: There is very little on the regulation of SOEs. Article 8 bis (in art. 13, p. 11) stipulates that public bodies that engage in activity in the mining sector will be treated in the same way as private persons. This is good for competition but ignores the need for greater transparency around the sale of assets by SOEs, which has been a key method for corruption in the past – this is the rationale behind using the public tender process for sales of SOE assets as well as attribution of new mining rights.

Further to that, we recommend that the law demands the publication of contracts signed between SOEs and private companies. For example:

> *Toute vente d'actifs ou titres miniers détenus par les entreprises du portefeuille , y compris le contrat pertinent, est publiée au journal officiel de la République Démocratique du Congo, sur le site web du ministère des Mines ainsi que sur le site web de l'entreprise du portefeuille concernée endéans 60 jours à dater de leur approbation.*

We also recommend an annual independent published audit of SOE accounts:

> *Chaque entreprise du portefeuille se soumettra à un audit financier indépendant annuel qui sera publié sur le site Web du ministère du portefeuille.*

Rationale: As with the publication of mining contracts, the 2011 Prime Ministerial decree also provides for the publication of mining contracts concluded between SOEs and other partners. This proposal seeks only to turn that decree into law. The secret sales of SOE assets have been a key mechanism for corruption in the past, so the publication of sales contracts helps to make such asset transfers more transparent. Secondly, SOEs have proved something of a financial black hole at the heart of the Congolese economy, run in some cases as personal empires for powerful officials. Public annual audits will help to trace financial flows in and out of SOEs and reduce this problem.

5. Beneficial ownership – reveal the ultimate owners of companies holding mining rights

Recommendation: The general provisions on transparency in article 7ter (in art. 10, p. 11) mention beneficial ownership but provide no detail, so we recommend the insertion here of the following text:

> *Pour toute demande et toute attribution de droit minier, est publiée dans un registre disponible publiquement tenu par le ministère des Mines l'identité de toute personne qui*

détient un intérêt direct ou indirect de plus de 5% dans la société demanderesse ou attributaire, notamment :

(i) *les noms des propriétaires réels ultimes de l'entreprise*
(ii) *des informations sur la manière dont s'exerce la propriété réelle, que ce soit par détention d'actions, de droits de vote, par contrat ou par d'autres moyens, en mentionnant le nom de toute entreprise intermédiaire éventuelle*
(iii) *la nationalité des propriétaires réels ultimes*
(iv) *la date de naissance des propriétaires réels ultimes*
(v) *le pays de résidence des propriétaires réels ultimes*
(vi) *les moyens de contacter ces personnes*

Tout demandeur ou titulaire de droits miniers doit divulguer auprès du ministère des Mines, qui le retranscrit dans le registre mentionné plus haut et le publie sur son site web, le nom de toute personne politiquement exposée disposant d'un intérêt direct ou indirect dans ledit demandeur ou détenteur de droits miniers, indépendamment du degré et des moyens de contrôle que cette personne exerce sur l'entreprise.

La responsabilité pour la divulgation des informations stipulées au présent article est de la responsabilité exclusive des demandeurs et titulaires de droits miniers, qui sont tenus de fournir tout document probant à l'appui de cette divulgation.

Afin de s'assurer du caractère exact des informations divulguées, le Ministère des mines rendra publiques sur son site web les documents prouvant l'identité des propriétaires réels de l'entreprise, tels que des liens vers les registres nationaux des sociétés ou, lorsque ceux-ci ne sont pas disponibles en ligne, des copies des documents de constitution de la société.

La divulgation des propriétaires réels se fait annuellement et doit comprendre les détails des propriétaires réels de toute l'année écoulée.

Rationale: Without an obligation to disclose information on the ultimate beneficial owners of a concession, an individual could legally hide their identity behind an anonymous company when acquiring a mining licence. This is another central factor which facilitated the costly secret deals in which, according to Kofi Annan's Africa Progress Panel, at least $1.36bn was estimated to have been lost to the Congolese state in a string of under-priced and opaque sales of mining assets. In those deals the identity of beneficiaries of the assets was hidden behind anonymous companies incorporated in secrecy jurisdictions, in that case the British Virgin Islands.

The lack of this provision would also undercut any robust conflict of interest article (see recommendation 1 above). If the ultimate beneficial owners of mining licences remain anonymous, it would be impossible to ensure that these provisions are respected.

6. Conflict financing – compel companies to do due diligence, and regulate the transport of minerals

The law must require all mining and mineral trading companies operating domestically to carry out supply chain due diligence in line with international standards to ensure their purchases do not finance conflict.

Recommendation: The proposed amendments to the mining law includes language on mineral traceability and certification (in article 7ter), but does not address supply chain due diligence. We

strongly recommend that the mining law explicitly require companies to undertake comprehensive supply chain due diligence that meets the standard set by the Organisation for Economic Co-operation and Development (OECD). This is necessary in order to ensure that companies address all types of supply chain transactions that may have benefitted warring parties, not limited to tracing minerals to mine of origin.

The weaknesses of article 7ter have already been touched upon – it is too vague, and too much of its effectiveness will rely on loosely-defined future edicts and regulations.

The mining law must require that due diligence and supply chain checks are undertaken by companies operating in DRC's mineral sector. The legal precedent has already been set by the Mines Ministry's Arrêté Number 0057 (2012). These requirements must now be enshrined in the new mining law.

Global Witness recommends the insertion of the following articles:

> *Les exploitants miniers (y compris les mineurs artisanaux, les exploitations à moyenne échelle et à grande échelle/industrielles), les négociants locaux et les exportateurs, les négociants internationaux en concentrés, les entreprises de retraitement de minerais, les fonderies et les raffineries opérant dans le secteur des minerais du Congo, doivent exercer sur leurs chaînes d'approvisionnement un devoir de diligence qui répond à la norme définie dans le Guide OCDE sur le devoir de diligence, et de veiller à ce que leurs activités, opérations ou achats ne contribuent pas à des violations des droits de l'homme ou à un conflit ;*
>
> *En tant que critère de tout appel d'offres pour des droits miniers, les entreprises sont obligées de fournir la preuve qu'elles appliquent une politique en matière de minerais des conflits qui est conforme au Guide de l'OCDE sur le devoir de diligence. Les firmes se voyant attribuer des droits miniers pour la première fois ou se voyant accorder un renouvellement de leurs droits devraient être soumises à la même obligation.*

Rationale: For over two decades, armed groups and members of the Congolese army operating in the east of the country have used proceeds generated from illegal control of lucrative mines and mineral-trading routes to fund brutal conflict. Minerals that have benefited abusive warring parties are then traded into regional and international supply chains. Compelling companies to source minerals responsibly would deprive fighters of a lucrative source of funding. Alongside good governance and infrastructural reforms, diverting this flow of funds back into artisanal mining communities could help to ensure that proceeds generated by the minerals trade are genuinely used for the benefit of the local population.

Section 1502 of the US Dodd Frank Wall Street Reform and Consumer Protection Act, passed in 2010, requires US-listed companies to carry out supply chain checks on minerals sourced from Congo and neighbouring countries. Furthermore, the European Union is considering introducing a regulation that may require EU companies sourcing minerals from any high-risk and conflict-affected area, including eastern Congo, to undertake these checks. The Chinese Chamber of Commerce is also working on Guidelines for Chinese companies – guidelines that are firmly based on the OECD Due Diligence Guidance. The inclusion of a due diligence requirement in the mining law would ensure that Congolese regulation is in line with international best practice on supply chain due diligence, and mean that Congo's minerals are accepted by international markets committed to responsible sourcing.

7. Conflict of interest and army members involvement in mining

Recommendation: Ban the transportation of minerals in vehicles used for public service, including military and police vehicles. Services prohibited would primarily include the mining division and FARDC, but ultimately any civil servant should not use their vehicle to transport minerals anywhere, including between mines or across borders.

We recommend adding the following line to the end of article 27 on conflict of interest, following the paragraph listing those prohibited from owning mining interests:

> *Ces mêmes personnes sont interdites de transporter ou faciliter le transport des minerais dans n'importe quel véhicule, y compris les véhicules de service.*

Rationale: Members of the Congolese army are profiting from illegal mining, taxing and smuggling of gold and other minerals in the east of the country, despite reform efforts by international governments, businesses and the Congolese authorities.

Evidence gathered by Global Witness during six months of field research in 2013, 2014 and 2015 shows that soldiers, including commanders, of the *Forces Armées de la Republique Démocratique du Congo* (FARDC) are illegally profiting from the tin, tantalum, tungsten and/or gold trade in North and South Kivu in eastern Congo.

Members of the army have mined minerals directly, taxed miners and traders, and smuggled minerals, sometimes in army vehicles. In 2013 Global Witness uncovered a military-led smuggling racket operating at the Kalimbi mine in South Kivu, from where The Conflict-Free Tin Initiative (CFTI), South Kivu's first responsible sourcing pilot from a conflict-affected area in eastern Congo, operated. Despite triangulated evidence and investigations independent of Global Witness' that confirmed members of the military used their vehicles to illegally transport Kalimbi's minerals, holes in the current legal framework allowed them to escape further legal investigation or trial.

The military are banned from any involvement in mining or transporting minerals under Congo's 2002 mining law, but this must be strengthened to include transportation of minerals. Improving the discipline of the Congolese army deployed near mining areas is an important challenge for establishing responsible trading chains. A clear and comprehensive legal framework is critical to this.

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[1] Based on 2014 production

[2] The revision process has been drawn out over several years. In both 2012 and 2013 Global Witness provided recommendations on the revision of the mining code. These focused on issues of transparency in ownership of mining rights, a public tendering process, the publication of contracts, and international due diligence standards to ensure that the mineral trade does not finance conflict and human rights abuses.
In March 2015, after a delay of a year and a half in which tripartite discussions between the government, private sector and civil society sought an agreement on various issues, especially the fiscal regime, a set of suggested amendments was submitted by the Government to parliament before being quickly withdrawn for further consideration. The government is expected to submit a second bill that is more favourable to the private sector in terms of tax and royalty increases, but which still contains some of the flaws in transparency and accountability that have persisted since 2002 as well as since the start of the revision process.