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Null and void? CoMiCo's oil aspirations in DRC

BRIEFING



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Last year, an opaque Guernsey-owned company called CoMiCo won presidential approval to explore for oil in Democratic Republic of Congo (DRC), threatening Salonga National Park – a UNESCO-World Heritage Site and Africa's largest protected tropical rainforest.

Now, after obtaining the Production Sharing Agreement (PSA), our legal analysis of the contract and DRC's oil laws indicates that rather than giving the go-ahead for exploration, the presidential ordinance approving CoMiCo's PSA may have rendered it null and void. It would therefore not only be environmentally devastating for the DRC government to allow CoMiCo to explore for oil, but also arguably contrary to Congolese oil law. The new government in DRC must review the terms of the contract in light of this analysis.

On the 1st February 2018, DRC's then President Joseph Kabila signed an approval ordinance for a Production Sharing Agreement (PSA) that oil company Compagnie Minière Congolaise SPRL (CoMiCo) had originally signed with the DRC Ministry of Hydrocarbons in 2007.^{1,2} The ordinance is the final stage in the granting of a PSA and was intended to allow CoMiCo to begin exploration across three oil blocks in the Cuvette Centrale, an extensive area of forests and wetlands in the Congo Basin, including a block encroaching on Salonga National Park.³

The company and the original deal went largely unreported in 2007. In investigations following the approval ordinance in 2018 Global Witness found that at its formation, on the 17th April 2006, CoMiCo had been linked

to Montfort Konzi - a politically connected individual, and Idalécio de Castro Rodrigues Oliveira - a businessman later convicted of



The front page of CoMiCo's contract.

corruption as part of Brazil's Car Wash Investigation, in relation to the sale of an

unrelated oil block.⁴ Mr Konzi is a former Congolese politician who was a cabinet member of Jean-Pierre Bemba's Mouvement de Libération du Congo. Minutes from a 2017 CoMiCo AGM show that a lawyer known to have acted on behalf of Mr Bemba was present at the meeting. When contacted by Global Witness the lawyer declined to disclose who his client was in relation to CoMiCo, only stating that the client had a minority stake in the company. He acknowledged that he had worked for Mr Bemba on other matters but stated categorically that Bemba was in no way connected to CoMiCo. Today, the present ownership of the majority of the company is hidden behind a nominee company.⁵

CoMiCo's contract has yet to be published on DRC's Oil Ministry's website as required by law. After sustained pressure on the government, the PSA appeared on the Extractive Industries Transparency Index DRC website.⁶ Our analysis suggests that in its current form the contract does not give the holder the right to carry out oil operations in DRC, because it is not in line with Congolese law. CoMiCo disputes this interpretation.

In January, Felix Tshisekedi was declared the winner of a disputed presidential election in DRC. Tshisekedi will succeed outgoing President Joseph Kabila, who had been in power since January 2001. It is important that President Tshisekedi and his administration seeks to improve upon the record of the Kabila government by enforcing strict adherence to Congolese law in natural resource deals, especially in terms of transparency around contracts and the real beneficiaries behind natural resource companies.

Clause for Concern

DRC's 2015 oil law states that any contract that contains a clause that contradicts the

Specific terms in CoMiCo's PSA that are not in line with 2015 oil law

➤ Area tax: Oil contracts approved after 2015 should pay an area tax of \$100 per km² annually.⁸ For the huge area covered by CoMiCo's contract, that would generate \$14.6 million per year.⁹ Yet CoMiCo's PSA says it needs to pay only \$2 per km² annually, which comes to \$292,000 owed in tax per year, leaving the treasury potentially short of millions of dollars.¹⁰

➤ Royalty rates: Oil agreements approved after the 2015 oil law should be categorised in one of four fiscal zones: A, B, C or D depending on their geological and environmental context.¹¹ This fiscal zone then determines the taxes and cost that each block is subject to, including the royalty rate payable to DRC. In the 2015 law the minimum possible royalty rates range from 8% to 12.5% dependent on fiscal zone.¹² However, CoMiCo's PSA does not designate a fiscal zone for each block; instead, the lower rate of 8% is applied across all the blocks for the first four million barrels, in order to "encourage commercial development [...] in the Cuvette Centrale," followed by a 10% royalty rate for production after that point.¹³

➤ Profit oil: The 2015 law states that a minimum of 35% to 45% of profit oil should go to DRC, depending on the fiscal zone attributed to the block.¹⁴ However, CoMiCo's PSA grants DRC a 30% share of profit oil on the first eight million barrels produced, rising to 40% for production over eight million barrels.¹⁵

CoMiCo's representative denied that the company was given any sort of discount in the PSA, stating that the area tax terms of the PSA had been negotiated freely with DRC. The representative said that while certain royalties and profit oil rates were below the levels laid out in the 2015 law for the first phases of production, this would be offset by the higher rates on subsequent production.

standards set by the law should consequently be considered null and void:

“Under penalty of being void, hydrocarbon agreements cannot in any case contain provisions which derogate to the 2015 oil law” - Article 43 of the 2015 oil law.⁷

CoMiCo’s PSA contains several clauses that are not in line with DRC’s 2015 oil law. This is almost certainly because the PSA was originally drafted in 2007, under DRC’s old 1981 oil law. In most of the key ways in which the PSA deviates from the current oil law it favours CoMiCo, potentially at the expense of DRC’s public purse.

The company and the Congolese government could have renegotiated the terms of the contract to bring them into line with the 2015 law before the February 2018 presidential ordinance was granted. That the approval ordinance was signed before any apparent review of the terms of the outdated contract raises serious questions about the commitment of DRC’s Ministry of Hydrocarbons to manage the country’s natural resources effectively.

According to our legal assessment, the misalignment of the PSA and the current oil law means that when President Kabila signed the approval ordinance, rather than bringing into force the terms of the PSA he in fact rendered it void.

Unstable PSA?

Global Witness wrote to CoMiCo’s legal representative to communicate concerns about the validity of the PSA and to provide a chance to comment. In response to the conclusions of our analysis as outlined above, CoMiCo’s lawyer said: “the 2015 Hydrocarbon Law by its own provisions does not apply to the PSA, except in respect to environment, security and hygiene provisions. On that basis

the PSA remains subject to the previous legislation.”

Here, CoMiCo’s lawyer claims that a stabilisation clause written into the PSA, drafted in 2007, protects the company from any subsequent legislative changes, including Article 43 of the 2015 oil law, cited above, which could render CoMiCo’s PSA void.

However, our analysis of CoMiCo’s PSA within the DRC’s legal framework indicates that CoMiCo’s stabilisation clause did not come into effect until the signing of the presidential ordinance in February 2018. This would mean that this stabilisation clause locks into place the terms of the 2015 oil law as this is the legislation in force at the time the contract was approved.

What are stabilisation clauses?

Natural resources contracts generally have long lifespans due to the complexity of oil, gas and mining projects. As a result, these contracts often contain so-called ‘stabilisation clauses’, which guarantee to the contract holder that certain (or all) terms of the contract will be governed, at least for a certain period, by the laws in place at the time the contract is entered into. This protects companies from radical changes in laws potentially enacted several years after the contract comes into force, for example if a new government were to take power. Stabilisation clauses are designed to provide investors with a degree of certainty about the future costs or profits of long-term projects, as the investor will be sure that certain tax rates, for example, will stay the same for a given period.

The stabilisation clause in CoMiCo's PSA (Article 28 in the contract) guarantees the contracting parties stability of laws in place "at the date of the signing of this contract". The question, then, is when the PSA is officially considered to have been signed.

Global Witness's position, based on analysis of Congolese law and CoMiCo's PSA itself, is that the whole content of the agreement, including the stabilisation clause, only applies from the 1st of February 2018, when the presidential ordinance was signed:

- Article 34.1 of the PSA states that the agreement only "enters into force" after approval by a presidential ordinance.
- The 1981 oil law (which was in force at the time of the first round of signatures on the contract in 2007) clearly states that an oil contract, and therefore all the terms contained within it, "although duly signed by the parties, does not take effect until it is approved by a presidential ordinance."¹⁶
- Article 41 of the 2015 oil law similarly states that PSAs should initially be signed by the relevant hydrocarbon and finance ministers, but that they will only come into effect once a presidential ordinance has been signed.¹⁷

Thus, under the stipulations of both the 1981 and 2015 oil laws, as well as Article 34.1 of CoMiCo's PSA itself, we conclude, based on our legal analysis, that the PSA was not in force until after the signing of the presidential ordinance on the 1st February 2018, despite having been signed by relevant ministers in 2007. It is also worth noting that neither the DRC government nor CoMiCo seems to have attempted to proceed with the exploration plans laid out in the PSA until after the presidential approval ordinance, meaning that in a practical sense the agreement was not being implemented until 2018.

Finally, Article 189 of the 2015 oil law, setting out its transitory provisions, states that hydrocarbons rights "regularly acquired" before the entry into force of the 2015 oil law remain in force until they expire or are renewed. This implies that all rights not "regularly acquired" before 2015 are governed by the 2015 law. Having only been signed by the relevant ministers and not having had a presidential approval ordinance, the hydrocarbon rights covered by CoMiCo's PSA could not be said to have been "regularly acquired" until 2018, according to our legal analysis. Based on that reasoning, the contract would therefore be subject to the 2015 law and, due to the terms in the contract which are not in line with that law, would be rendered null and void.

CoMiCo's lawyer disagrees with this interpretation of the PSA's terms and the DRC legal framework, calling the analysis "clearly wrong". In response to questions from Global Witness he stated that the stability clause in the PSA "takes effect with respect to the conditions in force as at 2007".

Salonga still at risk

The fact that one of the blocks assigned to CoMiCo puts Salonga National Park at risk has been at the centre of the controversy surrounding CoMiCo's PSA. The park is the largest area of protected rainforest in Africa and home to 40 percent of the world's remaining bonobo population, as well as several other rare and endangered species.¹⁸ Salonga National Park's size means it plays a fundamental role in climate change mitigation and carbon storage. Any oil activities in the area could have potentially devastating environmental consequences.

Following CoMiCo's presidential ordinance in February 2018, the DRC government announced the creation of an inter-ministerial

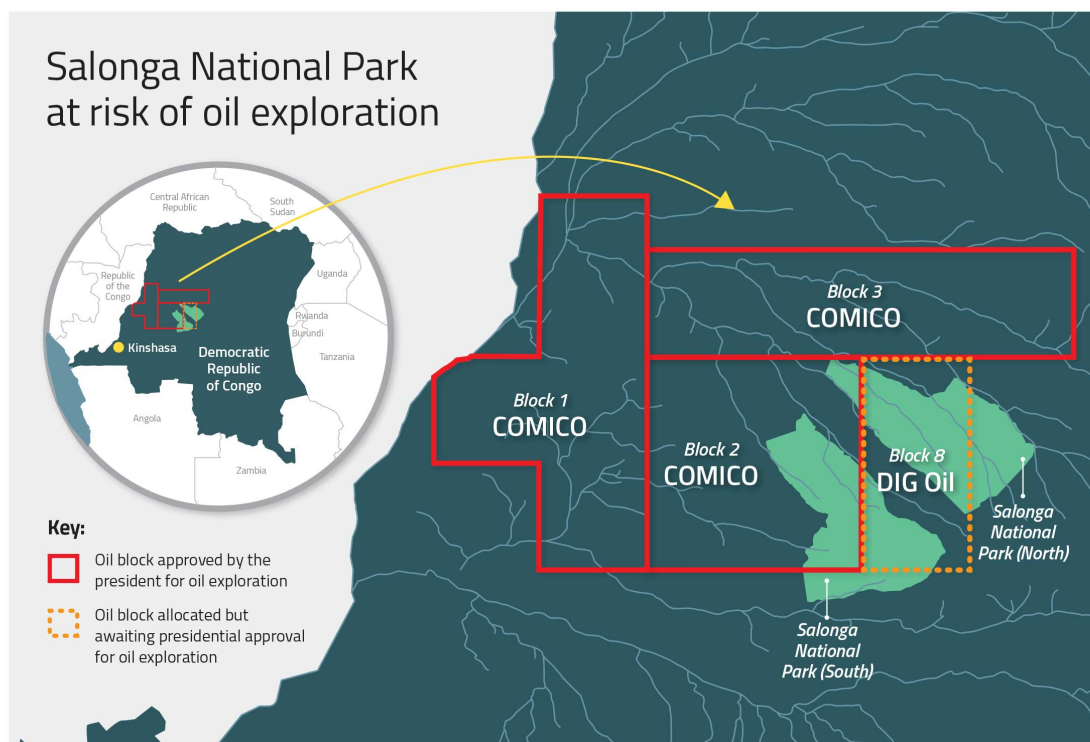
commission to examine the possibility of ‘declassifying’ sections of both Salonga and Virunga National Parks to allow oil exploration to take place.¹⁹ The declassification envisaged would mean altering the boundaries of the parks so that areas of interest for oil exploration were no longer inside park borders and as a result would no longer be covered by the protections afforded to national parks and UNESCO World Heritage sites.

However, boundary modifications of the scale proposed for the purpose of facilitating oil work are not generally acceptable under UNESCO rules, and they are unlikely to be ratified by UNESCO members.²⁰ Moreover, by reducing the scale of the parks, the DRC risks reducing the ‘Outstanding Universal Value’ of the sites to below that considered worthy of World Heritage Status. This means that there is a real risk that boundary changes could in fact put the status of the parks as a whole in jeopardy.

In light of these ongoing attempts to declassify parts of Salonga, Global Witness asked CoMiCo to make a public statement committing to not explore for oil anywhere within the current boundaries of Salonga National Park, regardless of any future changes.

In response, CoMiCo’s lawyer said: “My client’s position as to the Salongo [sic] National Park is as previously stated: it has no intention of drilling within the boundaries of the national park.” Given the risk that the DRC government might choose to redraw the boundaries of Salonga National Park to facilitate oil drilling, CoMiCo’s comment falls short of a strong and binding commitment to stay out of Salonga’s existing territory.

The allocation of this block to CoMiCo and the establishment of a declassification commission cast doubt upon the strength of the Kabila government’s commitment to protect the environment, and could even



Source: Letter from Phanar Legal representing COMICO shareholders and DRC Interactive Map, WRI and MEDD

sound alarm bells about the future of all five of the UNESCO World Heritage sites in the country, between them covering almost seven million hectares of land.



The endangered bonobo is only found in DRC. © Alamy

It is especially concerning that Salonga National Park is being put at risk on the back of a legally questionable PSA in the hands of an opaque company so far unwilling to make a meaningful pledge to protect the area. It is vital that Felix Tshisekedi's administration affirms DRC's commitment to environmental protection.

Conclusion

CoMiCo is attempting to push ahead with exploration rights granted by a contract that is legally questionable, according to our analysis. It is not clear if the company will be able to raise funding or find partners to join it on the basis of a PSA mired in controversy.

The approval given to CoMiCo's PSA together with recent attempts to declassify Salonga National Park together call into question the capacity and willingness of the previous DRC government to act in the best interests of the Congolese people when managing the country's natural resources. The previous government appears to have disregarded its own oil law, which was designed in part to ensure that DRC profits from its wealth in natural resources. In doing so, it has put Salonga National Park at risk and approved a

contract with fiscal terms that seem to be less favourable than those called for in DRC's own 2015 oil law.

The new Congolese President Felix Tshisekedi and his administration urgently need to review CoMiCo's contract and others made under the Kabila regime, to ensure that they are in line with Congolese law and that the Congolese people will benefit from the country's oil sector.

If CoMiCo's oil exploration were to go ahead, it would set a dangerous precedent of the Congolese government effectively ignoring its own strengthened laws by failing to renegotiate a better deal, to the likely detriment of both the environment and the public purse.

Recommendations

- The new Congolese government should review CoMiCo's contract in light of the questions raised by our analysis.
- The new Congolese government should dismantle the inter-ministerial commission that was set up to examine the declassification of parts of Salonga National Park, and renew its international commitments to protect World Heritage Sites immediately by cancelling all oil blocks or natural resource concessions which impinge on these sites or their buffer zones and commit to not grant any new blocks in those areas in the future.
- The new Congolese government should enforce the transparency terms of DRC's oil law, including by publishing contracts on the Oil Ministry website.
- All extractive companies in DRC, including CoMiCo, should make public details of their full beneficial ownership, so that the people of DRC know exactly who has gained control of their natural resources.
- CoMiCo should join the DRC chapter of the Extractive Industries Transparency

Index (EITI) and publish all information on its payments to government and beneficial ownership in line with EITI standards and international best practice.

¹ Journal Officiel DRC, première partie, issue 4, 15th February 2018 Ordonnance n° 18/010.

² The contract “CPP du 21 décembre 2007 approuvé par Ordonnance n° 18/010 du 01 février 2018” is available on the DRC EITI website here: <https://www.itierdc.net/carte-de-la-rdc-cliquable/registre-petrolier/>

³ A map of CoMiCo concessions and the location of Salonga National Park is available here <https://www.globalwitness.org/en/campaigns/oil-gas-and-mining/not-for-sale-salonga/>. CoMiCo’s block 2 overlaps the southern part of Salonga National Park.

⁴ For details of “a politically connected individual” see Montfort Konzi Sende Ngomba in ‘Not For Sale: Congo’s Forests Must Be Protected From The Fossil Fuels Industry’, Global Witness, 2018, <https://www.globalwitness.org/en/campaigns/oil-gas-and-mining/not-for-sale-salonga/>

Details of “a businessman later convicted of corruption”: in July 2018 Idalécio de Castro Rodrigues Oliveira, a founding shareholder of CoMiCo, was convicted of corruption and money laundering and sentenced to 12 years and 8 months, in relation to the sale of oil block in Benin to Petrobras. https://www.trf4.jus.br/trf4/controlador.php?acao=noticia_vualizar&id_noticia=13790 Lawyers for CoMiCo said “Mr De Oliveira is not a direct or indirect beneficial shareholder of CoMiCo. His conviction (of which my client was not aware) is of no relevance to the matter at hand.”

⁵ CoMiCo’s DRC company records show that 99% of the shares in the company are held by Artemis Nominees Limited. Global Witness found that forty percent of the shares in CoMiCo are held by Centrale Oil & Gas Limited. When contacted by Global Witness they declined to identify who held the remaining sixty percent, citing commercial confidentiality. More details on the ownership history of CoMiCo is available in Global Witness briefing ‘Not For Sale: Congo’s Forests Must Be Protected From The Fossil Fuels Industry’

⁶ The contract “CPP du 21 décembre 2007 approuvé par Ordonnance n° 18/010 du 01 février 2018” is available on the DRC EITI website here: <https://www.itierdc.net/carte-de-la-rdc-cliquable/registre-petrolier/> However, at the time of publication the DRC Ministry of Hydrocarbons had still not published the contract on its own website, as required under the 2015 oil law, <http://www.hydrocarbures.gouv.cd/?-Contrats->.

⁷ DRC Loi n° 15/012 du 1^{er} août 2015 portant régime général des hydrocarbures, available online here: <http://extwprlegs1.fao.org/docs/pdf/cng154970.pdf>

⁸ According to Art. 129. Loi n. 15/012 du 1^{er} août 2015 portant régime général des hydrocarbures, the « redevance superficielle » [area tax] is, in exploration phase, in Congolese franc equivalent to 100 dollars per square meter and 500 dollars in exploitation phase.

⁹ The Annex of Contrat de Partage de Production between the Democratic Republic of Congo, CoMiCo and la Congolaise des

Hydrocarbures, as found on the EITI website states the total surface area of the three blocks allocated to CoMiCo is 146,000 square kilometres.

¹⁰ According to art. 12.9 of the Contrat de Partage de Production between the Democratic Republic of Congo, CoMiCo and la Congolaise des Hydrocarbures, over blocks Mbandaka 01, Lokoro 02 and Busira 03 in the Cuvette Centrale, the “redevance superficielle” [area tax] is equivalent to 2 dollars per square meter in exploration phase and 500 dollars in exploitation phase.

¹¹ See Art. 124. Loi n. 15/012 du 1^{er} août 2015 portant régime général des hydrocarbures.

¹² According to Art. 128. Loi n. 15/012 du 1^{er} août 2015 portant régime général des hydrocarbures, the royalty tax is of 12,5% for fiscal zone A, 11% for fiscal zone B, 9,5% for fiscal zone C and 8% for fiscal zone D.

¹³ According to art. 12.2. of the Contrat de Partage de Production between the Democratic Republic of Congo, COMICO and la Congolaise des Hydrocarbures, over blocks Mbandaka 01, Lokoro 02 and Busira 03 in the Cuvette Centrale.

¹⁴ Loi N° 15/012 Du 1^{er} Août 2015 Portant Regime General Des Hydrocarbures, Article 134 and 135.

¹⁵ Art. 15.2. of the Contrat de Partage de Production between the Democratic Republic of Congo, COMICO and la Congolaise des Hydrocarbures, over blocks Mbandaka 01, Lokoro 02 and Busira 03 in the Cuvette Centrale.

¹⁶ Article 79 of the 1981 oil code « Les conventions pétrolières, quoique dûment signées par les parties, n’ont d’effet qu’après avoir été approuvées par une ordonnance du Président de la République » available online here : <http://extwprlegs1.fao.org/docs/pdf/cng70291.pdf>

¹⁷ Loi N° 15/012 Du 1^{er} Août 2015 Portant Regime General Des Hydrocarbures, Article 41 « Les contrats d’hydrocarbures et leurs avenants sont signés par les Ministres ayant respectivement les Hydrocarbures et les finances dans leurs attributions, après délibération en Conseil des Ministres. Ils ne produisent leurs effets qu’après leur approbation par ordonnance du Président de la République. »

¹⁸ Salonga National Park, UNESCO World Heritage Centre, online here <https://whc.unesco.org/en/list/280>

¹⁹ Democratic Republic Of Congo Must Halt Plans To Allow Oil Exploration Which Threatens Wildlife, Global Witness, Online here: <https://www.globalwitness.org/en/press-releases/democratic-republic-congo-must-halt-plans-allow-oil-exploration-which-threatens-wildlife/>

²⁰ ‘World Heritage Sites and the extractive industries’ by Turner (S.D.), 2012, states “There have been instances in the past where the boundaries of properties may have been too readily adjusted to allow for mining or hydrocarbon extraction. Boundary modification for these purposes is not appropriate.” available online here <https://whc.unesco.org/en/extractive-industries/>