

The Carter Center
Review of DRC Mining Contracts - Update and Recommendations
November 30, 2007

Introduction

By any measure, the Democratic Republic of Congo (DRC) is one of the most mineral rich nations on earth. Copper and cobalt alone provided a third of the government's revenue during much of Mobutu's reign. Yet this year, mining will contribute less than 2% of a minimal and insufficient state budget. The amount may increase in future years, but there are so many uncertainties that, despite vast reserves of diamonds and metals, mining may never become an engine of development. One of those uncertainties comes from the contracts between mining companies and the state.

Since June 2007, the government of the DRC has been engaged in the review of mining contracts entered into during the preceding war and transition. The review was not unexpected. Problems in the contracts were identified by NGOs, the World Bank, a parliamentary commission of the DRC, and professional consultants paid by the Bank.

The Carter Center views the review of contracts and the reform of the mining sector as essential to the consolidation of democracy in the DRC. The process is important in its own right because of mining's potential to contribute to development; but it is also important for what it represents. It is a major test of the will of the government to overcome the legacy of war profiteering and corruption, and respond to the widespread public demand for accountability and the rule of law.

It is also a test of the international community's support for accountability and the rule of law in the DRC. Hundreds of millions of dollars were spent to help bring an end to war in Congo. Irregularities in the mining sector have so far been left unattended. This may have been due, in part, to the important effort to achieve free and fair elections. Others who follow the DRC closely, such as the International Crisis Group (ICG), have a different view of why the mining sector was left unattended. The ICG argues that major international donor countries stopped pressing for reform when the innot unexpebar ne fr

noncommittal. Only Belgium has taken a public position in support of the contract review.

If the review is to succeed, the stance of the international community must change. This does not require unconditional endorsement of the government's process. However, it does require acknowledgment both of the problems in the contracts and of the need for review. Such an acknowledgement would be an important first step toward correcting those problems: it would encourage companies to play a more pro-active role in seeking solutions. It would also eliminate the appearance of improper support for national mining interests over the interests of the Congolese. The next step would be to help create a process that will allow companies that are capable of, and committed to, mining according to the best standards in the industry to do so.

A successful review would give a powerful boost to the legitimacy of a government that the international community spent enormous sums to help put into place. It could also help ensure good will towards western governments, who are currently perceived to be complicit with companies that benefit from illegal or grossly imbalanced contractual arrangements. Most importantly, it is a necessary step towards ensuring that the mining industry benefits the people as a whole. Without a serious review, suspicion and distrust are likely to undermine the efforts of the government, the international community, and the companies involved.

It is clear that large investments in the mining sector will play a significant role in the coming years, as the people of the Congo increasingly demand a peace and democracy dividend. It is imperative that the international community take bold steps, and be seen to be taking bold steps, to help shift fundamentally the environment within which the DRC's vast riches are developed.

I. BACKGROUND

In February 2007, following the first elections in decades, a new government was installed in the DRC under President Joseph Kabila and Prime Minister Antoine Gizenga. Soon afterward, the government issued a "Governance Contract," laying out its priorities and commitments. These included transparency in the mining sector and renegotiation, if necessary, of existing agreements. The World Bank and European Commission played a major role in drafting the text of the Governance Contract, which was intended to translate the goals outlined in the Bank's Poverty Reduction and Growth Strategy Paper into action strategies.

In April, the Ministry of Mines announced the creation of an Interministerial Commission for the Revisitation of Mining Contracts (the "Revisitation Commission"), which began its work with a three month mandate in June 2007. The creation of the Revisitation Commission did not inspire great confidence for many reasons, including:

- Many of the same people perceived to profit from mining deals were in the new government.
- The Revisitation Commission was composed of individuals from government ministries; it lacked both safeguards to insure against political influence and the expertise requisite for complex analysis.
- The exact criteria for contract review were not fully elaborated (nor have they ever been).
- The time allotted to the Revisitation Commission was insufficient to ensure completion of its task.

Nevertheless, there were significant reasons to support the Commission. Most importantly, perhaps, the problems in the contracts were well documented. There had already been several major studies, including at least three that were supported by the World Bank: the “Lutundula Report,” by a parliamentary Commission (June 2005), the Duncan & Allen review undertaken by a US law firm (April 2006), and audits by Ernst & Young (April 2006). They all detailed serious failings in the agreements or their implementation, though the Duncan & Allen review and the Ernst & Young audits remained secret after completion. There were also reports by NGOs and a leaked memo from one of the principal World Bank mining officers noting similar concerns with the contracts.

As a result, the Revisitation Commission had strong foundational documentation upon which they could build. Much work had already been done and simply needed consolidation and updating. Moreover, the Ministry of Mines invited several outside organizations to ‘accompany’ the process. One of those was The Carter Center; the others were the Open Society Initiative for Southern Africa (OSISA) and the Benjamin de Rothschild Bank. OSISA has given some direct support to the Commission and has played an important role in mobilizing civil society experts to undertake an independent review of the contracts. According to the Ministry, the Rothschild Bank was dropped from the process because they could not provide *pro bono* assistance. o t h e r s

of refugees in the East. After the elections, The Carter Center remained in the country to work on consolidating democracy and ensuring the protection of human rights.

The Ministry of Mines recognized the possibility that The Carter Center could help mobilize expertise to assist in the review and, by monitoring the process, ensure and strengthen the legitimacy of the outcome. As a condition of its involvement, The Carter Center asked the Ministry of Mines to commit to: (i) public disclosure of all contacts in the sector; (ii) regular communication between the Revisitation Commission and the public regarding the process, including an opportunity for civil society to submit its advice and have it considered; and (iii) full disclosure of the results of the Commission's work at its conclusion. The Carter Center also insisted on complete independence in all aspects of its work.

The Carter Center's proposed participation was organized along three lines: (i) oversight and assistance to the Revisitation Commission, (ii) independent review of the contracts and (iii) support in articulating approaches to addressing any problems found in the contractual arrangements governing mining activities. No funding was available to play a meaningful role in oversight and assistance to the Commission during its first months. However, despite delays in funding, The Carter Center has pursued the remaining activities, including independent evaluation of the fiscal, governance, transparency, and human rights aspects of the arrangements, among others. The Carter Center's activities are carried out in collaboration with Columbia Law School's Human Rights Clinic.

Affirming the Problems in the Contracts

At the time that it set up the Revisitation Commission, the Ministry of Mines made available to The Carter Center a number of studies and contracts. The Carter Center reviewed these and released its preliminary conclusions in an Interim Note on October 15, 2007. The Interim Note follows this Update. It states, *inter alia*, that the prior reviews agree on certain common problems among the agreements, including:

- *There was no valuation of the assets prior to the contract.* No known economic modeling was done by the parastatal prior to entering into these agreements, making the question of whether the DRC is getting an appropriate return for its asset contribution very difficult to answer. The absence of valuation points to haste, which could be due to a number of factors, including corruption, intense pressure from the corporation, or simple lack of resources and representation of the parastatal.
- *Unexplained variation in the contractual terms.* Terms vary widely among the agreements. An example that is particularly glaring, given the minority share of the project companies afforded to the parastatal, is the variation in these shares. Why this share is 17.5% in one project and 49% in another is never explained.

At this point, the work of the Commission appears to be complete. The next phase in the review is not clear. Any positive developments will depend on cooperation by companies who are seriously committed to long term investment in the country, governments in which those companies are headquartered, listed or incorporated, and international institutions such as the World Bank.

As such, the rest of this Update is devoted to explaining the positions of the major foreign donor governments, the World Bank, and mining companies towards the contract review. It also provides recommendations to those stakeholders. The Update also provides a review of the DRC government's work so far and recommendations in their regard.

II. THE INTERNATIONAL COMMUNITY

The international community has invested significant sums to support stable and accountable institutions in the DRC, includi

for Tenke Fungurume was strongly criticized at the time it was concluded in 2005, in part because the circumstances for such a major agreement were inconsistent with the internationally agreed efforts to reform the copper-cobalt parastatal, Gécamines. The consulting company contracted by the World Bank to assist in restructuring Gécamines insisted on a moratorium until existing contracts could be reviewed. The law firm of Duncan & Allen was contracted for the review on that basis. The firm raised serious questions about, among other things, the validity of the rights to Tenke Fungurume that were the subject of the contract with Phelps Dodge.

Nevertheless, according to information from Congolese and international sources, the United States embassy actively lobbied for the DRC government to sign the agreement with Phelps Dodge. There are several reports that the political officer and temporary “Chargé d’Affairs” of the embassy was personally engaged in urging the President’s office to sign. At the very least, there was no indication at any time that the US was concerned with the request for a moratorium. In fact, the ICG’s July 2007 report notes that US officials attended a signing party

many of the principal mining agreements are published on the website of the DRC Ministry of Finance, the most important of the Phelps Dodge contracts has not been made public.

Canada

According to a combined report of NGOs and industry, “the Canadian stock exchanges are the world’s largest source of equity capital for mining exploration and production both in Canada and abroad.” There are also more mining companies listed on the Canadian exchanges than anywhere else.

Many companies involved in the Congo are among those listed in Canada. The minority shareholder in the Tenke Fungurume contract, Lundin Mining, is among them. The validity of the rights that were the subject of the Tenke Fungurume contract, among others, was questioned in the Duncan & Allen review. Duncan & Allen were also critical of the fact that an agreement was signed, during what was supposed to be a moratorium on contracting, with a company owned by Katanga Mining, which reports in a number of Canadian jurisdictions. A number of reviews, including that of the Lutundula Commission, have been severely critical of the operation of the Mukondo mines by CAMEC, another Canadian-listed company. Several other Canadian-listed companies, including Anvil Mining and First Quantum, have been the subject of controversy in the Congo because of alleged corruption or complicity in other crimes.

Notwithstanding, the Canadian government has remained entirely outside the review process. Indeed, it helped to lobby for at least one mining contract.

Canadian NGOs have found the government to be closed to serious discussion about the risks which its corporations are running in the Congo. The Ministry of Foreign Affairs and International Trade informed one NGO that it would await the end of the review process before taking any position.

United Kingdom

The United Kingdom (UK) is another major home to mining companies. Much like Canada, London’s Alternative Investment Market, or AIM, has been relied upon by several companies operating in the Congo to generate financing. This sub-market of the London Stock Exchange has fewer regulatory requirements for listing, making it an attractive capital source for newer and smaller mining companies.

The UK indicated to The Carter Center that it was funding reforms such as EITI in the Congo. However, citing concerns about the lack of transparency, the UK has remained publicly silent on the contract review. EITI is a valuable initiative and should be supported in the Congo. However, support to EITI cannot substitute for, and seems disingenuous in light a failure to, support for the process of addressing the fundamental problems with the arrangements concerning mining activities. The prospective revenues that EITI concerns will remain theoretical unless the deals that are to generate these revenues are rectified.

European Institutions

The European Commission has expressly stated its support for the DRC's contract review: "Regarding the reviewing of past mining contracts, while waiting for the concrete outcomes of this process, the [European] Commission is encouraged by and supportive of the DRC authorities' initiative to set up an inter-ministerial committee on mining to carry out that task."

While The Carter Center team was in Kinshasa, it was informed by the European Commission that the Commission not only supported the government's contract review initiative, but also that the European Bank for Reconstruction and Development would finance only those projects that were approved by the relevant government bodies upon conclusion of the review. The Carter Center understands that those companies in the DRC whose project contracts are declared subject to renegotiation will not receive EBRD financing until renegotiation or other resolution has been effected.

Unlike the EBRD, The European Investment Bank agreed to provide \$100 million in financing to the Tenke Fungurume mining project on 17 July 2007, in disregard of the process underway.

Belgium

The Belgian government was initially opposed to a contract review, but has since changed its position and now supports the review. More recently, the Belgian embassy in Kinshasa has sought to mobilize other embassies and the World Bank around a common position. They have argued that the current review process, despite its acknowledged imperfections, creates an opportunity for a limited time. Recently, the Belgian government also agreed to provide funding to the independent review of The Carter Center.

Recommendations

The Carter Center urges individual governments and the European institutions to:

- Take a strong public stand acknowledging that significant problems exist in many of the mining contracts.
- Encourage companies registered, listed, or headquartered in their countries to engage on the merits of the review, and come to the table to renegotiate where necessary and appropriate, including where contracts are inconsistent with DRC law or international best practice.
- Continue to press for transparency and accountability in the review process. This position will be more tenable once the above acknowledgement of the substantive problems is made.
- Not request special treatment in relation to the grant of mining rights or regulation of mining activities, or support company requests for such special treatment.

- Provide support, or continue to provide support, to capacity building projects that will ensure that beneficial gains from renegotiation will be realized.
- Continue support for EITI, assistance to artisanal miners, capacity building and other parallel mining sector projects.

World Bank

The World Bank's position has been the most complicated and, perhaps, the most influential. The Bank has funded consultants who identified problems in contracts and called for a halt to negotiations of new agreements. In a leaked internal memo, the Bank's Mining Specialist reiterated that there were problems in the agreements, and acknowledged the risk of taking no action in this regard. The Bank has also acknowledged the value of – if not the need for – review. Yet the Bank has taken no known action to address the problems in the agreements. Indeed, the Bank is widely viewed as opposing the process undertaken by the government without providing a realistic alternative.

The World Bank reinitiated involvement with the DRC at Joseph Kabila's request in early 2001. Reforming the mining sector and the most significant state-owned mining company, Gécamines, were high on the World Bank's list of immediate reforms for the Congo. The World Bank was the leading force in drafting the new mining code adopted in 2002. The Code was written to attract foreign private investment and bring some degree of uniformity to the mining industry.

World Bank consultants were active in many areas of the Congo's mining industry, particularly the privatization of mining in Katanga (the location of the country's vast copper and cobalt reserves) and restructuring Gécamines, the DRC's copper-cobalt parastatal. The UK-based firm of IMC was retained to write a report detailing possible reforms for Gécamines. The Washington-based law firm, Duncan & Allen, which has a long history of involvement in DRC mining, was hired to assist in reviewing Gécamines'

had been concluded by Gécamines. The memo detailed problems with three major contracts: those with Kinross Forrest, Global Enterprises Corporate, and Lundin and Phelps Dodge. The memo notes that the contracts remove “75% of the productive base” of Gécamines. The contracts are sufficiently problematic, the Bank’s Mining Specialist argued, that “[t]o allow the contracts to proceed without comment would put us in the difficult position of perceived complicity and/or tacit approval of them.” There is no record of the World Bank having taken any action in relation to these contracts, which remain in effect today and are among those being reviewed by the Revisitation Commission.

At the time that the contract review was launched in June, there was considerable disagreement between the government and the World Bank about how a review might proceed. According to the Ministry of Mines, the Bank made a vague offer of assistance, premised on the process being run by experts chosen through the Bank’s tender procedures. Other alternatives were excluded. When the government proposed to invite independent organizations, including The Carter Center and OSISA, to play a role in monitoring and supporting the process, the Bank suggested that this, too, should be subject to tender.

In October 2007, the World Bank circulated a draft report on the Congo’s mining sector, entitled “Democratic Republic of Congo: Growth with Governance in the Mining Sector.” This draft is a thorough and thoughtful analysis. It articulates many of the problems with the mining sector that the DRC will need to address in order for that sector to be an engine for growth. Some of the problems that the World Bank identifies could be addressed through the renegotiation of certain contracts. For example, the draft report details problems with the government’s equity participation in mining project ventures, the fact that the dividends from the government’s shareholding may never materialize, overly long tax holidays, and company advances or loans with excessively high interest rates. Yet it is not clear whether the Bank is proposing to engage with the contract review process in which the government is engaged, or whether it is insisting on a separate approach. The ambiguity is highly problematic.

Recommendations

The Carter Center urges the World Bank to:

- Take a strong public stand acknowledging that significant problems exist in many of the mining contracts.
- Publicly support the contract review process that is underway.
- Engage with the contract review process that is underway, and collaborate with other organizations involved in the review process.
- Press for transparency and accountability in the review process.

- Encourage companies to come to the table to renegotiate where necessary and appropriate, including where contracts are inconsistent with DRC law or international best practice.
- Provide support, or continue to provide

III. THE GOVERNMENT OF THE DRC

As noted above, the Revisitation Commission was created in April, and began its work in June. Its initial mandate was for three months. From discussions in Kinshasa, it appears that most people involved with the Commission believed from the start that the Commission would receive an extension of its mandate for another three months.

After the Revisitation Commission was announced, the government sought funding for its work. The twenty-eight members of the Commission are civil servants from various ministries and the presidency. They were mandated to review the contracts in addition to their normal responsibilities. Funds were needed to support this additional government project. As far as The Carter Center is aware, the only organization that provided any funding for the Commission's work was OSISA. The funding provided by OSISA did not fully meet the government's articulated funding needs, yet no other donor offered assistance. While the World Bank has represented to The Carter Center that it offered assistance to the contract review at various points in the process, Ministry of Mines officials indicated that such support was not desired, as it would result in greater indebtedness of the country. Further, there were indications that the government's vision and timeline for the process was not well-received by the Bank.

Despite the absence of external funding, the Revisitation Commission carried out its work. Sources in Kinshasa reported that, while the Commission was meeting less frequently at the beginning of the summer. However, once it became clear that the Commission was under intense pressure to finish its work within the original three month mandate, it was reported that the Commission was meeting essentially everyday and on weekends. The World Bank also characterized the Commission's work as being carried out in a "diligent and responsible fashion."

Many questions about exactly what the Revisitation Commission was doing have remain unanswered. How the contracts were chosen for review has never been fully explained, although it has been suggested that these contracts were the ones provided to the Commission by the parastatals.

The Carter Center has found the Ministry of Mines to be willing to proceed at high levels of transparency, despite allegations of bias in the Revisitation Commission. The contracts under review have been published on the Ministry of Finance website, which is a standard-setting step in mining sector transparency. However, not all of the documents pertinent to any given mining project are online. Most notably, the critical document

The fact that there was never a Terms of Reference or other official document laying out the work plan of the Commission is cause for concern. Most notably, the criteria by which the contracts were to be judged were not set out in a definitive document, although the Vice-Minister of Mines has said in press interviews that the contracts would be judged against the *Mining Code*.

Regular public statements would have provided an opportunity for the Commission and the Ministry of Mines to respond to many questions that the Congolese and international community had about the review, such as the how these contracts were chosen for review, by what terms they will be judged, etc. Such public communications were, unfortunately, not made.

The Revisitation Commission did not immediately involve civil society in its work, although did eventually open its meetings. While certain members of Congolese civil society still felt left out of the process, other groups did involve themselves with the review, attending meetings and contributing documentation.

Recommendations

The Carter Center therefore urges the DRC government to:

- Publish the report of the Revisitation Commission. Given the uncertainties surrounding the review, this is the only way to demonstrate and thereby ensure that the integrity of the Revisitation Commission's recommendations are not corrupted by vested interests. Such publication is consistent with practice in other jurisdictions in which extractive industries reviews have been undertaken.
- Articulate and make public clear guidelines for how a characterization of a contract may be challenged or appealed by companies.
- Make regular public statements providing information about the process going forward and throughout the next phase of the review.
- Solicit civil society reactions to the Commission's report and take these into full consideration in the next phase of the contract review.
- Ensure that all subsequent mining rights are granted in a manner consistent with the *Mining Code*, including its provisions requiring public tender in certain circumstances. The suggestion that the loan agreement with China contains mining concessions has done significant disservice to the review process and the government more generally.

IV. CONCLUSION

The Carter Center recognizes that legally and financially sound contracts with mining companies are only one part of a much larger effort to establish economic stability and bring the benefits of the Congo's mineral wealth to its people. Yet such contracts are a crucial foundation for such efforts.

As such, The Carter Center calls on the international community and the DRC government to work as partners in reviewing the contracts governing mining activities in the Congo, and in renegotiating these contracts, as necessary. Admitting that these contracts are problematic is just the first step.

Mining companies operating in the DRC must also acknowledge the problematic aspects of their contracts. It is in the best interest of these companies and the Congo to approach each other as long term partners in mutually beneficial economic relationships. Addressing the issues in these contracts through good faith renegotiations is an important facet of such a partnership.

The government must also demonstrate a firm commitment to the contract review process that it has undertaken. Transparency, consultation, and engagement with the relevant stakeholders in a neutral and unbiased manner, are of the utmost importance going forward. The steps already taken are commendable, but much more must be done for this process to result in a transparent, stable, and profitable mining industry in the Congo.

The DRC government, foreign governments, civil society, and mining companies all ultimately share the same goal: good governance and the rule of law, and a stable and mutually beneficial economic infrastructure. The Carter Center's independent review aspires to assist in the admittedly complex and difficult work that is needed to achieve this goal.

