Global Witness's recommendations for the Democratic Republic of Congo's new hydrocarbons code

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The Democratic Republic of Congo (DRC) is set to see a rapid increase in oil exploration and production over the coming years. As the country drafts a new hydrocarbons code, all the necessary measures must be put in place for the proper governance of the sector. A robust law promoting transparency and good governance in the sector will allow the state to maximise revenues and to protect the Congolese population from the devastating impacts of corruption.

The draft of the code[1] seen by Global Witness is vague on tenders and makes no mention of transparency over financial flows from the industry. It also does not address questions of transparency regarding the ultimate (or "beneficial") owners of companies and lacks clarity on social issues and the environment.

This document sets out proposals covering these issues under five headings: governance; tenders; transparency; measures against tax havens; and safeguards for local communities and the environment.

Governance

The DRC must ensure that there is sufficient regulatory oversight of the sector, while avoiding conflicts of interest within institutions. There should be a clear separation of mandates between the institution charged with policy-setting (the Ministry of Hydrocarbons), the institution charged with policy-monitoring (the regulatory body) and companies (including state-owned companies).

Financial auditing

In addition, there should be a body independent from the Ministry of Hydrocarbons and companies whose responsibility is to watchdog the hydrocarbons sector. The *Cour des Comptes* (Government Accounting Office) would appear to be the most appropriate entity, provided it is guaranteed the expertise, funding and access necessary. As part of the monitoring process, regular audits of key information must be conducted by both this internal monitor and an internationally respected auditing firm so that citizens can be assured of the integrity of the system. The audit reports should be made publicly available. Every civil servant and company involved in the sector should be legally obliged to cooperate with these audits. Credible allegations of corruption or mismanagement in the DRC's hydrocarbons sector should automatically lead to independent investigation and possible formal prosecution.

Avoidance of conflicts of interest

The hydrocarbons code should prohibit all civil servants involved in the hydrocarbons sector from holding oil or gas rights, to serve on boards of directors or to own shares in oil or gas companies, contracting or sub-contracting firms. In addition, upon appointment to management positions in the petroleum sector, civil servants should disclose in writing the nature of any direct or indirect interest.

[1] This analysis is based on a March 2010 version of the draft hydrocarbons code, sent to Global Witness in November 2011.

Tenders

This section should be read in conjunction with Global Witness "Citizens' Checklist"[2], aimed at preventing corruption in the award of oil, gas and mining licences. The Checklist goes into more detail on how natural resource rights should be allocated and contains several other proposals that should be integrated into the hydrocarbons code.

Tenders are the best way of ensuring that the state will get the highest possible prices for its oil and gas resources. Furthermore, open tenders would help prevent corruption, by ensuring that all companies are dealt with in an impartial manner. A number of countries, including South Africa and Algeria, already ensure that nationally owned hydrocarbons assets are sold off by tender as the rule.

The new hydrocarbons code should state clearly that open and competitive tenders are obligatory for the allocation of oil and gas licences by the state. This should apply for each of the three upstream stages outlined in the draft code: surveying (the initial research into hydrocarbons resources in an area, which is often undertaken before blocks are attributed), exploration (the more in-depth surveys within specific blocks) and production. Key information regarding the bids should be published at every step of the process. In the draft code seen by Global Witness, a tender process is described only for exploration and production permits and it is not stipulated that this is mandatory.

These tenders should be based on equal treatment of bidders. Surveys and information on the oil or natural gas blocks should be made available to bidders. The terms governing contracts should be set out in law or regulation to the greatest extent possible. Model contracts that have been subject to a detailed legal review should be used as a template for negotiating bids during the allocation process.

There should be mandatory disclosure of beneficial ownership and audited accounts for prospective bidders in tenders. Companies should be prohibited from bidding if they cannot demonstrate technical expertise or are not financially viable. Companies with a history of corruption, tax evasion, illegal environmental destruction or any other criminal activities should also be forbidden from bidding.

All hydrocarbons assets to be sold by the state should be valued by internationally respected auditors and these valuations should be published.[3]

In exceptional cases where open bidding may not be feasible, the public agency responsible for the award of rights should be required by law to justify the exception to both the legislature and the public.

Transparency

The Congolese government has already taken the positive step of publishing several oil contracts, in line with a May 20, 2011 decree, and has published its second report under the Extractive Industries Transparency Initiative (EITI). However, the DRC must go further and ensure full transparency over the allocation of rights for exploration and production, and over production and revenue data. This would help prevent corruption and ensure that the Congolese population benefits as much as possible from the emerging hydrocarbons sector.

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[2] The list can be found at http://www.globalwitness.org/sites/default/files/A%20citizens%20checklist%20EN%20Jan%202012.pdf

[3] This is the case in Norway.

The hydrocarbons code should provide a clear legal basis for:

- Disclosure of the financial situation and corporate ownership (including details of beneficial ownership) [4] of all companies active in the hydrocarbons sector and a list of members of their boards of directors. Any directors who serve purely as nominees for other individuals should declare their status and who they are acting for. Hidden control of companies helps facilitate corruption and, for this reason, steps should be taken to ensure the real owners and directors of companies are known.
- Full disclosure of all oil contracts within 60 days of their coming into effect, as prescribed by the May 20, 2011 decree.
- The obligatory publication of all production data and sales and revenue figures by the state, in accordance with the EITI. Likewise, companies should be obliged to publish what they pay to the government on a project-by-project basis.[5] The appropriate authorities (notably the Central Bank of Congo and the Ministry of Finance) should ensure that these figures are reflected in and reconciled with the national budget.
- Publication of all signature bonuses paid, listed by company, for each contract signed. This information should be published by the appropriate financial institution (Ministry of Finance or Central Bank of Congo).

Measures against tax evasion

The hydrocarbons code should include measures to combat tax evasion through transfer-mispricing schemes, which are believed to cause huge losses to the Congolese treasury. These measures should include a stipulation that any trade between affiliated companies takes place on an "arm's length" basis. That is, products must be sold at what can fairly be considered international market rates and any goods imported by one company from an affiliate must not be purchased at artificially high prices. A provision along these lines already exists in the present Mining Code (article 265) and the principle should be extended to the oil sector. The *Cour des Comptes* or other appropriate body should monitor the implementation of these rules and ensure that any companies contravening them are sanctioned.

Safeguards for local communities and the environment

The DRC's territory abounds with lakes, rivers and national parks on which the livelihoods of local communities and the world's ecosystem depend. It is crucial that the hydrocarbons code reflects international and national legislation.

Hydrocarbons activities and environmental legislation

As a signatory of the Convention on World Heritage, the DRC should ensure that its new hydrocarbons code includes clear environmental rules. The draft code seen by Global Witness does state that activities relating to the hydrocarbons sector are forbidden in protected sites but then says that the minister in charge of the sector can overrule this. In the opinion of Global Witness, hydrocarbons surveying, exploration and production should be expressly forbidden in protected sites without exception.

Impact assessments

In order to prevent tensions that could lead to conflicts, environmental and social impact assessments should involve consultation with people from local communities. This involvement is crucial as the impact of oil operations on a local community can be extreme.

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[4] These provisions have just been included in the Republic of South Sudan's first oil law that was passed by the country's parliament (article 79c).

[5] Project is equivalent to activities governed by a single contract, licence, lease, concession or similar legal agreements with a government upon which payment liabilities arise. Where any payment liabilities are incurred on a different basis, reporting shall be on that basis.

These impact assessments should be required for all exploration and production permits, as well as refining and transporting permits and any renewal and material amendment of these. Assessments should include an emergency preparedness and response system.

Assessments should be updated regularly and made public. Companies should also be required to prepare a social mitigation plan for each stage of concession development. Social impact assessments should include a study of the impact on local populations' cultural heritage (for example, whether places of religious importance could be affected), property and livelihoods as well as potential conflicts, possible health and safety consequences and the risk of human rights abuses.

Responsibility and compensation of local communities

The hydrocarbons code should contain clear provisions stating that:

- Damage from pollution is the responsibility of the hydrocarbons rights-holder. Where subsidiaries are created by a parent company for its Congolese operations, the parent company is ultimately responsible for the subsidiary's actions, or its failure to act, including in relation to due diligence and financial matters. Full disclosure of information related to spills should be made public on a regular basis.
- A fund held in an escrow account should be created by the rights-holders to compensate local inhabitants experiencing negative impacts from the oil industry.
- In the event that expropriation or forced removal of people from their land cannot be avoided, this should be carried out in a humane and culturally-sensitive way and must also be subject to fair compensation. Resettlement should be part of the compensation and should place people in a situation similar to or better than before. Any compensation payable by the hydrocarbons rights-holders should be prompt and in accordance with a contract that should be made public. The right to collective redress should also be guaranteed in the new code for communities affected by activities related to oil and gas production.

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