VALE COLUMBIA CENTER
ON SUSTAINABLE INTERNATIONAL INVESTMENT
A JOINT CENTER OF COLUMBIA LAW SCHOOL AND
THE EARTH INSTITUTE AT COLUMBIA UNIVERSITY

Comments on the March 2013 DRC draft hydrocarbons law

The analysis below focuses on key environmental and transparency aspects of the DRC draft hydrocarbons law, as well as provisions dealing with the tender process and management of oil revenues.

General comment - provisions not very detailed, discretion to Minister or other parties

In general, the provisions of the Law are not detailed. It is not clear if the intent is to leave the detail to be set out in regulations, as generally there is no specific statement to that effect. It appears more like a policy framework than legislation to govern the sector.

There is a lot of discretion given to the Minister in some cases and to other bodies in other cases, to determine issues by decree or authorizations, or to get around restrictions. For example, in Article 48, exploration and exploitation is not permitted in surrounding towns, villages, and populations, wells, water lines, public buildings, sacred places, etc. However, the provision goes on to state that these works may be permitted where there is agreement between the concessionaire and the owners of buildings. Similarly, Article 24 (discussed below), allows for a decree to overcome restrictions on working in protected areas.

Environmental provisions

Article 24

Article 24 appears unusual in that it states that the grant of rights will be subject to respect of protected areas, but at the same time allows for a decree to derogate from this restriction. This creates a risk that rights will be granted in protected areas – decrees can be passed much more easily than legislation, simply by the relevant Minister. They do not need to pass parliament.

In this case, there are some protections built in, such as the requirement that the derogation be in the public interest, and that the decree be deliberated in a Council of Ministers (although this term is not defined, so it is not clear which Ministers are included, or how broadly representative it is). This may provide for some inter-ministerial oversight in relation to the proposed decree by requiring input from relevant ministries, such as the environment ministry.

With respect to whether this provision could make the grant of rights legal when it was not previously, this would require the provision of the Law to have retrospective application. This is generally unusual, and there is no specific statement in this Law that this will be the case. However, there is still a risk that a decree may be passed to apply retrospectively to rights already granted.

Requirement to comply with environmental legislation

Article 97 provides that the rights holder (and any sub-contractors) must comply with the environmental laws and regulations relating to the protection of the environment and with cultural heritage. Usually, detailed laws relating to the environment would be set out in separate environmental legislation, which may be amended over time, so it is positive that the Law recognizes these laws and the necessity of the rights holder abiding by them.

Environmental and Social Impact Assessments

The requirements with respect to environmental impact assessments (EIAs) and social impact assessments (SIAs) are not very detailed; Article 98 provides a list of five issues that must be dealt with in the assessment and Articles 21 and 34 state that a company must have completed an EIA and SIA in order to apply for a license for exploration and exploitation, respectively. Best practice in EIA requires that all available environmental and social information be assessed in an equitable and detailed manner. This requires the inclusion of local, community and traditionally based ecological, environmental and cultural knowledge. It also requires that effective stakeholder consultation and communication be undertaken. This is not evident within the requirements of Article 98.

Of course, the detailed requirements may be included in environmental legislation, or could be expanded in regulations, but should include requirements such as:

- to demonstrate that stakeholder (and especially community) consultations have been undertaken;
- to ensure that cultural, social and socio-economic impacts have been considered;
- to ensure that local, community or traditional ecological and cultural knowledge have been included in the descriptions pertaining to environmental impacts and their management;
- to contain a chapter outlining the characteristics of the planned activity and the physical development of infrastructure and for these features to be clearly shown on a map of appropriate scale;
- to contain a description of the current baseline conditions and likely trends in the absence of the planned development;
- to describe impacts in terms of potential scale, magnitude and significance, for example, major, minor and likely duration, short term, medium term, long term and reversibility or irreversibility;

- a Non-Technical Summary written in plain language for a layman to be able to understand; and
- an EIA template could be provided as an Appendix to the Law.

In addition, the EIA should contain (but not be restricted to) a selection of additional documents from those listed below:

- a plan for management of alien and invasive species;
- a plan for the conservation of biological diversity;
- a waste management plan;
- a groundwater management plan;
- a surface water management plan;
- an air quality management plan;
- a wetland management plan;
- a greenhouse gas management plan;
- a stakeholder and stakeholder information management plan;
- a cultural heritage management plan;
- a socio-economic management plan;
- a rehabilitation and closure plan; and
- a post-closure management plan.

Article 98 deals with resettlement, incorporated into the EIA and SIA. While the issue of resettlement can be outlined in an EIA/SIA, it should be dealt with in more detail. It should require, for example, preparation of a resettlement management plan, prepared in consultation with a relevantly qualified committee as well as the communities to be resettled. This plan should also be in accordance with international frameworks on resettlement standards, such as the IFC Performance Standard for Resettlements and the Involuntary Settlement Policy created by the African Development Bank.

It is also important to include a timeframe within which the EIA/SIA is approved or refused by the relevant environmental authority. Acceptability of the EIA/SIA should not be at the discretion of an individual, as contemplated in Article 98, but rather determined by a relevant authority that has inter-ministerial and expert representation.

There should also be a public consultation process, with an opportunity for the public to review the EIA/SIA as well as all supplementary information provided in response to public comment. In order not to unreasonably hold up the approval process, time limits should be set for public comment, or alternatively, a public hearing could be required at which public comments are taken into account. Applicants should be required to consult in particular with communities, and to provide EIAs/SIAs to communities, in a form in which they can understand them.

Most EIAs are undertaken on an ad-hoc or project-by-project basis. This results in environmental assessments being performed without recognition of impacts from other projects in the same location. Consequently, both spatial and temporal

cumulative impacts tend to remain unrecognized during the impact assessment and management process. Although it would be more common for this issue to be dealt with in environmental legislation, the Law does not make any provision for assessing or managing cumulative impact assessments. This can be added as a requirement in the EIA/SIA process.

Management plans represent key components of all EIA and SIAs. This is a requirement that in addition to the EIA and SIA, the applicant prepares an environmental management plan (EMP) and a social management plan (SMP) which set out the actions that it will take to mitigate the adverse impacts of the project. Plans provided are often incomplete at the outset and require modification as the project proceeds. This makes it difficult to assess their strength and their suitability to the project. It is therefore important to include a mechanism that allows on-going public review or inspection of these plans, for example, a requirement that requires the applicant to update the EMP and SMP on a yearly basis. This would improve the level of confidence the public (and the relevant authority) would place in environmental and social management of the project.

There should be a requirement on the title holder to review its EMP and SMP on an annual basis and to update those plans to accommodate any changes that have occurred in the method of extraction, areas of operation, or other activities that could affect environmental protection and ultimate restoration or rehabilitation of the affected areas. The updated plan should be submitted also following the start of works. In addition, an annual environmental and social report should be required, to be distributed to local communities as well as to the environmental authority and the hydrocarbons authority.

Right to audit

There could be more detail included on government's right to audit the operations (dealt with in Article 99). The audits should be performed by environmental inspectors (duly qualified). In addition, there should be a broader and clearer right to inspect and monitor any operations (not restricted to the risks to the environment and the population). There could be a requirement for a routine inspection schedule for each project, as well as a right to carry out random inspections. It can also be worthwhile to include a provision allowing the government to obtain independent audits of compliance with EIAs, SIAs and environmental requirements.

Closure requirements and associated fund

There is very little detail in the Law with respect to closure and associated security. This is necessary to ensure that project operators leave the environment in a useable and sustainable manner once their project is complete. For projects such as large hydrocarbon projects, it is important for the company and the country to plan for closure at the outset of the project and provide for available funds so that the

government can undertake this restoration work itself if necessary. A specific form of security should be required under the Law, well in advance of closure, to ensure that these aims can be achieved so that the government can draw on these funds if it needs to carry out closure and rehabilitation itself rather than suing the company that no longer has an interest in the project.

The closure plan should be required with the EMP, and should explain how the company will rehabilitate the project site and restore it to a useable state and it should be reviewed and updated during the course of the project.

There is mention in Article 21 of a requirement for a payment into the Bank of an amount for "environmental security", but this is not described in any detail. There is also a provision in Article 101 for the Minister to rely on a guarantee (said to be described in Article 96 – but this cross-reference is not right) provided by the company to undertake work required with respect to the environment, if it is not carried out by the company. However, this is not enough detail and does not rely on a requirement for a detailed rehabilitation or closure plan setting out the company's requirements with respect to the environment, to which the Minister can point in order to claim the guarantee. There should be clear guidance as to the types of security that may be provided (some options include a guarantee, a parent company guarantee if appropriate, a bond, a letter of credit), how the amounts will be calculated and how they may be drawn on by the government if required.

Community participation

The Law could be made much stronger by requiring public participation and consultation with local communities regarding environmental and social matters. For example, there should be requirements for meaningful consultation at each stage of the process, and for dissemination (in a manner which can be understood by communities) of information regarding the project, including EIAs, SIAs, EMPs and SMPs, as well as closure requirements.

Standards

There is little information on important environmental matters likely to arise in hydrocarbon projects, such as waste management and protection of water from hydrocarbons. There are also no standards with respect to pollution, such as air, water, noise, soil, etc. These may be included in the environmental legislation.

There is a very broad statement in Article 103 requiring the rights holder to comply with measures prescribed by the Minister, but these measures are only described, they are not set out. It seems that there may be intent for regulations to prescribe these measures, but this is not actually set out.

Other provisions

Transparency

There does not appear to be any explicit requirement for transparency around hydrocarbon rights in the Law, other than Article 108. This provides that payments and receipts will be made public in a form which is understandable to the general public. While this is a start, there is little detail around it and it is not broad enough. It is surprising there is no mention of the EITI, for example, since DRC has been a candidate country since 2007.

In addition, more information regarding the deals should be made public, beyond payments and revenues. The only information that should be kept confidential is technical data (ie the geological and geophysical information obtained by the company) – and then only for a limited period of time – as well as proprietary information that is the intellectual property of the company (as well as any information related to personnel, employees etc). All other information (including the terms of the agreement itself, and the parties to the agreement, including beneficial owners) should be made public. The Law should specify that this information is not confidential and that it will be published.

Award of rights

A tender process alone, as contemplated in Article 63, does not guarantee transparency in the allocation procedure. The tender process must include safeguards to avoid corruption and ensure transparency – such as requiring that the bids be made public and outlining clear pre-qualification and evaluation criteria (such as minimum financial and technical standards, minimum work programs). External monitors and independent auditors overseeing all aspects of the auction process can also decrease the risk. While this can be achieved whether the system used is a tender process or 'first come first served', the provisions of the Law do not include such requirements.

Many countries use a competitive bidding system for the allocation of hydrocarbon rights. The potential advantage is that it can overcome information asymmetries by revealing the market value of the resources (assuming that companies will bid what they consider, based on their analysis, the resource is worth) and that by making fiscal elements biddable, the odds to get a better deal will be increased. It is possible to make other factors biddable too, depending on the country's priorities (for example, infrastructure, local content).

The Law does not currently make clear how the tender process will operate. There is only a statement that every application will be recorded in a register and the Minister will determine the application (Article 64), but there is no guidance as to the factors on which that determination will be made. Indeed, the provisions dealing with the award of rights (Articles 63-65) provide very little detail, appearing

more like a general framework with additional information to be filled in, for example, by regulations. There is, however, no mention of the intent to set this out in regulations besides at the end of Article 63, the allusion that the duration of the bid or the conclusion of the bid will be set in the regulations.

The Law should set out the information which an applicant is required to provide in its application. This could include the name and place of incorporation (if a company), the name of any person who is the beneficial owner of more than five per cent of issued share capital as well as the entire chain of ownership of companies with an interest in the applicant company, identification of the block or blocks in respect of which the application is made, full information of the applicant's financial status, technical competence and experience, the number of hydrocarbon exploration and exploitation licenses held (if any), a statement giving particulars of work to be carried out and minimum expenditure and an estimate of any significant effect of the proposed exploration operations on the environment. Details of plans for local content (employment and training of DRC citizens, or use of local procurement) could also be required. In case of "amodiation" the same information should be required from the "amodiataire".

Hydrocarbon contracts

The Law specifies that rights will be granted through production sharing contracts or contracts for services (Article 63). There is only an overview provided as to the terms that will be included in these contracts (Article 67). To promote transparency in the negotiations and the ultimate deal, it would be beneficial to have model contracts, either as an annex to the Law or by way of regulation, to ensure that the terms of any deal are generally known in advance. This limits the parameters which are available for negotiation. This helps in promoting transparency and, in the context where the resources and capacity available to the government are generally limited and far less than that available to the companies, this can assist in ensuring a better deal. For these same reasons, it can be best to have most of the important terms spelled out in the legislation; however, it appears that the Law is far off having that level of detail such that model contracts may be necessary in the meantime.

The requirement that the contract be signed by the Minister only after deliberation with the Council of Ministers provides some oversight of the signing of contracts (presuming this Council is inter-ministerial with representation from those Ministries affected by the contract). A requirement for parliamentary ratification, however, would provide a higher level of oversight of the signing of contracts.

Management of oil revenues

The Law creates a fund for future generations, to be sustained by allocation of revenues from commercialization of hydrocarbons (Article 112). The prime minister is to create a body to govern the management of the fund, by decree.

This is not enough detail to create a fund for revenue management. The success of a fund depends on its design (ie the rules that govern how it is operated and administered), the institutional context in the country (ie the strength of the regulatory institutions of transparency and monitoring) and the political conditions (ie the political will of governments to abide by the rules). In the case of the fund set up under the Law, there are as yet no rules. In addition, it appears that the fund will be under the control of the prime minister (through the ability to create certain aspects by decree), which threatens its effectiveness and sustainability.

A separate piece of legislation, or at least detailed regulations, would be required in order to create a fund that will be capable of managing the revenues for future generations. There are many potential pitfalls in the design of a fund, so that it should be carefully and transparently designed, with clear rules, based on the country's circumstances. As the fund is just being established, it could be beneficial to set up a nation-wide consultation process. This can ensure that it is acceptable to all stakeholders, that there is independent monitoring and oversight and to obtain public buy-in and awareness of the fund. Such a process was undertaken for example in Ghana and in Timor-Leste, for the Ghanaian Petroleum Revenue Management Act (2011) and Timor-Leste's Petroleum Fund Act (2005) respectively.

March 28, 2013

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