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THE CONGOLESE MINING SECTOR IN THE BALANCE

Lack of transparency risks undermining review of mining contracts

**A Global Witness briefing
1 October 2007**

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1. Summary

In April 2007, the Minister of Mines of the Democratic Republic of Congo (DRC) announced the creation of a governmental commission to review mining contracts signed between private companies and the state or public enterprises. The Commission began meeting in June 2007. It is due to submit its report to the Minister by October 2007. Global Witness is publishing this paper with the intention of helping to frame the Minister's response and set the parameters for a comprehensive, independent and objective review of mining contracts in the DRC, which conforms to international best practice.

In May 2007, Global Witness published a press release welcoming the decision to review the mining contracts, urging the government to ensure transparency, independence and broad public consultation throughout the process and highlighting the fact that respect for these principles would determine the credibility of the review. Global Witness set out a number of recommendations for minimum requirements for the review.¹

The present paper provides a brief update on the government's review of contracts, outlines a number of concerns about the process and presents more detailed recommendations to the Congolese government. These concerns and recommendations relate to the process of the review rather than the content of specific contracts.²

On the basis of information gathered so far, in particular during a visit to Kinshasa in August 2007, Global Witness is concerned that the review is suffering from a number of serious weaknesses, in particular:

- ◆ a lack of transparency and clarity, affecting almost every aspect of the review.
- ◆ intense pressure exerted on the Commission to complete its review within an unrealistic time-frame, calling into question its methodology and the quality of the outcome.
- ◆ inadequate safeguards to protect the independence of the Commission and of the review.
- ◆ limited involvement of civil society.

¹ See Global Witness press release, "Congolese government should ensure transparency and independent oversight in mining contract review", 17 May 2007.

² As described in this paper, several other organisations are involved in analysing and commenting on the contracts themselves. Some have already published their findings on specific contracts. See for example Rights and Accountability in Development (RAID), "Key mining contracts in Katanga: the economic argument for renegotiation", April 2007, which analyses Katanga Mining Ltd's Kamoto contract. More recently, a number of Congolese organisations, under the umbrella of the *Forum de la société civile*, have published observations and recommendations on 12 contracts (see Sections 8 and 10).

If these problems are not addressed promptly, there is a risk that the integrity and the outcome of the process will be entirely undermined. The review of mining contracts is a unique opportunity to restore respect for the law, fairness and trust in one of the DRC's most important sectors. It could mark a turning point for the country as a whole and provide an effective tool with which to rebuild confidence on the part of civil society, economic operators, investors and donors. But if the process is rushed and is perceived as biased, it will be labelled as "business as usual". Not only will the Commission's efforts then have been wasted, but popular disillusionment with the review could lead to increased tension and instability in mining areas.

2. Background

The initiative to review mining contracts in the DRC takes place against a backdrop of decades of extensive corruption, mismanagement and illegal exploitation of the country's natural resources. The DRC's vast mineral wealth includes diamonds, gold, copper, cobalt, coltan and cassiterite – all of which have served as sources of illicit enrichment and have contributed little or nothing to the country's development. Over the last ten years, in particular, numerous lucrative mining agreements were signed in opaque deals between unaccountable and unelected political leaders, mining companies and other economic operators. Little information is available on the circumstances surrounding the signature of these contracts and how much money was paid, and to whom, in the process. The result has been that vast profits have flowed out of the country, and into the pockets of corrupt leaders and businessmen, while the Congolese population continues to be subjected to extreme poverty.

The brutal armed conflict which erupted in the DRC in 1996 and continued over the ten years that followed created an environment of chaos and confusion in which illegal and unaccountable practices flourished. An additional deadly dimension which emerged during this period was the use of mining profits to purchase weapons and prosecute a war in which several million people are estimated to have died. Numerous Congolese and foreign armed groups, as well as the Congolese army and armies of neighbouring countries, fought over mining areas, especially in the east of the country, with catastrophic consequences for the civilian population.³

Many large mining deals, especially in the copper and cobalt mining province of Katanga, were signed during the three years of the transition (2003-2006) as the DRC headed towards nationwide elections. Even those contracts which may have been signed legally during this period are viewed with suspicion by the Congolese population, not only because of the lack of information about the circumstances in which they were signed but because many of them are seen as imbalanced: some of the big copper mining contracts, in particular, provide disproportionately large shares of the profits to private, multinational companies and a poor deal for the Congolese state.⁴

³ This phenomenon in relation to cassiterite mining in the eastern provinces of North and South Kivu is documented in the Global Witness report "Under-mining peace – Tin: the explosive trade in cassiterite in eastern DRC", June 2005. The links between gold mining and grave human rights abuses in the northeastern district of Ituri are documented in the Human Rights Watch report "The curse of gold", 2005.

⁴ See Global Witness report "Digging in corruption: Fraud, abuse and exploitation Katanga's copper and cobalt mines", July 2006, Section VI.

The use and misuse of the mining sector in the DRC has been documented in detail by numerous organisations and bodies, including the UN Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth in the DRC; its successor the Group of Experts; national and international non-governmental organisations (NGOs); and the Lutundula Commission, a Congolese parliamentary commission tasked with investigating economic and financial contracts signed during the war.⁵ Partly thanks to these organisations' reports, it is now broadly recognised, both in Congolese and international circles, that the DRC's mining sector has been and continues to be characterised by high levels of fraud, corruption and obfuscation, as well as a disregard for the right of the Congolese population to benefit from the country's natural wealth.⁶ Yet despite public condemnations of these practices, the government in Kinshasa has taken little concrete action to introduce bold reforms in the mining sector or to end the impunity which has protected those responsible for the illegal exploitation of the country's resources.⁷

It is within this context, and in response to sustained pressure from national and international civil society, that the new government of the DRC, formed after elections in December 2006, announced that it would carry out a review of mining contracts in 2007.

The initiative to launch this review was a positive move. However, enthusiasm for the exercise, both inside and outside the DRC, has been tempered by fears that the process itself would be tainted by the very same corruption and favouritism which had plagued the signature of the contracts in the first place⁸ and that the review could simply be a token exercise designed to appease criticism. The government now faces the challenge of proving its critics wrong and earning back the trust of the Congolese population, as well as that of valuable international partners.

3. The Commission

The Commission to review the contracts was set up on 20 April 2007. The official announcement of its creation by Minister of Mines Martin Kabwelulu is one of the few official documents on this issue which is widely available.⁹ The ministerial statement outlines briefly the Commission's two main missions:

⁵ For further information on the Lutundula Commission, see Global Witness report "Digging in corruption: fraud, abuse and exploitation in Katanga's copper and cobalt mines", July 2006, Section VI,3.

⁶ Article 58 of the Congolese constitution states: "All Congolese have the right to enjoy the nation's wealth. The State has the duty to redistribute it equitably and to guarantee the right to development."

⁷ For an overview of the problems affecting the DRC's mining sector, as well as other natural resources, and recommendations for change, see Global Witness "Agenda for reform in the natural resource sector of the Democratic Republic of Congo", March 2007. In 2007, some provincial authorities have made efforts to limit abuses in the natural resource sector, but have not always been supported by the authorities in the capital Kinshasa.

⁸ These fears are based in part on the fact that the government formed after the 2006 elections includes several members of the transitional government (not least President Joseph Kabila himself), as well as other individuals who were influential in negotiating or profiting from mining contracts during the transition and have remained highly influential in the political and economic landscape since the elections.

⁹ Arrêté ministériel no.2745/Cab.Min/Mines/01/du 20/04/2007 portant mise sur pied de la commission ministérielle chargée de la revalidation des contrats miniers.

- to examine partnership contracts drawn up by the state and/or public companies or mixed public/private companies with private investors in the mining sector and their impact on the recovery of these companies and national development.
- to propose, if necessary, modalities for their revision with a view to correcting any imbalances and faults.¹⁰

The statement, which is only two pages long, does not contain the Commission's terms of reference, nor does it explain which aspects of the contracts will be reviewed and against which criteria.

The Commission is composed entirely of members of the government and civil servants including, among others, representatives of the Presidency, the Prime Minister's office, the Ministry of Mines, the Ministry of Finance and various other ministries. It reports to the Minister of Mines and is chaired by his *Directeur de Cabinet* (Principal Private Secretary).

In terms of its day-to-day work, the Commission has a plenary (composed of the Commission chair and 28 members) and three sub-commissions, each of which has been allocated a proportion of the contracts to review. The work is structured into three phases. First, each sub-commission meets to study the contracts allocated to it; it calls relevant individuals in for questioning (including state officials and representatives and board members of the companies whose contracts are under review) and can carry out field visits. Then, on the basis of the information they have gathered, the sub-commissions analyse the contracts and write a report which they submit to the plenary. Finally, the plenary is responsible for adopting the reports, then for submitting an overall report to the Minister of Mines.¹¹

4. Terms of reference

The Commission adopted its terms of reference around the time that it began its work in June 2007. Although these terms of reference are not confidential, they were not made public. Two months after the Commission had begun its work, they were still not widely available, and even some of the organisations officially designated as observers had not been given a copy.¹² Global Witness requested the terms of reference from the Ministry of Mines in August 2007 and was given a copy of a draft version (according to a ministry official, the final version was apparently almost identical).

The draft terms of reference first set out the methodology for the review of contracts, structured into three phases:

- collecting information and documents including, among other things, the contracts themselves, minutes of management and board meetings,

¹⁰ Arrêté ministériel no.2745, articles 1 and 2.

¹¹ The structure and functions of the different parts of the Commission are laid out in its internal regulations (*Règlement intérieur*).

¹² Global Witness interviews in Kinshasa, August 2007, and e-mail and telephone communications with sources inside and outside the DRC, July and August 2007.

information on the value of deposits and infrastructure, feasibility studies, research and production programmes, and the social clause (the *cahier des charges*, social responsibility agreements).

- definition of the terms of reference, which include the legal nature and status of the contracts, their validity with respect to the law, the conditions in which they were signed, the financial balance between the parties (including in terms of capital, interests and other advantages), the parties' respective commitments, an evaluation of research and production programmes and a verification that the operations conform with legal and contractual clauses.
- an analysis of the contracts themselves, which may include requests for further information or field trips.

They then list five main aspects to be reviewed:

1. The distribution of share capital within joint-venture companies.
2. The breakdown of the allocation of revenues from joint-venture companies.
3. Respect of the social clause.
4. The disempowerment of statutory management bodies of the joint-venture company in favour of the operating company, the subsidiary of the majority partner.
5. The confidentiality clause with respect to the principles of the Extractive Industries Transparency Initiative.¹³

Human rights, social and environmental aspects

Although the “social clause” is one of the five main points highlighted in the terms of reference, no details are given as to how this aspect should be analysed or evaluated. The social clause seems to be limited to compliance with companies' *cahier des charges* (social responsibility agreements) “in relation to the sustainable development plan aiming to improve the economic, cultural and social well-being of local populations affected by the mining project.”¹⁴ The broader human rights and environmental aspects of mining operations, which are not necessarily included in the *cahier des charges*, are not mentioned at all in the terms of reference.

However, a separate, undated and unsigned two page note entitled “What the Commission should look for in the contracts” places much greater emphasis on the impact of mining contracts on the population. The contents of this note, which was given to Global Witness by a member of the Commission's secretariat at the Ministry of Mines in August 2007 along with the draft terms of reference and other documentation, appear to be lifted in large part from a publication entitled “Guidelines for the revision of mining contracts in the DRC”, produced by Southern Africa Resource Watch (SARW).¹⁵ The note does not form part of the Commission's

¹³ The Extractive Industries Transparency Initiative (EITI) is an international, voluntary mechanism aimed at encouraging transparency in the extractive industries through the full publication and verification of payments by companies to government and government revenues from the extractive industries. EITI brings together governments, companies and representatives of civil society. The DRC officially signed up to EITI in 2005.

¹⁴ Draft terms of reference, part I,1.

¹⁵ Southern Africa Resource Watch, “Guidelines for the revision of mining contracts in the DRC: the quest for justice, fairness, transparency and accountability”, June 2007. SARW is a project of the Open Society Initiative for Southern Africa (OSISA).

official terms of reference, but it would appear that the Commission may be using it, among other resources, to help guide its review.

At least three out of fifteen points in this note call on the Commission to evaluate the human, social, human rights and environmental aspects of the contracts. For example, point 6 states that the contracts should lead to a feeling of genuine participation by Congolese in the management and ownership of resources through partnerships, sharing of capital and the management of companies. It refers to the creation of employment and states that the process of granting exploitation licences should take into account the consent of local communities. “In other words, the State should impose, in a reasonable way, a social obligation on actors involved in exploitation and extraction permits, and should make this commitment a requirement for granting and renewing exploitation and extraction permits.” Point 9 asks the Commission to consider the mining contracts in terms of human resources, social responsibility and human rights, including health and safety in the mines, living conditions of workers, community infrastructure in the mining areas, industrial relations, conditions of employment and land rights, especially compensation and benefits for the people. It asks the Commission to evaluate the impact of the contracts on social equality, poverty and job creation. Point 11 calls on the Commission to propose to the government the adoption of standards and procedures which will ensure that mining operations do not contribute to human rights abuses or the degradation of the environment.

Global Witness welcomes the fact that the Commission is taking these and other recommendations from the SARW document into consideration, but regrets that these points are not formulated in as much detail in the Commission’s official terms of reference. At the time of writing, the extent to which these aspects are being evaluated in detail by the Commission is not clear. The impression gained by Global Witness from sources in Kinshasa involved in or closely monitoring the review is that in practice, priority has been accorded to the financial aspects of the contracts and the “human impact” has taken second place.¹⁶ Neglecting this aspect could heighten feelings of marginalisation on the part of local populations in mining areas, which in turn could lead to further tension and potential instability.

The note based on the SARW recommendations also goes further than the Commission’s official terms of reference in other respects. For example it states that the Commission should insist that all mining companies be approved by EITI, according to which companies and governments are required to publish the payments they make and the revenues they receive.¹⁷ However, one of SARW’s key recommendations – that the Commission should repeal confidentiality clauses in all the mining contracts – is missing from the version given to Global Witness by the government.

¹⁶ Global Witness interviews, Kinshasa, August 2007.

¹⁷ Although the DRC signed up to EITI in 2005, implementation has been severely hampered by a number of factors, including attempts by the government to interfere with the process by imposing representatives on the national EITI committees and adopting regulations without consultation. See “Memo des organisations de la société civile et des industries extractives, membres du comité technique de l’ITIE/DRC”, addressed to the Minister of Planning, Kinshasa, 4 September 2007, and report by DRC Publish What You Pay Coalition, “L’Initiative de transparence des revenus des industries extractives en République démocratique du Congo: Etat des lieux”, July 2007.

5. The contracts

The questions of which contracts the Commission is reviewing, how these contracts have been chosen and how they have subsequently been prioritised are surrounded by vagueness and opacity.

In April 2007, a list of 60 contracts was drawn up by the *Directeur de Cabinet* of the Minister of Mines.¹⁸ Initially, this was assumed to be the complete list of contracts which the Commission would be examining. However, the document listing the 60 contracts merely states that these were the contracts which had been submitted to the office of the Minister of Mines. In reality, it is neither a definitive nor an exhaustive list. The *Directeur de Cabinet* told Global Witness that the mandate of the Commission was not linked to this list and that the Commission could study, and was indeed studying, contracts which were not on the list. He also stated that in view of the short time-frame of the review (see Section 6 below) certain contracts were being prioritised and that the Commission was starting with “the biggest”. He did not specify whether this meant the most important contracts in financial terms or those with the most serious flaws or problems.¹⁹ Another source reported that approximately 30 contracts had been prioritised, based on the significance of the mineral deposits and their economic importance; a few others had also been added to the list, but the criteria for choosing them were not known.²⁰

Global Witness and numerous other organisations have been calling on the government to publish the contracts under review to demonstrate transparency and to enable members of the public to submit comments. To date, the government has been unwilling to do so, citing a number of excuses ranging from the cost of photocopying to the need to respect unspecified confidentiality clauses.²¹ The issue of confidentiality has been advanced at various stages as justification for not publishing the contracts; in other countries too, governments and companies have tended to use this as an excuse for resisting publication of contracts, payments and other information, thereby hindering efforts to increase transparency.²² There is a clear contradiction between this position and the official commitment of countries such as the DRC to principles of transparency enshrined in EITI. Indeed, in the Commission’s terms of reference, one of the five prominent aspects to be reviewed is “the confidentiality clause with respect to the principles of EITI”.

¹⁸ *Liste des contrats de partenariat des entreprises minières*, 14 April 2007.

¹⁹ Global Witness interview with Alexis Mikandji and Gaby Matshafu, *Directeur de Cabinet* and *Directeur de Cabinet Adjoint du Ministre des Mines*, Kinshasa, 14 August 2007.

²⁰ Global Witness communication with source in Kinshasa, September 2007.

²¹ Global Witness interview with Alexis Mikandji and Gaby Matshafu, *Directeur de Cabinet* and *Directeur de Cabinet Adjoint du Ministre des Mines*, Kinshasa, 14 August 2007.

²² The International Monetary Fund's (IMF) Guide on Resource Revenue Transparency makes the case for the publication of contracts and sets out ways in which the confidentiality of commercially sensitive information can still be respected. It states: "Little by way of strategic advantage thus seems to be lost through publication of contracts. Indeed, it could be argued that the obligation to publish contracts should in fact strengthen the hand of the government in negotiations, since it has to disclose the outcome to the legislature and the general public." See IMF "Guide on Resource Revenue Transparency", June 2005, paragraph 32.

Although the government has not been willing to publish the mining contracts under review, it has agreed to make them, or some of them, available on request. Global Witness submitted a request in August 2007 and was given a set of contracts within a few days (it is not clear which proportion this represents of the total number of contracts under review or how these particular contracts were chosen). The government seems to be caught between two conflicting positions: on the one hand, it has shown a superficial willingness to cooperate with some organisations working in the field of natural resources and accepts that several sets of contracts are now circulating. On the other hand, it has resisted taking the initiative to publish the contracts officially. In a meeting with Global Witness, the *Directeur de Cabinet* reiterated that the government would be willing to publish them but only after the Commission had concluded its work (by which time it would presumably be too late to incorporate comments).²³

6. Timing: sacrificing thoroughness for the sake of speed

From the very beginning, the Commission has come under huge pressure to complete its work as fast as possible. When it was set up in April 2007, it was given three months to conduct the review, with a provision for extension.²⁴ The Commission only started working in earnest in mid-June, so the three month period expired in mid-September. Almost all those involved in the process, as well as those involved in observing it directly or indirectly, have been aware from the outset that it was wholly unrealistic to expect the Commission to review more than 60 contracts in just three months.

At the start, the Commission was meeting three times a week. It then increased this to six times a week and was meeting every afternoon, from Monday to Saturday, in an attempt to meet its deadline.

When Global Witness met the *Directeur de Cabinet* and his deputy in August 2007, they acknowledged that it was highly unlikely that they would be able to review all the contracts within three months, but were determined to submit a report to the Minister in mid-September on what they had accomplished so far, possibly with a request for extra time. They said that if the legal analyses of the contracts being undertaken by external organisations such as the Carter Center and OSISA (see Section 8) were not ready in time, the government would not wait for them.²⁵

In mid-September, the Commission requested an extension to complete its work. On 10 September, the Minister of Mines granted the Commission an additional 15 days and set a deadline of 25 September for the completion of its report.²⁶ While some sources in Kinshasa initially stated that this would be the final report, others have since indicated that this may be an interim report, pending completion of the full review.²⁷ On 25 September, the *Directeur de Cabinet* told Global Witness that the

²³ Global Witness interview with Alexis Mikandji and Gaby Matshafu, *Directeur de Cabinet* and *Directeur de Cabinet Adjoint du Ministre des Mines*, Kinshasa, 14 August 2007.

²⁴ Arrêté ministériel no.2745, article 6.

²⁵ Global Witness interview with Alexis Mikandji and Gaby Matshafu, *Directeur de Cabinet* and *Directeur de Cabinet Adjoint du Ministre des Mines*, Kinshasa, 14 August 2007.

²⁶ Global Witness e-mail communications with sources in Kinshasa, 11-12 September 2007.

²⁷ Global Witness telephone and e-mail communications with sources in Kinshasa, September 2007.

duration of the review had been further extended to the end of October²⁸, but there has been no official public statement regarding the extension or progress of the Commission's work.

The pressure to finish the review of contracts within such a short time-frame is likely to have a detrimental effect both on the quality and the outcome of the process, as well as on public perceptions and the investment climate in the DRC. Global Witness does not believe that the process should be prolonged unnecessarily, and would encourage efforts to complete it swiftly, but not if this means sacrificing objectivity, thoroughness, care and attention to detail. An accelerated process is also likely to mean insufficient time for public consultation and consideration of advice from other organisations and external legal experts. The government should recognise that the review of more than 60 contracts, some of which may be quite complex, is a time-consuming and delicate exercise, especially where analysis of supplementary documents and in-depth investigations, including field trips, may be required.²⁹ Purely on a practical level, the members of the Commission all have full-time jobs (most are civil servants), so they are trying to squeeze in this extra work on top of their regular employment. Inevitably, this has sometimes resulted in meetings starting very late (and therefore shortened) and lack of concentration during some of the sessions.³⁰

In practice, the short time-frame has meant that the Commission has prioritised the analysis of some contracts over others, but as indicated above, the criteria for this prioritisation have not been made clear.

There are a number of factors which may explain the pressure on the Commission to complete its work so fast. Pressure may be coming both from the government and from mining companies. On 27 March 2007, the Minister of Mines issued an instruction to state and parastatal actors that all negotiations regarding new mining contracts should be suspended from the time that the government launched its review of existing contracts.³¹ Any extension of the review process would therefore mean a further extension of the freeze on the negotiation of new contracts. This measure would directly affect a number of mining companies, including some large multinationals, who were hoping to start investing in the DRC as soon as possible after the 2006 elections.³² Some of these companies may now be frustrated by these delays. Individuals within the government who are impatient to sign potentially lucrative new contracts with some of these companies may be feeling the same

²⁸ Global Witness telephone conversation with Alexis Mikandji, *Directeur de Cabinet*, 25 September 2007.

²⁹ Members of the Commission have already travelled to some of the mining provinces as part of their review of specific contracts.

³⁰ Global Witness interview, Kinshasa, 18 August 2007.

³¹ Note Circulaire no.001 Cab.Mines/01/03/2007, "Rappel des mesures conservatoires relatives aux contrats de partenariat des entreprises publiques et paraétatiques minières", 27 March 2007.

³² Although many mining companies operated throughout the conflict in the DRC since 1996, and during the transition period from 2003 to 2006, others were deterred by the volatile and insecure environment. As the conflict gradually decreased in intensity and after elections were held across the country in December 2006, companies and potential investors began perceiving the political and financial climate in the DRC as less risky and have been keen to start exploring opportunities as quickly as possible. This trend has been particularly evident in the rich copper-mining province of Katanga, in southeastern DRC.

frustration. Several different sources told Global Witness that the government, at the most senior levels, was extremely reluctant to extend the duration of the review and that some senior government officials considered that the entire review should have been carried out in two rather than three months.³³ The *Directeur de Cabinet* told Global Witness that the Commission could not drag out the process too long because “companies are in suspense”.³⁴ It was not clear whether he was referring to companies who are waiting to sign new contracts or to those who are already operating in the DRC.

Pressure is also likely to be coming from the latter category, as companies whose contracts are under scrutiny will be anxious for the process to be completed as soon as possible. Although their operations are not suspended while the review is underway, they may feel that their reputation depends, to some extent, on obtaining an official “seal of approval” from the review.

The pressure to complete the review as quickly as possible, and the government’s apparent reluctance to extend the period, also raises questions about the motives behind the exercise. The more rushed the process of formal review, the more likely it is that significant decisions on the future of large contracts will be taken outside the framework of the Commission, in parallel discussions and negotiations which are neither documented nor observed by any external parties.

Global Witness has received indications that moves may already be underway to renegotiate some of the contracts which the Commission has finished reviewing.³⁵ A draft consultancy agreement between the financial services company Compagnie Benjamin de Rothschild and an unnamed mining company, seen by Global Witness, also suggests that this might be the case (see Section 8). Global Witness has been unable to verify these reports or the progress of moves towards renegotiations, but is concerned that the overall lack of transparency surrounding the process, combined with the government’s sense of urgency, could favour a parallel process in which government and company officials might attempt to renegotiate contracts privately before the Commission’s conclusions have been officially finalised or adopted.

7. The question of independence

As soon as the Commission’s composition was announced, doubts were cast on its independence as all its members are drawn from government ministries or departments. The manner in which the review of contracts has proceeded so far raises further questions about its independence and the likelihood of higher political agendas influencing its work or determining its outcome. The impression of transparency which may be created by the presence of observers (see Section 9) is largely negated by the fact that the sessions in which the Commission makes its final decisions on the adoption of reports are held behind closed doors. At least one source also noticed that in some of the sessions, members of the Commission appeared to feel uncomfortable when sensitive or controversial information came to light and showed

³³ Global Witness telephone and e-mail communications with sources in Kinshasa, September 2007.

³⁴ Global Witness interview with Alexis Mikandji and Gaby Matshafu, *Directeur de Cabinet* and *Directeur de Cabinet Adjoint du Ministre des Mines*, Kinshasa, 14 August 2007.

³⁵ Global Witness interviews in Kinshasa, August 2007.

reluctance to discuss these kinds of issues openly and frankly.³⁶ On the other hand, other sources commented that some Commission members were asking precise and sometimes hard-hitting questions to representatives of mining companies who were called to attend the sessions relevant to their contracts.³⁷

The mining sector in the DRC is extremely politicised and has been characterised by corruption at the highest levels. Senior government officials, as well as their close allies, relatives and friends, have significant interests in mining and have been directly benefiting from the trade for many years without any outside scrutiny.³⁸ The stakes in any review of mining contracts are therefore extremely high, leading to a risk of attempted interference and manipulation of the process from the outset.³⁹ A thorough, independent review could expose criminal acts by senior individuals in government or in companies. Not only could it then cause these individuals or companies to lose substantial profits and gains, but ultimately – if the review is conducted rigorously and independently – it could even lead to a risk of prosecution. Although the Commission does not have criminal investigation or prosecution powers, in theory it could refer acts of illegality that it uncovers to the appropriate judicial authorities. In practice, however, this is extremely unlikely: members of the Commission are likely to feel that their hands are tied, as some of the individuals who risk being exposed through their review may be the same as those they are ultimately reporting to.

More generally, the mining sector is seen by the government and by foreign donors as an the best opportunity for the DRC to develop its economy and start to rebuild the country after the war. The DRC desperately needs outside investment, and that investment is now more readily available than it has been at any time over the last ten years. The government would therefore want to avoid any course of action which might discourage or upset mining companies and investors.

The government's use of language in this context has been telling from the start. The official term used by the government to describe the current process is "revisitation" of contracts, rather than "review". The term has been chosen carefully. In private and public statements, government officials have made clear that their intention is not to cancel contracts. In April 2007, the Minister of Mines told Global Witness: "The purpose is not to throw people out but to improve the contracts and rectify imbalances. We don't want to break contracts but improve them."⁴⁰ It can be

³⁶ Global Witness interview, Kinshasa, 13 August 2007.

³⁷ Global Witness interviews, Kinshasa, 17 August 2007, and interviews with Kinshasa-based sources, September 2007.

³⁸ For further information on the role of political actors in the mining sector, see Global Witness report "Digging in corruption: fraud, abuse and exploitation in Katanga's copper and cobalt mines", July 2006, Section VIII.

³⁹ Initiatives by other bodies to investigate mining contracts have faced numerous difficulties. For example, the Lutundula Commission encountered obstruction and threats when investigating contracts signed during the war, and there were repeated attempts to block the publication of its report. Two years after it was submitted to the National Assembly, the report of the Lutundula Commission has still never been debated or acted upon. See Global Witness report "Digging in corruption: fraud, abuse and exploitation in Katanga's copper and cobalt mines", July 2006, Section VI,3, and press release by Congolese and international NGOs (including Global Witness), "DRC: End illegal exploitation of natural resources. Government must act on parliamentary commission's findings", 21 February 2006.

⁴⁰ Global Witness interview with Minister of Mines Martin Kabwelulu and Vice-Minister Victor Kasongo, Kinshasa, 18 April 2007.

presumed that this strategy forms the backdrop to the Commission's work and that the Commission is therefore unlikely to recommend the outright cancellation of many, or any, contracts.

The remit of the Commission in terms of its recommendations is another area where clarity is sorely lacking. It is assumed that the Commission's report to the minister would include recommendations for action on the specific contracts it has studied, but in theory, the Minister of Mines could over-ride these recommendations. As the sessions at which the Commission adopts its report are held behind closed doors, it may not even be known what recommendations its report contains. The Minister may choose to alter the contents of the report, and unless the Commission's version of the report has already been made public, it would be difficult to know which changes had been made by whom and at which stage. Even the Minister's recommendations will need to be approved by the Council of Ministers, so further alterations could take place at that stage. In a situation where senior government officials have a direct interest in some of the large mining contracts and therefore a direct interest in the outcome of the review, the need for transparency and monitoring of the process is all the more critical.

8. Outside expertise and advice

The Minister of Mines, the Vice-Minister of Mines and the *Directeur de Cabinet* have all stated, at different times, that they were open to receiving advice and recommendations on the contracts from outside experts and other organisations.⁴¹ The *arrêté ministériel* setting up the Commission states that the Commission can resort to external expertise, without giving further details.⁴² The Commission's internal regulations are more precise on this point, stating that the Commission's plenary can decide on the choice of experts to provide technical assistance to the Commission.⁴³

Three organisations have reportedly come forward to offer advice to the Commission: the US-based Carter Center and the Open Society Initiative for Southern Africa (OSISA), both not-for-profit organisations, and Compagnie Benjamin de Rothschild (CBdeR), based in Switzerland, part of the LCF Rothschild Group. According to its website, CBdeR provides financial services including risk management, quantitative asset management and corporate finance.⁴⁴ Early on, the government was keen to advertise the offer of assistance from these organisations, even before their role had been clearly defined or formalised.⁴⁵ In subsequent months, there has been some confusion as to the extent and exact nature of their involvement, particularly that of CBdeR, as described below.

⁴¹ Global Witness meeting with Minister of Mines Martin Kabwelulu and Vice-Minister Victor Kasongo, Kinshasa, 18 April 2007; Global Witness interview with Alexis Mikandji and Gaby Matshafu, *Directeur de Cabinet* and *Directeur de Cabinet Adjoint du Ministre des Mines*, Kinshasa, 14 August 2007; Global Witness interviews with other sources, April to August 2007.

⁴² Arrêté ministériel no.2745, article 3.

⁴³ *Règlement intérieur*, article 5.

⁴⁴ See <http://www.ctbr.ch/fr/ctbr/index.asp>.

⁴⁵ See for example "Congo delays start of mining contract review", Reuters, 15 May 2007.

Carter Center and OSISA

The Carter Center and OSISA are each working on a legal analysis of a limited number of contracts which were given to them by the government. A particular difficulty they face is the short time available for this exercise if the Commission's deadline is to be respected. The *Directeur de Cabinet* made clear to Global Witness that if external experts' advice was not available by the time the Commission had finished its own work, it would simply not be taken into account.⁴⁶ He also emphasised that the review was a governmental process, which was not bound in any way to parallel or related exercises by other organisations; that the Commission was willing to integrate elements provided by outside parties but that all the decisions would be made by the Commission, which is accountable to the Congolese government and parliament.⁴⁷

In an exchange of correspondence between the Carter Center and the Ministry of Mines, the Carter Center outlined the nature of the assistance and advice it proposed to provide and set out three conditions for its cooperation: the public disclosure of all contracts; regular communication between the Commission and the public, including an opportunity for civil society to submit its advice and have it considered; and the full disclosure of the results of the Commission's work at its conclusion.⁴⁸ After a full month, during which time the Commission's work was proceeding, the *Directeur de Cabinet* of the Minister of Mines replied, agreeing with the terms of reference set out by the Carter Center.⁴⁹

At the end of August 2007, a group of legal experts funded by OSISA and working under the coordination of the *Forum de la société civile* in the DRC published a summary report of their findings based on the study of 12 mining contracts. The report includes observations and recommendations on the technical, legal and economic aspects of the contracts.⁵⁰ They also published three reports containing observations and recommendations on specific contracts.⁵¹

Compagnie Benjamin de Rothschild

Soon after the Commission was set up, the government announced that Compagnie Benjamin de Rothschild (CBdeR) would be analysing the financial aspects of the contracts. However, very little public information is available on its role or official relationship with the government – if any – in the context of this review. In a letter to Global Witness dated 20 September 2007, CBdeR stated that the company had not

⁴⁶ Global Witness interview with Alexis Mikandji and Gaby Matshafu, *Directeur de Cabinet* and *Directeur de Cabinet Adjoint du Ministre des Mines*, Kinshasa, 14 August 2007.

⁴⁷ Global Witness interview with Alexis Mikandji and Gaby Matshafu, *Directeur de Cabinet* and *Directeur de Cabinet Adjoint du Ministre des Mines*, Kinshasa, 14 August 2007.

⁴⁸ Letter from John B. Hardman, President and Chief Executive Officer (CEO), Carter Center, to the Minister of Mines, 3 July 2007.

⁴⁹ Letter from Alexis Mikandji Penge, *Directeur de Cabinet*, Ministry of Mines, to John B. Hardman, President and CEO of the Carter Center, 7 August 2007.

⁵⁰ “*Rapport synthétique du groupe d'experts du Forum de la société civile sur 12 contrats miniers*”. Kinshasa August 2007.

⁵¹ “*La révision des contrats miniers: vues et pistes*”. “*Rapport du groupe thématique de travail de diamant sur la revisitation des 6 contrats miniers entre la MIBA et les partenaires extérieurs*.” “*Revisitation des 11 contrats miniers de Kilo-Moto*”, August 2007.

“been so far mandated about the financial aspects of the review of mining contracts either by the Democratic Republic of Congo (RDC) or by any public entity or public company depending of RDC. No agreement of any sort has been concluded on that topic by CBdeR and any of these entities [...] [CBdeR] is not and hasn’t been involved in any decision taken by any public body in RDC in relation with the review of mining contracts.”⁵²

Discussions between the government and CBdeR took place soon after the Commission was set up, but contrary to the initial impression created by public statements by government officials,⁵³ the government had not signed a formal agreement with CBdeR by September 2007.⁵⁴ However, several sources in Kinshasa told Global Witness that following the completion of the “first phase” of the Commission’s work, the government was considering inviting a small number of companies, possibly including CBdeR, to bid for a consultancy to advise the government on the subsequent stages of the review.⁵⁵

Separately from the above, Global Witness has seen a copy of a draft agreement between CBdeR and an unnamed mining company, which outlines consultancy services to be provided by CBdeR to the company regarding the renegotiation of its mining contract. The document, which is in the form of a letter on CBdeR headed paper, states: “The purpose of the present [document] is to confirm the terms of CBdeR’s involvement as the company’s exclusive financial advisor and exclusive coordinator for the renegotiation of the concession contract.”⁵⁶ It sets out the objectives, duration, phases and fees for the consultancy and refers to recent discussions between CBdeR, the Congolese government and the company concerning plans to review and renegotiate the contract for an unnamed concession.

The draft seen by Global Witness is undated and unsigned. Global Witness first had sight of it in August 2007, while the government’s contract review was still ongoing. From the wording in the draft agreement, Global Witness believes it is reasonable to conclude that the proposed renegotiation was taking place, or would take place, in the context of the government’s ongoing review of contracts. This would suggest that steps towards the renegotiation of certain contracts may already be underway before the government’s review has been completed.

9. The observers

Partly in response to pressure from national and international NGOs to open up the process of review, the government invited five organisations to act as observers to the Commission: the *Centre d’études pour l’action sociale* (CEPAS, a Jesuit research

⁵² Letter from CBdeR to Global Witness, 20 September 2007.

⁵³ For example during a speech to launch the Commission on 11 June 2007, the Minister of Mines thanked “our friends from OSISA, the Carter Center and Rothschild, organisations which have agreed to support us in this delicate process so that we can benefit from their experiences in this field.” *Allocution de Son Excellence Monsieur le Ministre des Mines au lancement des travaux de la Commission de revisitation des contrats miniers*, Kinshasa, 11 June 2007.

⁵⁴ Global Witness telephone conversation with Alexis Mikandji, *Directeur de Cabinet*, 25 September 2007.

⁵⁵ Global Witness telephone communications with sources in Kinshasa, September 2007.

⁵⁶ *Mandat de conseil financier entre la société X (“La Société”) d’une part et la Compagnie Benjamin de Rothschild SA (“CBdeR”) d’autre part.*

and study centre focusing on social issues), the *Conférence Episcopale nationale du Congo* (CENCO, National Bishops' Conference), the *Fédération des Entreprises Congolaises* (FEC, Federation of Congolese Businesses), the *Association Nationale des Entreprises du Portefeuille* (ANEP, National Association of Public Companies) and *Avocats Verts*, an NGO working for the protection of the environment and the rights of local communities.

The observers were appointed in early July 2007, about a month after the Commission had started its work. The criteria for choosing them were not made clear. Even some of the observer organisations themselves do not know on what basis they were chosen. Ministry of Mines officials stated that they had responded to requests from these organisations, but at least three of them had not requested participation.⁵⁷

There are no terms of reference or written definition of the role of the observers. The observers are allowed to attend sessions of the sub-commissions and can participate and make comments during the sessions. However, they are not allowed to sit in on the plenary sessions where the reports are adopted.⁵⁸ The observers are expected to respect the confidentiality of proceedings.

The absence of relevant documentation was one of the first problems the observers encountered. Initially, some observers were attending sessions without having received copies of the contracts under consideration. Nor had they received the Commission's official terms of reference, so they did not even know what they were supposed to be observing. Eventually, after they requested them, the contracts were made available to the observers as the work progressed.

Attendance by the observers at the Commission's sessions has been erratic. CENCO, the bishops' conference, opted not to participate in the government's review⁵⁹ and instead decided to create its own ad-hoc episcopal commission on natural resources.⁶⁰ Avocats Verts have attended a number of sessions but as its members are all full-time professional lawyers, they initially found it difficult to spare the time to attend every day. CEPAS has also found regular attendance difficult, and by mid-August, had only attended one session. According to officials in the Ministry of Mines, only FEC and ANEP had attended regularly; FEC had been the most conscientious, both in terms of attendance and participation, followed by ANEP.⁶¹ This comes as no surprise as both organisations, representing the industrial sector, have a direct interest in the outcome of the review.

⁵⁷ Global Witness interviews, Kinshasa, August 2007, and e-mail communications, July and August 2007.

⁵⁸ Observers have been told that they cannot attend these sessions. Article 7 of the *Règlement intérieur* also specifies that the sessions in which the plenary adopts reports are held behind closed doors.

⁵⁹ Global Witness e-mail and telephone communications, August and September 2007.

⁶⁰ Message from the CENCO plenary meeting, July 2007: “*A vin nouveau, outres neuves*’. *Ne pas décevoir les attentes de la nation. Message de la conférence épiscopale nationale du Congo aux fidèles catholiques et aux hommes de bonne volonté à l’occasion du 47ème anniversaire de l’indépendance.*”

⁶¹ Global Witness interview with Alexis Mikandji and Gaby Matshafu, *Directeur de Cabinet* and *Directeur de Cabinet Adjoint du Ministre des Mines*, Kinshasa, 14 August 2007.

10. The role of civil society

Although the government has stated its willingness to receive comments and suggestions from civil society, in practice, opportunities for Congolese NGOs to provide a meaningful input into the process have been limited. It would appear that the government has chosen to avoid involving some of the more outspoken or critical NGOs. Likewise, there have been few opportunities for populations living in mining areas to testify on the ways mining operations affect them.

The Commission's regulations state that national and international NGOs working in the mining, environmental or development sectors may be invited to attend discussions at the Commission's plenary and give advice on the Commission and sub-commissions' draft reports.⁶² However, the Commission appears to have accorded a low priority to seeking out opinions of NGOs. When Global Witness met the *Directeur de Cabinet*, he was dismissive when talking about Congolese NGOs and said that involving them in these kinds of processes tended to slow the work down. He described those who had been selected as observers as among the more serious organisations.⁶³ He and other officials have cited the appointment of these observers as evidence of their commitment to an inclusive process.

Global Witness does not consider that the appointment of these observers is a substitute for a real process of engagement with civil society. The choice of observers, in itself, has been problematic and divisive. Of the five organisations chosen by the government, only one, *Avocats Verts*, can be considered to be an "activist" NGO working for the protection of rights. There are several other active and committed Congolese NGOs, as well as networks of NGOs, who have been working on mining issues in the DRC for many years, but the government has not included them among the observers or actively sought their contributions to the process. One of the unfortunate results is that some NGOs, whose long experience of these issues could have helped strengthen the process, have felt marginalised. On 1 June, a meeting of around a dozen NGOs was held in Kinshasa with the *Directeur de Cabinet* of the Minister of Mines and a representative of the Carter Center. The participants listed a number of concerns about the review process and presented a set of recommendations.⁶⁴ Although participants described the meeting as productive, it does not appear to have led to a sustained dialogue between many of these NGOs and the government.

Some NGOs had called for civil society representatives to be included as fully-fledged members of the Commission, not just as observers.⁶⁵ This request has been

⁶² *Règlement intérieur*, article 56.

⁶³ Global Witness interview with Alexis Mikandji and Gaby Matshafu, *Directeur de Cabinet* and *Directeur de Cabinet Adjoint du Ministre des Mines*, Kinshasa, 14 August 2007.

⁶⁴ See "Déclaration finale de l'atelier de la société civile de la RDC sur le processus de revisitation des contrats miniers initié par le gouvernement congolais", Kinshasa, 1 June 2007.

⁶⁵ See for example press release by the DRC Publish What You Pay Coalition, "L'absence de la société civile dans la Commission chargée de la revisitation des contrats miniers: un mauvais pas du Gouvernement congolais", 30 April 2007. The press release makes three requests to the Ministry of Mines: to include in the Commission members of civil society organisations working on natural resources; to determine sanctions which would face companies or individuals who refuse to collaborate

ignored by the government. As a result, some of these NGOs have resolved to set up their own parallel process to consider some of the contracts under review.

In late August / early September 2007, a number of NGOs, grouped together under the umbrella *Forum de la société civile du Congo* and funded by OSISA, published the preliminary findings of a group of experts who had studied 12 mining contracts. These documents contain comments and recommendations on these specific contracts as well as broader observations on the review.⁶⁶

11. Conclusion

Global Witness believes that the review of mining contracts has the potential to be one of the most significant developments in the natural resource sector in the DRC. But the translation of its theoretical significance into a practical and meaningful reality will depend on the integrity of the process. This process will test the government's verbal commitments to good governance and responsible management of the DRC's mineral resources. If the review is carried out transparently, objectively, with clear criteria; if efforts are made to involve and invite comments from all relevant sectors of society; and if the government is prepared to act courageously in response to the Commission's findings – for example by cancelling illegal contracts or significantly amending those which are found to contain serious flaws – then the review could have lasting positive effects on the management of the mining sector. It could also set a benchmark for assessing future contracts. On the other hand, if the review process is marred by a lack of transparency and failure to consult the general public; if it is rushed through; and if the government is not willing to consider actions which might upset certain companies or individuals, it will be seen as a mere rubber-stamping exercise which could have serious negative consequences for the future of the mining sector and the credibility of the government as a whole.

Observations on the process to date indicate that the review is already tainted by a lack of transparency and clarity and that there are inadequate safeguards to protect the independence of the Commission and its work. The speed of the review is a particularly alarming aspect of the process. Global Witness urges the DRC government to remedy this situation as soon as possible by implementing the recommendations below.

with the Commission; and to set up mechanisms to prevent corruption of members of the Commission by the affected companies.

⁶⁶ "*Rapport synthétique du groupe d'experts du Forum de la société civile sur 12 contrats miniers.*" "*La révision des contrats miniers: vues et pistes.*" "*Rapport du groupe thématique de travail de diamant sur la revisitation des 6 contrats miniers entre la MIBA et les partenaires extérieurs.*" "*Revisitation des 11 contrats miniers de Kilo-Moto.*" Kinshasa, August 2007.

12. Recommendations

To the DRC government

Transparency

- ◆ Publish the terms of reference of the Commission and the criteria against which it is evaluating the contracts.
- ◆ Publish a full and definitive list of all the contracts under review.
- ◆ Ensure that all the contracts are reviewed against the same criteria and with the same degree of thoroughness and scrutiny.
- ◆ Publish the contracts being reviewed, for example on a special website or a section of the website of the Ministry of Mines. The contracts should be published as soon as possible, to enable interested individuals or organisations to submit comments before the Commission's report is finalised or adopted. Confidentiality should not be used as an excuse not to publish the contracts and related information of direct concern to the general public in the DRC.
- ◆ Make a public commitment to publishing the full findings and recommendations of the Commission.

Adequate time for a thorough analysis

- ◆ Extend the period available to the Commission to enable it to complete a thorough review of all mining contracts, if necessary by several months. The report due to be submitted to the Minister in October 2007 should be seen as a preliminary report and further time should be granted to the Commission to finish its work. Draw up and publish a revised timetable, which allows sufficient time to solicit and take into account a broad range of views.
- ◆ Ensure that the report of the Lutundula Commission and other relevant reports, including those of the UN Panels, national and international NGOs and the World Bank commissioned legal and financial audits of the parastatal Gécamines, are not only used as background documentation for the work of the Commission but form an integral part of their review and basis for recommendations.

Consultation with civil society

- ◆ Set up a specific channel and timetable for soliciting comments from a range of Congolese NGOs active in the natural resource sector, including organisations active in mining provinces at the local level. Civil society input should not be limited to the five organisations designated as observers by the Commission.

- ◆ Ensure that the impact of the mining operations on local populations, in particular the social, environmental and human rights aspects, are fully considered during the contract review and addressed in the Commission's recommendations.

Independence

- ◆ Ensure that no political or other undue pressure or interference is exerted on the members of the Commission – whether by government officials or companies – and that they are able to carry out their work in complete independence.
- ◆ Ensure that no new negotiations or renegotiations of contracts take place until the Commission's review has been completed and published.
- ◆ Set up an independent monitoring or oversight mechanism for the review, distinct from the existing observers. This would be a formally constituted body, which could include members of civil society, parliamentarians⁶⁷ and international legal experts. This body would have a particular role in overseeing the Commission's process of reaching conclusions and ensuring that its final report is based on a fair, independent and thorough assessment of the contracts. It would also monitor the process of the government's adoption of the report and /or its recommendations at ministerial level. The same body could then also oversee the implementation of the recommendations and action on other issues arising from the Commission's work.

To donor governments and international financial institutions

- ◆ Urge the DRC government to implement the above recommendations.
- ◆ In particular, urge the government to grant sufficient additional time to the Commission to complete its review of all the contracts.
- ◆ Highlight to the government the political and economic importance of the review and the serious negative consequences of sacrificing standards of objectivity, transparency and thoroughness, in terms of public perceptions and the impact on the business environment.
- ◆ Offer advice, expertise and other appropriate assistance for the subsequent stages of the review.

⁶⁷ Parliament could play an important oversight role in this respect, but to date, has not been assigned or taken on any particular responsibility. This is despite the fact that in early 2007, a parliamentary commission on natural resources and the environment was created. A report published by Southern Africa Resource Watch, "Guidelines for the revision of mining contracts in the DRC: the quest for justice, fairness, transparency and accountability", June 2007, provides further ideas and recommendations on the role of parliament in this context. It also presents a number of other recommendations on the review of mining contracts.