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Democratic Republic of Congo

How Kabila and the mining giants went from best friends to adversaries

- IV Online magazine - 2019 - IV528 - January 2019 -

Publication date: Tuesday 29 January 2019

A new mining code has created a rift between mining multinationals and government.

For much of 2018, two of the most powerful forces in the Democratic Republic of Congo (DRC) were engaged in a tense standoff. Then President Joseph Kabila, the country's powerful political leader since 2001, was in one corner. A group of multi-billion-dollar international mining companies was in the other.

Their dispute centres on a new mining code. The details of this legislation had been debated for several years, but a version was finally passed by parliament in January 2018. Several multinationals were strongly opposed to elements in the new code, however, and quickly announced their opposition to it. [1]

They were particularly irritated by three provisions: an increase of royalties from 2% to 3.5%; the removal of a "stability clause" from the previous code that guaranteed a ten-year grace period following any amendments; and the designation of certain minerals such as cobalt as "strategic" subject to higher royalties of up to 10%.

Mining executives from five of the biggest companies – Glencore, China Molybdenum, Randgold, China's Zijin Mining and Ivanhoe – publicly lobbied President Kabila not to sign the code into law until it was profoundly altered. They even threatened legal action. [2]

The mining companies were perhaps emboldened in these calls by the president's weakness at the time. Kabila's legitimacy has been hotly contested for failing to organise elections following the end of his constitutional term in December 2016. In the past two years, the embattled leader has faced massive demonstrations against his rule, international censure, and a rise of local clashes. [3]

When it came down to it, however, Kabila didn't blink. He signed the new code into law in June without making any of the changes demanded by the mining companies. [4]

New friends with mutual benefits

This wasn't supposed to happen. For the majority of Kabila's rule, his relationship with mining companies has been very close. Soon after coming to power in 2001, the president relaxed many regulations and enacted a mining code drafted by the World Bank. Following the uncertainty under Mobutu and mismanagement under Laurent-Desiré Kabila, this new arrangement attracted foreign investors by offering them better deals they could ever dream of.

The new legislation offered low taxes, a myriad of tax deductions, and a web of tax holidays. Moreover, the 2002 mining code tied the government's hands in two ways. Firstly, it prohibited any amendments to the laws for ten years. Secondly, it contained a clause that meant any changes made to the fiscal regime after this ten-year period would only come into effect another ten years. In other words, the mining code guaranteed that companies would enjoy the fiscal benefits it contained for at least twenty years.

This arrangement was economically beneficial to mining companies, but it was also politically beneficial to Kabila. At the time, he was engaged in peace talks with rivals. These negotiations were being mediated heavy-handedly by the international community and Kabila understood that winning the favour of Western powers would be crucial for his ambitions going forwards. By publishing such a company-friendly mining code, he took a big step ahead of his opponents who later joined him in a transitional government. [5]

As his fledgling presidency continued, relations between the government and mining companies continued to be cosy and mutually advantageous. As the 2005 Lutundula Commission found, several well-connected officials, including relatives of President Kabila, engaged in secretive contracts with foreign mining companies in these early years. [6]

In 2007, the government of Kabila – who had won the DRC's first open elections for four decades the previous year – announced that 63 mining contracts would be reviewed. The hope was that this would rebalance agreements that disproportionately benefited mining companies. But the process instead ended up giving the government – via the state-owned miner Gecamines – even more freedom to negotiate opaque transactions with often unscrupulous companies.

In the words of the Africa Progress Group, the DRC's mining sector has been defined by "a culture of secrecy, informal deals and allegations of corruption". They found that between 2010 and 2012, the country lost at least $1.36 billion in revenues "from the underpricing of mining assets that were sold to offshore companies".

A new mining code tests the friendship

By 2012, it was impossible to escape the fact that the mining code needed updating. It had succeeded in attracting investors and benefiting regime insiders, but it had also enhanced inequality and poverty in an unsustainable manner. [7] Even the International Monetary Fund has acknowledged that the 2002 mining code had been too generous.

A process to revise it commenced. The previous code had been single-handedly developed by the World Bank. But these talks involved representatives from government, the private sector and civil society as equal partners. [8] Decisions were made by consensus.

The process was not without challenges. When metal prices collapsed in 2012, mining companies insisted that any revisions to the code now would threaten their operations. The government seemed to agree. Yet thanks to pressure from civil society and some MPs, talks continued and, in 2015, a draft mining code was tabled in parliament. Once again, however, the multinationals complained of poor market conditions and convinced the government to unilaterally withdraw the bill.

A year-long public debate ensued. Eventually, the draft was re-tabled for consideration. Despite mining companies' high-level and personal lobbying of Kabila and their strong resistance, it was approved by both the National Assembly and the Senate in early 2018.

Once again, though, Kabila's government stepped in. As a joint committee met to iron out discrepancies in the versions of the bill passed by the two chambers of parliament, the administration inserted itself into proceedings with some sweeping last-minute amendments.

The nature of this intervention, however, took everyone by surprise. Rather than softening the code for its friends in the mining industry, Kabila's representatives did the exact opposite. It was at this point that they added what are now the code's most controversial measures: the removal of the ten-year freeze on any changes coming into force, and the redefinition and raising of royalties on strategic substances.

Extracting from the miners

There are various possible reasons behind Kabila's complete change of heart.

On the one hand, he may have been angered by a perceived lack of loyalty among the mining companies. During his presidency, Kabila's approach to the industry has hugely benefited multinationals. He has also been personally involved in mining agreements, often through his close friend Dan Gertler who facilitated the deals with Glencore. [9]

Yet the moment the US imposed sanctions on the Israeli billionaire, Glencore was quick to distance itself from Gertler. [10] [11] It was after this that an avalanche of lawsuits was filed against the Swiss multinational and that the Congolese authorities began to discover irregularities that had existed for nearly a decade.

On the other hand, Kabila's deeper political and economic calculations may have also changed. The president is required to step down after the long-delayed elections scheduled for 23 December. This means that there are fewer reasons for him to maintain favour with the mining companies into the future and more reasons for him to extract what political and economic gain he still can in the short-term. [12]

This perhaps explains why it was Albert Yuma, chair of Gecamines and one of the main individuals handling Kabila's business interests, that oversaw the new mining code in parliament rather than Mining Minister Martin Kabwelulu, who was completely side-lined.

So far, Kabila's uncompromising strategy appears to be working. The companies that previously threatened to sue or to withdraw from the chamber of mines have recently agreed to resume dialogue with the government. Meanwhile, by threatening to take Glencore to the nation's notoriously malleable courts, he has managed to secure huge settlements from the multinational. [13] [14] The company has recently agreed to pay $43 million it allegedly owed Gertler, while it has forgiven $5.6 billion of debt to Gecamines while offering to pay a largely unexplained $150 million for the "settlement of certain historical disputes".

When the process to revise the DRC's overly generous mining code began in late-2011, activists believed that new laws would transform the industry. They hoped fresh legislation would ensure the government receives more revenues, that profits are spread across society, and that the sector is governed by democratic rules and transparency.

They may now be disappointed. While the new mining code may have ensured the government get more returns, recent developments suggest these will remain in a few select hands, and that deals continue to be made between powerful individuals behind closed doors

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[1]
https://www.reuters.com/article/africa-mining-congo/congo-minister-declines-to-say-whether-new-mining-code-signed-into-law-idUSL8N1PX0KU

[2] https://www.reuters.com/article/us-congo-un/u-n-condemns-congos-unlawful-crackdown-on-protests-idUSKBN1GV1GH.

[3] https://www.reuters.com/article/us-congo-un/u-n-condemns-congos-unlawful-crackdown-on-protests-idUSKBN1GV1GH.

[4] https://www.reuters.com/article/us-congo-mining/congos-kabila-signs-into-law-new-mining-code-idUSKCN1GL2MB

[5] https://issuu.com/ipisresearch/docs/20080218_risky_business/38

[6] http://congomines.org/reports/210-rapport-lutundula-version-finale

[7] https://www.imf.org/en/News/Articles/2015/09/28/04/53/socar101315a

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[9] https://www.jeuneafrique.com/18904/economie/rd-congo-l-embarrassant-dan-gertler/

[10] https://www.bloomberg.com/news/articles/2018-02-23/he-got-rich-on-congo-mines-until-bribe-probe-put-future-on-hold

[11] https://home.treasury.gov/news/press-releases/sm0243

[12] On December 30, 2018 the presidential election to determine the successor to Kabila was held. Kabila endorsed Emmanuel Ramazani Shadary, his former interior minister. On January 10, 2019, the electoral commission announced opposition candidate Félix Tshisekedi as the winner of the vote.

[13] https://home.treasury.gov/news/press-releases/sm0243.

[14]
http://www.miningweekly.com/article/miners-establish-industry-body-to-engage-drc-govt-on-mining-code-industry-issues-2018-08-23/rep_id:3650,

