

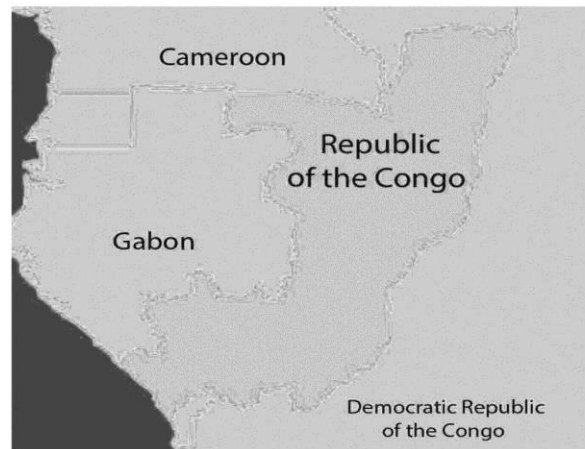
Upstream Developments in the Republic of the Congo Full Speed Ahead Soon?

What should be expected in the near future from one of the ‘veteran’ petroleum producers of sub-Saharan Africa – the Republic of the Congo? Much has been happening, albeit often in ebb-and-flow movements. Developments have taken place in various fronts over recent years, while not always as swiftly as one could desire. Recent signs seem positive, however. With the recent presidential election in the rear-view mirror – President Denis Sassou Nguesso having been reelected for a third term in late March – industry players should perhaps be ‘ready for action.’

For several years, a revamping of the legal framework has been considered. The cornerstone of the current petroleum sector legal regime is Law no. 24-94, of August 23, 1994 (1994 Hydrocarbons Code), which is complemented by a number of ancillary statutes of more specific scope. This regime has been viewed by many as being somewhat in dissonance with today’s industry requirements, not only from a technological standpoint, but also in legal, economic, environmental and social terms. Following an assessment of the existing legal regime, which included consultation with industry players, broad-range discussions, and a ‘benchmarking’ based on a study conducted by the African Petroleum Producers Association (APPA), a new draft hydrocarbons code was approved by the President on March 25, 2015 (Draft Hydrocarbons Code). Although many expected it to be enacted soon after approval, for a number of reasons the new legislation has been awaiting approval by Parliament for over one year.

The Draft Hydrocarbons Code is much more comprehensive in nature than the 1994 Hydrocarbons Code. It attempts not only to reflect the practice in the Congo of recourse to production sharing contracts (PSCs), but also to bring legislation into line with best industry practices, the regional context, and technological, social and environmental demands. While amendments could still be made to the Draft Hydrocarbons Code, it is perhaps worth outlining some of the more relevant changes that could be expected:

- The Draft Hydrocarbons Code is meant to cover legal, fiscal, customs and foreign exchange matters, and is to apply generally to all companies across the board;
- The national oil company – *Société Nationale des Pétroles du Congo* (SNPC) – is to become the sole and exclusive holder of petroleum mining titles. In order to conduct petroleum operations, international



oil companies (IOCs) and Congolese petroleum companies will have to become associates of SNPC;

- Petroleum mining titles are to take the form of ‘exploration permits’ or ‘production permits’ to be granted by Council of Ministers decree upon proposal of the Minister of Hydrocarbons;
- Petroleum contracts will have to be either a PSC or a services agreement, the models for which must be approved by Council of Ministers decree;
 - Petroleum contracts negotiated and signed with a contracting group of companies must, before coming into effect, be submitted to the approval of both chambers of Parliament;
 - For the exploration phase, the operator is authorized to register a branch in the Congo. However, the Draft Hydrocarbons Code requires the operator to incorporate a company in the country for the production phase;
 - Any provisions in the petroleum contracts which are in contravention with the Draft Hydrocarbons Code are to be deemed null and void;
 - Congolese petroleum companies are to have a 15% minimum participating interest in the contracting group of companies (which can become 25% in certain cases), unless otherwise allowed by the Minister of Hydrocarbons. Such minimum participating interest is to be a ‘carried interest’ in production permits (unless the right to be carried is waived);

Following an assessment of the existing legal regime, which included consultation with industry players, broad-range discussions, and a ‘benchmarking’ based on a study conducted by the African Petroleum Producers Association (APPA), a new draft hydrocarbons code was approved by the President...

- Certain specific fiscal terms are set forth in the Draft Hydrocarbons Code in respect of the PSCs to be entered into there under. First, a 15% royalty applies on oil net production (which may be lowered down to 12% in production in waters deeper than 500 meters), and a 5% royalty applies on gas net production. Second, a cost oil maximum cap is set at 50% of net production, which may nevertheless be raised up to 70% in specific situations (e.g. deep-water projects, recourse to very expensive technology). Third, the available net production (i.e. the profit oil, which equals net production minus cost oil), is to be shared between the State and the contracting group of companies, the minimum State's share being set at 35% of the profit oil for each calendar year;
- Each member of the contracting group of companies is to provide a corporate guarantee by the ultimate parent company, or a first demand bank guarantee, in favor of the State and covering the minimum work obligation for exploration, in accordance with and within the deadlines set forth in a decree of the Council of Ministers;
- Flaring of associated gas is prohibited (with certain operational exceptions in accordance with industry best practices being allowed), unless otherwise permitted by means of prior special authorization of the Minister of Hydrocarbons;
- The income tax rate may be defined in the petroleum contract; and
- Provision for abandonment must be made pursuant to an abandonment plan, and the abandonment funds so collected must be deposited in an escrow account with the *Caisse des Dépôts et Consignations*.


One key issue that could arise down the line concerns the interpretation and implementation of the Draft Hydrocarbons Code in respect of agreements and contracts already in place. In principle, establishment conventions and PSCs entered into prior to the entry into force of the future Code are to remain in force up to their expiration. Amendments thereto must be made in compliance with future law, however. Further, public policy provisions in said Code, or otherwise set forth in subsequent statutory changes respecting certain specific matters, are to apply from the date of entry into force of the new Code (with a two-year grace period being granted for reaching compliance). Implementation of this regime could lead to difficulties, or even controversy, as the provisions are not a model of clarity as they stand.

From an industry's standpoint, the entry into force of such novel regime could become challenging, most particularly in view of the numerous ancillary statutes that will have to be enacted pursuant to the new Code, in order to have a comprehensive regime. Further, how the new Code will influence existing production projects in the Congo, many of which are mature projects, seems also a matter to be considered. As deepwater offshore the Congo has become a 'focus' for IOCs investments, due to a large extent to the interest in the pre-salt play resulting from the

massive finds across the South Atlantic, the enactment of new legislation could be critical for any upstream developments.

The good news seems to be that Congolese authorities have in the past shown flexibility in accommodating specific project needs. For example, following the discovery of the cross-border deepwater field of Lianzi, in 2004, they have worked together and cooperated with Angolan authorities to put in place the first petroleum development project offshore central Africa that spans national boundaries. First oil took place in early 2015. In addition to rendering viable a project in a 'disputed area,' in the absence of delimited boundaries, this was done through the adoption of a joint legal, contractual, fiscal and customs regime for the unitization area.

Very much in tandem with the overhauling of its legislation, the Congo launched the 2016 Licensing Round at the 22nd Africa Oil Week, in Cape Town, in October 2015. At the time, the Minister of Hydrocarbons, HE Jean-Marc Thystère Tchicaya, announced the 13 blocks on offer (eight offshore blocks in the deepwater and ultra-deepwater, and five onshore blocks in the Cuvette Basin). The industry players seem to have reacted well. Several expressions of interest were apparently put forward already. As for a timetable, further to the official announcement and registration, tender documents are expected to be made available on June 1, the closing date for submission of offers being planned for September 30. The bidding round results are expected to be made known in late October.

Signs that important upstream developments in the Congo are nearing are there for all to see. Will it then be full speed ahead soon? Only time can tell. Whatever the upstream developments, much will probably depend upon how Congolese authorities deal in practice with a context marked internationally by low oil prices, cost-cutting and divestment, and domestically by the mature nature of many projects, as well as increasing challenges at the technological, social and environmental levels. The legal regime to be enacted through the forthcoming Hydrocarbons Code will likely contribute to shed light on what lies ahead. One would hope that the pending lawmaking process, currently 'stalled' in Parliament, would be completed in time for industry players to make a sounder and more complete analysis of the opportunities. With higher oil prices in a realistic horizon, it would be regretful if 'legal hesitations' would constrain decision-making. 

One key issue that could arise down the line concerns the interpretation and implementation of the Draft Hydrocarbons Code in respect of agreements and contracts already in place.

Nuno Antunes is Partner at Miranda & Associados Lisbon headquarters, co-heads the Firm's Energy and Natural Resources Practice Group, is responsible for the Firm's Paris office, frequently advises oil and gas companies in their operations in Francophone and Lusophone Africa, and has assisted states in drawing up their petroleum sector legislation. Nuno may be contacted at Nuno.Antunes@mirandalawfirm.com.