The role of competition law and policy in managing extractive industries

Hassan Qaqaya
Head, Competition and Consumer Protection Branch
UNCTAD

Ad Hoc Expert Group Meeting
Geneva, 7th July 2014

The views expressed are those of the author and do not necessarily reflect the views of UNCTAD

Background

- Why focus on extractive industries?
  Extractive industries (EI), which include mining and oil and gas production, are a major source of investment and revenue in many developing countries. However, developing countries generally have not succeeded in translating EI revenues into sustainable economic development. In many cases, large EI revenues even appear to have retarded economic and social development through a number of phenomena often referred to as the “resource curse”.

Background

The 2013 report of the African Progress Panel (APP), an international panel of experts led by former United Nations (UN) Secretary-General Kofi Annan, indicates that people in Africa's most resource-rich countries like Angola, Nigeria, Equatorial Guinea and the Democratic Republic of Congo (DRC) are often the poorest of the poor.

Two contrasting examples: Botswana and Papua New Guinea

Botswana:

Since its independence in 1966, it has had the highest average growth rate in the world, averaging about 9% per year. The foundation of this growth was diamond mining, but the revenues from those mines were managed wisely with prudent fiscal policies, and ultimately the wealth was shared by the entire population of the country. Botswana is rated as the least corrupt country in Africa by Transparency International.

Two contrasting examples: Botswana and Papua New Guinea

Papua New Guinea:

A 2010 report by Human Rights Watch found that PNGnea's national revenues from its EI, including the Ok Tedi Mine, had been widely dissipated through mismanagement and corruption, without leaving any discernible positive impact on the wider population. The net effect of the mine was very negative.

What are the challenges?

Public policy related to EI involves issues of business, economics, law, engineering, public health and environmental science and therefore require a broader and coherent approach.

Public reporting of EI revenue, though extremely valuable, represents only one step in improving sector governance and maximizing development outcomes throughout EI.

A comprehensive approach to IE

An effective strategy would provide a more integrated and comprehensive approach to managing the full chain, including all the steps of EI development and impact. Such strategy would encompass awarding contracts and licenses, monitoring operations, enforcing environmental protection and social mitigation requirements, collecting taxes, distributing revenue in a sound manner, and implementing sustainable development policies and projects.

Such a coherent approach would require addressing, inter- alia the following concerns:

A comprehensive approach to IE

- **Licencing and concessions**

Governments grant hydrocarbon or minerals exploration, development, and production rights in particular areas or blocks by means of concessions, leases, licenses, or contracts, depending on their legal systems.

Efficient and effective award policies exhibit the following characteristics:

- Competitive, Transparent and non-discretional procedures for the award of exploration, development and production rights
- Clear legal, regulatory, and contractual framework
- Well defined institutional responsibilities

A comprehensive approach to IE

- **Bidding Procedures**

  Governments usually award hydrocarbon exploration and production rights to qualified investors following competitive licensing rounds. The organization of competitive licensing rounds is greatly facilitated by the wide access to modern information technology for storing, managing, and accessing data, which allows greater transparency and lower administrative costs.

A comprehensive approach to IE

➢**Regulatory framework**

A clear and comprehensive regulatory framework, coupled with the ability to enforce it, helps support the goals of transparent and efficient EI management. Two key steps for improving the efficiency and effectiveness of regulation and monitoring of EI projects are to:

- ➢ Ensure that responsibilities of the various government entities are clearly defined and that these entities' authority, institutional capacity and available resources are commensurate with their responsibilities
- ➢ Build sufficient capacity for monitoring regulatory compliance

A comprehensive approach to IE

- **Revenue management and allocation**

The key steps in transparent and sound revenue management and allocation, the fourth aspect of a coherent approach, are to:

  - Prepare an "**competition neutrality framework**" that does not discriminate between private and STOs;
  - Allocate public expenditures judiciously, nested within a medium-term expenditure framework and aligned with a country development strategy that ensures adequate scrutiny and appraisal of public investment choices and provides for sound revenue sharing policies

A comprehensive approach to IE

- **State Owned Enterprises STOs**

There is still a broad consensus on the need to maintain political control over the utilization and extraction of natural resources. However, Governments are advised to resist the temptation of extending the STOs' responsibilities to undertake infrastructure investments. It is important that development priorities remain the responsibility of the government and suitable checks and balances be in place.

- To the extent possible, STOs are best kept confined to productive and commercial operations where they are more likely to add value. Profits made by national companies profit should be transferred to the government, the main companies' shareholder, and then within the priorities of the central budget used in programs and projects implemented by the appropriate public or private organization. In addition to the policy choices it is important that the government procurement practices be revised to enhance competition and transparency.

A comprehensive approach to IE

- **Sustainable development**

The key elements of efficient and well-designed implementation of sustainable development policies are:

- Strong public financial management and procurement systems
- Clear measures for environmental management and remediation, including EI site rehabilitation and the management of environmental hazards
- Public investment decisions that adequately capture potential benefits of EI expansion and favour the country's economic diversification away from EI through the development of a vibrant enterprise sector.
- Community development and environmental protection programs in regions affected by EI activities.

Concluding remarks

Sustainable development requires long-term commitment to reforms and a political system that embraces good governance and transparency. Optimal expenditure and saving decisions are made within the context of an overarching competition policy framework that recognizes the cyclical nature of commodity prices and the exhaustibility of oil, gas, and mining resources. Public expenditure needs to be developed in accordance with, and in support of, the priorities expressed in the country's poverty reduction and development strategy. That standard is best maintained by ensuring Competition neutrality, effective government procurement and licencing as well as an efficient system awards of concessions.,