

Experience of Mining Tax Reforms and Renegotiation of Mining Contracts:

THE CASE OF THE DEMOCRATIC REPUBLIC OF CONGO



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Tel: 233-302-500419/503669/511189

Website: www.twnafrica.org

Email: twnafrica@twnafrica.org

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Foreword

This is a research report about the steps taken by the Democratic Republic of Congo (D.R. Congo) to reform its mining fiscal regime and renegotiate contracts with the foreign mining companies that dominate its copper industry, during the commodity boom, to improve the country's earnings from the mineral which is its main export.

Revenues are the main benefit African countries like D.R. Congo derive from the production and export of largely unprocessed mineral commodities. During the recently ended mining boom which lasted for roughly a decade from the early 2000s, the average price of minerals tripled. This occurrence exposed the stark inequities in the relations between African countries and the foreign transnational mining companies that dominate the continent's mining sector. During the boom the profits of the biggest transnational mining companies rose dramatically, increasing by an average of 20% between 2000 and 2011.

African mineral producing countries did not fare that well. Across Africa, including in D.R. Congo, there was a huge disparity between the huge jump in the profits of the mining TNCs and the comparatively modest increases in the revenues accruing to governments from the increases in the price of minerals. The inequitable distribution of the benefits of the mining boom in favour of foreign investors was due to two main factors. The giveaway terms of the contracts under which they had privatised their state-owned mining companies as part of Structural Adjustment Programmes (SAPs) and the fiscal regimes offered to investors as part of the liberal mining regimes of the SAP reforms.

D.R. Congo was one of many African countries which sought to rectify these contractual imbalances and legislative giveaways. These reforms are consistent with one of the key objectives of the Africa Mining Vision (AMV) agenda - increasing the fiscal returns from mining.

The analysis of the D.R. Congo experience is one of several TWN-Africa commissioned to contribute to our understanding of ongoing efforts to advance the AMV agenda.

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Acronyms

AFDL:	Democratic Alliance for the Liberation of Congo
CAMI:	Mining Registry
CEEC:	Centre for Testing and Valuation of Mineral Substances
CFL:	Railway Company of Upper Congo
CESG:	Centre for Strategic Studies on Governance and Development
CEPAS:	Centre for Studies on Social Action
CNKi:	National Kivu Committee
COHYDRO:	Congolese Petroleum Company
CSK:	Special Katanga Committee
CTCPM:	Technical Unit for Mining Coordination and Planning
DGDA:	Directorate of Customs and Excise Duties
DGI:	National Tax Authority
DGRAD:	Directorate General of Administrative and Land Revenues
EIC:	Independent Congolese State
ETD:	Decentralized Departments
FEC:	Federation of Congolese Companies
EITI:	Extractive Industry Transparency Initiative
KMT:	Kingyamambo Musonoi Tailling
MDDK:	Kisenge Gold Mine
MIBA:	La Minière de Bakwanga
OEDC:	Organization for Economic Development and Cooperation
OSISA:	Open Society Initiative for Southern Africa
PROMINES:	Mining Sector Support Project
DRC:	Democratic Republic of Congo
SAESCAM:	Support Service for Small-scale Mining
SARW:	Southern Africa Resource Watch
SODIMICO:	Mining Investment and Development Company
SOKIMO:	Kilo-Moto Company
TFM:	Tenke Fungurume Mining
VAT:	Value Added Tax
TWN-Africa:	Third World Network-Africa

Executive summary

This report analyses the two major reforms in the Congolese mining sector. The mining sector in the Congo was fraught with several challenges, limiting its capacity. Because of this, two major reforms, namely, the 2002 Mining Code and the 2012 mining legislation reform, were introduced to improve the sector's governance and to increase its contribution to Congo's economic development. The reforms proposed renegotiation of contracts between the State and private mining companies; along with adjustment of tax regimes for the mining companies. This was to rectify contract and revenue distribution imbalances. In 2002, the first reform came into being with a reform legislation that made notable changes within the sector and formed the basis for new legislation. The new legislation offered generous incentives; it initiated rapid and transparent procedures for granting mining or quarrying rights. And it organized the tax, customs and exchange regime.

The stabilized tax regime in the 2002 Mining Code motivated many investors to invest in the DRC. The country has since recorded about twenty mining projects already in production. Further, there are about one hundred more mining projects under construction. The 2002 Mining Code put in place a single tax and custom duties regime; this applied to all the operators in the mining industry including small-scale miners. The code made no exceptions regarding the nature or duration of mining title. It was based on the principle of maximization of State revenue. This attractive tax and custom duties regime adapted to the realities of the sector.

Beyond considering the specific and peculiar conditions in the mining industry, this regime also ensured the taxation system adapted to the phases of a mining project. The 2002 Mining Code replaced the tax system under the Legislative Order No. 81-013 of April 1981. The Legislative Order had negative effects on the profitability and growth of mining investments. Ten years after the enactment of the 2002 law, the government initiated a new reform to amend the tax regime. In 2012, the government sought to raise the rates and base of various taxes and royalties

in the sector. The draft Law is yet to be discussed in Parliament though. Although the proposed amendment emerged from a tripartite negotiation – government, private sector and civil society, it faces strong opposition from the private sector. The private sector considers the proposed taxes as high.

The second reforms had to do with the renegotiation of mining contracts. In 2008, the government initiated a process to review 63 mining contracts and agreements. The review tried to rectify obvious imbalances in each contract. This review was conducted by an inter-ministerial commission which included experts from public institutions. A renegotiation process followed the review of the contracts. Chaired by a Minister of State and President of the Economic Commission of the Government, a panel of nine government officials led the renegotiation process.

After the renegotiation process, the government recouped over US\$3 million. The parties renegotiated the distribution of share capital and royalties for public mining companies. Further, the renegotiations established government participation in the day-to-day management of partnerships. However, several challenges were observed; key amongst them were lack of capacity and expertise for the renegotiation of contracts, and reluctance of some partners to renegotiate with government.

It is worth noting the conditions under which these two reforms were initiated. The 2002 tax regime was established when the Congolese Mining Sector was nearly at total collapse. The 2012 mining legislation reform, however, was initiated when the mining sector was full-grown. In 2012, the sector produced close to one million tons of copper. There was a significant increase in the production of gold and an extraordinary increase in the production of cobalt, making the DRC the leading producer in the world. After the renegotiation, which in principle ended in 2010, investors felt reassured to inject their capital. This led to the noticeable increase in minerals production. However, the imbalance lies between investors and state-owned mining companies, which had transferred their mining rights to partnerships or joint ventures.

Introduction

The Democratic Republic of Congo (DRC) is one of Africa's most endowed countries. DRC is replete with mineral resources, crude oil, forests, fauna, flora, water etc. Despite this immense wealth, the DRC is classified among the poorest countries in Africa. A great majority of Congolese survive on income below the acceptable minimum level. Minerals are mined in the Congo through artisanal and industrial mining methods. The country has several mining companies established; but revenue earned on extraction or sale through taxes and royalties are insignificant. The reasons behind the poor revenue earnings include excessive exemptions, embezzlement, fraud, and non-payment. The mines do not contribute enough to social development and poverty reduction. This situation can also be linked to bad governance and the lack of transparency.

Since 2006, the Congo has been ruled under a democratic dispensation. Yet, the Congolese government is still not positioned to protect the country's interest. The state lacks the capacity and will to apply its laws. Coherent policies for the commercialisation of minerals have not been designed or instituted. And so is the case for the collection and distribution of revenues. Corruption in the Congo affects the entire production chain; from contract signing, collection of taxes to sharing of revenues. The DRC, since independence, has had three major reforms in the mining sector's tax system. These are:

1. The 1967 reform with Ordinance-Law No. 67/231 of May 3, 1967 on general legislation on mines and hydrocarbons.
2. The 1981 reform with the promulgation of Ordinance-Law No. 81 / 013 of April 2, 1981 on general legislation on mines and hydrocarbons.
3. The 2002 reform with the promulgation of Act 007/2002 of July 11, 2002 on the Mining Code.

The fourth major reform is underway. A draft amendment to the 2002 Mining Code has been submitted to parliament. This fourth reform is

inclusive; a wide range of stakeholders contributed to the preparation process. In this study, we will focus on the 2002 legislation. The tax system in the mining sector of the DRC is governed by two main instruments; Law No. 007/2002 of July 11, 2002 on the Mining Code and Decree No. 038/2003 of March 26, 2003 on the Mining Regulation.

Objective of the study

The overall objective of this research, as defined in the terms of reference, is to evaluate the experiences and outcomes of fiscal reforms and renegotiation of mining contracts in the DRC during the past decade.

The specific objectives of the research are to understand:

1. The substantive outcomes of the reform process, the factors that influenced them, and how they met the objectives set by the government;
2. How the reform/renegotiation exercise was organized and carried out, including the role of state and non-state actors;
3. The challenges faced and the lessons learned by the State and its institutions from the process.

The study has two parts, the first touches on mining taxation in DRC and the second part focuses on the mining contract review experience.

Methodology

Two main methods were used in conducting this study. These are literature review and interviews. The CESG put in place a team of three experts specialized in the mining sector, who first gathered all the documentation on the mining contracts review process and the 2002 Mining Code review process. Several reports compiled by government, civil society, mining companies, international institutions and research institutes were explored.

To complete this study, the specialists from the centre conducted interviews in Kinshasa and Lubumbashi, two towns mainly affected by public mining policies and activities. The targeted stakeholders through this study were mainly officials of the Ministry of Mines, agents and managers of specialized units of the Ministry of Mines (CAMI, CEEC, CTCPM, PROMINES, and SAESCAM), Parliamentarians, Members of the Chamber of Mines and civil society. The draft report produced by the three experts was validated by other members of the Centre in Kinshasa.

Part 1:

Brief historic background of mining taxation in the DRC: from Belgian Congo to Mobutu's Zaire

Given its vast mineral potential, the DRC has enforced mining taxation from the colonial era to date. There have been various tax systems enacted within the colonial and post-independence eras. During the colonial era, natural resources, particularly, precious mineral substances, attracted explorers and investors from various backgrounds. This led the Belgian Congo to legislate on the extraction of mineral substances in the country.

The government of the Belgian Congo regulated mineral exploration and exploitation through the Decree of December 16, 1910. This Decree was amended and completed by the Decree of April 16, 1919 which affected only the Katanga province. Later on, these decrees were abrogated and replaced by the Decree of September 24, 1937 for the entire territory. The main objective of the colonial legislation was (i) to establish the authority of the Independent State of Congo (ISC), and later of the Belgian Congo over the mineral wealth and (ii) control the exploitation of mineral resources in the territories constituting the Congo Basin, opened to international trade under Article 1 of the General Act of Berlin of February 26, 1885 as revised by the St Germain-en-Laye Convention of September 10, 1910. To achieve this dual objective, the ISC, later called the Belgian Congo, allowed the formation of powerful companies known as chartered companies. These were the Special Katanga Committee (SKC), the Railway Company of the Upper Congo of the African Great Lakes Region (CFL) and the National Committee of Kivu (CNKi).

The Colonial Decree remained in force until 1967. In 1967, the independent DRC introduced its first mining legislation by the Ordinance-Law No. 67/231 of May 3, 1967 on the General Legislation on mines and hydrocarbons. When compared to the colonial legislation, this legislation failed to attract investments. It had a negative impact on the country's

mineral production and finances. With a few exceptions, the statistics show that the volume of investments and production were significant from 1937 to 1966. The same cannot be said about the period covered under the 1967 legislation. Although 48 mining companies operated between 1937 and 1966, they reduced to 38 during the next three decades. This number further dropped to seven after 1997.

The 1967 legislation was abrogated by the Ordinance-Law No. 81-013 of April 2, 1981. This abrogation brought no major innovations as the 1981 mining legislation differed little from the 1967's. According to Article 1 of this Ordinance, the subsoil (minerals, quarries, mineral water sources and hydrocarbons) of the Zaire (which DRC was then called) shall be and shall remain the property of the State. Ownership of minerals and hydrocarbons is a distinct and separate right from rights resulting from a land concession. The holder of a land concession can under no circumstances use its title to lay claim to any minerals or hydrocarbons contained in such a concession.

Then came the Decree of June 8, 1988 which established the principles according to which "the ownership of minerals is distinct from that of the land and minerals belong to the State; no one can exploit a mineral resource without a concession granted by the Government." It was followed by the decree of March 20, 1993 which specified the classification of substances considered mineable and therefore required a concession to be granted by the State. This decree also established the rules for granting concessions. Concessions would be granted by decree; another rule determined the mining royalties to be paid if the decree granting the concession did not stipulate otherwise¹. Since independence until 2002, legislations governed both the mining and the hydrocarbon sectors. The 2002 Mining Code will separate the management of these two sectors.

1.1 The Mining Code of 2002

The 2002 Mining Code is an overarching mining law in the Democratic Republic of Congo. It was adopted in Lubumbashi by a parliament whose members were co-opted by the new regime of Laurent Desire Kabila after the fall of Mobutu. The scope of this Code covers prospecting, explora-

¹ SARW, Analysis of the Congolese Mining Tax Regime and Proposals for Reforms, MEDIASPAU, Kinshasa 2015, p. 15

tion, mining, processing, transportation and marketing of mineral substances.

1.1.1. The tax regime in the Mining Code

The 2002 Mining Code has been the legislative reference document for both the industrial and the artisanal mining sector since 2002. It organizes the sector so the State is primarily responsible for the regulation and control of the mining sector. Exploration and exploitation activities are left to private investors. The Code describes the major institutions and their powers, procedures for accessing and preserving mining titles, the exclusive and exhaustive tax regimes, environmental and social conditions to be observed and the procedure for settlement of disputes.

In 2002, the legislature established a new mining law which sought to set up rapid and transparent procedures for granting mining or quarry rights. This legislature also organized tax, customs and exchange regimes. Under the 2002 Mining Code the mining sector is characterized by three types of taxes:

- Taxes prior to business operations which requires authorizations;
- Taxes flowing from common law within the framework of taxation entrusted to customs and tax authorities;
- Specific taxes relating to the traceability of mining products, from exploration to exploitation.

The 2002 Mining Code and 2003 Mining Regulation with the inter-ministerial decrees, include all previous provisions relating to taxes, duties, fees, fines and penalties, miscellaneous charges and other charges in the mining and quarry sector. There are also provincial by-laws that have instituted fees and taxes on mining activity collected by the Provinces and the Decentralized Administrative Entities; "DAE". These taxes are not in the Mining Code. Implementing these taxes and other levies is creating problems as mining operators must deal with many tax assessment and collection services which they consider a form of administrative harassment.

The 2002 legislation has the merit of combining innovations with the principles enshrined in the old legislations. It reaffirms among others state ownership of mineral resources, while recognizing the mining or quarry right holder's ownership of the tradable products or mineral substances.

The 2002 legislation reaffirms the principle that the right resulting from the mining concession is distinct from that of land concessions. As a result, a land concession holder does not have a right of ownership over the mineral resources in its subsoil. This legal instrument has incorporated several innovative and modern principles for the management of mineral resources to attract investors. These novelties include time limits beyond which any application for rights or title is supposed to be acquired. A mining land registry has been established and has a legal status.² The mining land registry is in charge of the management of mining and quarry law, under the supervision of the ministries of mines and finance.

1.1.2. The 2002 Mining Code and tax regime stability

Unlike the mining legislation of 1981, the 2002 Mining Code guarantees the stability of the tax and customs regime. The broad tax incentives it grants to mining investors are safeguarded. The tax provisions of common law apply to holders of mining rights according to the rates and terms prevailing on the date of coming into effect of the 2002 Code. The Congolese government has made many sacrifices to allow holders of mining rights to enjoy a tax and customs regime that can contribute to the profitability of its mining investment. It further allows an exemption from export duties, import turnover tax and the statistical tax and administrative fees which are remunerative taxes collected by customs services.

Article 276 of the Mining Code provides that the State shall ensure this Code may only be amended if, and only if, the Code itself is the subject of a legislative amendment adopted by Parliament. No legislation other than the Code can alter the tax provisions in this Code. The rights attached or arising from an exploration permit or mining right granted and valid on the date of the promulgation of such a legislative amendment and the rights attached or arising from the mining right granted subsequently under such exploration permit, tax, customs and commercial regulations of this Code, shall remain established and inviolable for ten years from:

- (a) The signing of the legislative amendment for existing valid mining rights;

² AVOCATS VERTS Analysis of the environmental and social legislation in the mining sector, Kinshasa, October 2010, p 14

(b) Issue of the mining right granted subsequently under a valid exploration permit existing on the date of coming into force of the legislative amendment.

1.1.3. State institutions in charge of tax collection

There are three financial authorities in charge of revenue collection:

- Directorate of Customs and Exercise Duties (DGDA)
- National Tax Authority (DGI)
- Directorate General of Administrative and Land Revenues (DGRAD).

The DGRAD was established by Decree No. 0058 of December 27, 1995. Its main task is to schedule and collect non-tax revenues payable to the public treasury. It has administrative and financial management autonomy. The DGRAD performs these key functions:

- It controls and verifies the regularity of all operations about the recording and liquidation of administrative, judicial, land and participation revenues carried out by the generating public departments known as assessment services.
- It collects duties, taxes and royalties established and liquidated by the ministries and generating institutions of the State.
- It validates administrative acts and documents which makes it possible to establish the references of payment of sums due.
- Finally, DGRAD institutes legal actions against defaulting debtors.

Like other financial institutions in the DRC, the DGRAD is constrained by the numerous problems that hinder the total mobilization of non-tax revenues and judicial revenues. The weaknesses of DGRAD are manifest at two levels: the first is lack of leadership and policies, and then there is the unprofessional behaviour of DGRAD management and staff.

The General Directorate of Taxes (GDT) is a public service agency with administrative and financial autonomy. It performs, in accordance to the laws and regulations in force and all the tasks and exercises. The GDT has the prerogative in tax matters about assessment, control, collection and tax related litigation, besides levies and other related tax levies. Within the GDT, the collection of mining taxes is entrusted to the Mining and Hydrocarbons Division.

Five types of taxes collected by the GDT besides VAT identified in this research are:

- Property taxes
- Professional tax on remuneration
- Professional tax on profits
- Taxes on turnover
- Special tax on remuneration paid to expatriates-
- Value added tax

1.1.4 Strengths and weaknesses of the 2002 tax regime

The mining law put in place a single tax and custom duties regime applicable to all the operators in the mining industry including small-scale miners. This single tax and custom duties regime made no exceptions regarding the nature or duration of the mining title. It is an attractive tax and custom duties regime adapted to the realities of the mining sector and based on the principle of maximization of state revenue. This regime considered specificities and peculiarities of the mining industry while ensuring a taxation system adapted to the phases of a mining project by mainly granting rebate in tax rates.

This tax and customs regime has these characteristics:

- It is unique because it is the only tax applied uniformly to all eligible persons;
- It is exhaustive as it provides the full list of the fees to which the eligible persons are subject;
- It is exclusive in the sense that any fees not provided for is not applicable to eligible persons³.

Implementing the Mining Code from 2002 to 2014 resulted in the following:

- An increase from 35 to 101 mining companies at the mining phase;
- A shoot up from 679 mining and quarry rights validated and confirmed to 2,510. The breakdown of these numbers is:

³ BGSM/GIZ op cit, p23

- 1,471 Exploration permits;
- 466 Mining licenses;
- 11 Permits for the exploitation of tailings;
- 177 Small-scale mining permits;
- 163 Authorizations for the exploration of quarry products;
- 9 Temporary quarry operations authorizations;
- 213 Permanent quarry operations authorizations.

These were significant developments compared to the impact of the 1981 Act. The 2002 Mining Code is one of the legal instruments which raised high hopes among public authorities and the Congolese people. One of the special features of this law, which reinforces its incentive character, is it imposes a tax and customs regime mainly applicable to the holders of mining rights and their subcontractors, beneficiaries and affiliated companies⁴.

As for the weaknesses, the 2002 Mining Code maintained the existence of two legal regimes, namely the common law regime, which is subject to strict compliance with the statutory provisions of the Code, and the special law or the contractual regime. Following the enactment of the 2002 Code, majority of contract-based mining companies opted to maintain their respective contracts, with some amendments under Article 340 of the Mining Code. This Article allowed the partners of the Congolese State to make the free choice between the contractual regime and the tax regime in the Mining Code. The existence of these parallel contracts outside the code creates a dual tax system with consequences for revenue collection. The tax and customs regime embodied in the 2002 Mining Code is also in line with two legal regimes applicable in the mining sector of the DRC. These are the common law systems, which are subject to the strict compliance of the legal provisions of this code, and that of special, partnership and contractual law kept in secret, usually from the public.

The two regimes have points of convergence and divergence:

- Convergence: Both regimes are specific to the common provisions applicable to rights resulting from the Mining Code. They both offer a choice to holders of former titles to opt either for the maintenance

⁴ Emile Lamber Owenga Odinga, Eight recurrent issues on Congolese tax laws April 2016, p4

of their regime or for the full application of the Mining Code. They all set a time limit to be observed beyond which a regime becomes automatically applicable.

- Divergence: The partnership regime concerns mining right and quarry right whereas the contractual regime concerns mining right only. The contractual regime is preferred to the regime of the code whereas the partnership regime option depends on the choice of the holder. The period allocated for the choice of the partnership is three months while that of the contractual regime is nine months. The holder of contractual mining rights must comply with the code, while the holder of the partnership rights need not do so.

The contract and partnership terms are not generally available to the public so it is difficult to know their content.⁵

1.1.5. Mining sector's contribution to the national budget

Regarding trends in mining sector tax revenues, the table below summarizes the mining sector's tax and non-tax revenues generated for the state from 2010 to 2013. The turnover of the mining sector grew at least 16% between 2010 and 2013, thanks to the large mining investments made during the previous decade. In 2013, while production increased by more than 17% compared to the previous period, value added in the mining sector reached almost 28%.

According to several economic analysts, tax rate in the DRC was 16% on average in 2013. This was much lower than what pertained in some countries with the same level of economic activity, as their rates exceeded 20%. Mining operators claim they are subjected to increased tax burden and harassment. According to mining operators, instead of concentrating on the accrued revenue from existing mining activities, the government of the DRC should invest in developing the mining industry and consider revenue from developing natural resources.

Revenue from major taxes in the sector, namely the income tax and the mining royalty, is still low, accounting for barely one-third of total revenues. This is paradoxical since the large tax revenues in the mining

⁵ Analysis of the environmental and social legislation in the mining sector of the DRC

sector over the period under review came from direct and indirect taxes, including the professional tax on remuneration under common law and not from the special taxes applicable to the mining sector under a specific taxation regime as defined in the mining regulations. The structure of tax revenues shows the particular purpose for which a tax is imposed and its effects on welfare, meaning the cost imposed on consumers, workers and capital owners.⁶

The contribution of the mining sector to the national budget is still low given the mineral potential of the country especially in 2015, when the DRC became the leading producer of copper in Africa and of cobalt in the world. The mining sector accounts for less than 20% of the total revenue of the DRC national budget. This low contribution is due to several factors.

According to the EITI/DRC report for the financial year 2014, the mining sector is the largest contributor to the state budget with US\$761.2 million (US\$746 million from mining companies and US\$15.2 million from EPE Mines), accounting for 66.7% of budget revenues from the extractive sector, followed by the oil sector with a total contribution of US\$380.1 million (US\$378.8 million from oil companies and US\$1.3 million from COHYDRO)⁷.

1.1.6. Challenges in tax collection

The challenges of collecting revenues from the mining sector are numerous. The Congolese mining industry plays an important role as a catalyst for the economic development of the DRC. The main challenge is good governance in the sector, particularly the rigorous application of mining legislation and its enforcement measures. There were weaknesses in relation to the revenue management mechanisms, notably in the control of the revenue management system between the tax assessment institutions and the financial authorities, large limitations in tax audits, manual management of tax transactions, and uncontrolled overlapping of levels of taxation between the national and provincial levels, particularly at the

⁶ BGSM/GIZ Analysis of tax revenues generated from 2011 to 2014 in the mining sector and growth projection of the achievable tax potential in the next five years in the industrial mining sector of the DRC, study conducted in 2015

⁷ DRC EITI Report, 2014 p8

DGRAD. These factors observed during the study may explain the much deplored low level of revenues accruing from the mining sector⁸.

The DRC's mining taxation review revealed a system of taxation made up of numerous taxes, duties and other tax-related charges managed by many collectors. This makes the tax system opaque, with inconsistent information and traceability challenges in revenue management. An analysis of trends in some performance indicators of the DRC mining taxation system has shown that some tax yields are low or negligible and therefore affects the yield of major taxes. This is reflected in the contribution of the DRC's mining sector to public revenue⁹.

The collection of taxes is fraught with these problems:

- The configuration and relations between the financial authorities. The financial authorities are not interconnected and have a poor relationship.
- Human resource, their working conditions and their capabilities. In the DRC public servants are poorly paid. A decent remuneration, especially for staff involved in the collection of taxes and duties would reinforce the tax authority's ability to severely punish officers who engage in corrupt practices. As regards equipment, institutions in the DRC are ill-equipped. They lack adequate tools to properly perform their functions. All the financial institutions are experiencing similar problems especially in IT.
- Corruption, tax evasion and avoidance are factors that weaken the maximization of state revenue. Interviews conducted in both Kinshasa and its provinces revealed corrupt practises among DGRAD managers and officials. Practices such as tax avoidance and evasion, misappropriation of public funds and corruption were recorded. Some officials use double tax files; this technique involves establishing two collection files, one for the state chest and the other to be misappropriated by the tax officials involved. Usually, the file with the least amount goes to the state. Sometimes files are removed from the official collection system. And this allows tax officials to engage in

⁸ BGSM/GIZ Ten-year projection of the tax potential of the industrial mining sector in the DRC (2016 -2025), Kinshasa June 2016 p9

⁹ BGSM/GIZ Ten-year projection of the tax potential of the industrial mining sector in the DRC (2016 -2025), Kinshasa June 2016 p9

private or personal collections outside the laid down rules of the tax system.

- The Mining Code grants several exemptions on exports, imports, interest on borrowing, and remuneration for services rendered. Any export, in connection with mining, is exempted from export tax, except for other additional export samples. However, royalties and charges imposed on services rendered for the export of goods or temporary export of goods for processing are payable. Such royalties and charges cannot exceed 1% of the value of the goods.
- The weakness of State institutions in compiling production and export statistics. The management of the mining sector is not up-to-date in the collection of reliable data that can help determine the number of mine operators, their production, the quality of their production and the actual quantity of exports. All these statistics vary from one department to another and this has adverse effects on the collection of revenue due the state.
- The weaknesses in the system of collection of mining taxes take two forms: First, in the structure of taxes and duties and then, in the structure of the stakeholders involved in the administration of the Mining Code. The actors involved in the administration of the Congolese Mining Code are political stakeholders and public administration officials in the mining sector.

1.2 Review of the draft Mining Code and its tax regime

1.2.1. Rationale for the Mining Code review

A major challenge facing the tax policy of African governments is how to achieve an optimal balance between a tax regime conducive to business and investment and a level of taxation that generates sufficient revenue to finance public investments.¹⁰ These two objectives often appear contradictory and are at the heart of the challenges in the review of mining regulations during this super cycle decade characterized by a long period

¹⁰ An investment and investment oriented taxation: an overview of tax policy challenges in Africa, Mike Pfister

of high commodity prices. Both the private investor and the state wish to maximize profits.

For a country called a ‘geological scandal’ because of its abundant mineral resources, several reports have highlighted the tax losses that the DRC experiences each year. Aside the wars that have destabilized the country with the attendant illegal exploitation of natural resources by armed groups, illegal traders have also been involved in the illegal exports of Congolese minerals especially in the eastern part of the country. The weakness of state institutions, corruption and tax evasion are other factors leading to significant revenue losses for the Congolese State. The Mining Code contains a tax regime which, under the present circumstance, is causing frustration for the political leaders and the Congolese people. One cannot ignore the overall favourable world commodity prices as one reason behind the Congolese Government’s decision to carry out such a reform. In doing so, it wants to take a share of the windfall profits due to the current commodity super-cycle, despite the current slowdown and volatility.¹¹

The 2002 Mining Code, adopted in the Democratic Republic of Congo following the war, was revolutionary and ambitious. This Code, that sought to revamp the Congolese mining sector, attracted several mining investments and partnership agreements between the government of the DRC and private investors. However, a large part of the expectations and objectives of this Code has not been met, thus, justifying the review process. The reasons for the 2002 Mining Code review are set out in the memorandum to the draft law submitted to Parliament in March 2015 which reads:

“The review aims to increase the level of control over the management of the mineral resources of the State, mining and quarries rights, clarify elements relating to the social and environmental responsibility of mining companies to the communities affected by their projects and to balance the tax, customs and exchange regime, all within the framework of win-win partnerships between the State and mine operators. Finally, developments in the political and administrative context, characterized by the emergence of a new Constitution in 2006, with new stakeholders in the management of the Code, were considered.”

¹¹ Draft Revised Mining Code of the DRC: From Incentive to Disincentive PHILIPPE-ALEXANDRE SONDJI MULANZA KATING, EGMONT PAPER

Twelve (12) years later, gaps and weaknesses have been observed in the law and its application.

These include:

- The prevalence of the contractual regime and that of the common law, with negative effects on the tax and customs regime and the stability clause for acquired rights over ten years, starting from the date of any amendment to the Code;
- Insufficient provisions on the freezing of mineral substances in the areas covered by mining and quarry rights;
- The low proportion of the state's share in the share capital of mining companies;
- The low rate of fixed charges for the registration of mortgages, lease and transfer contracts;
- The unrestricted extension of the preferential regime of the Code to subcontractors and affiliated companies and to the holders of mining rights in production for several years;
- Eligibility to mining and quarry rights for individuals not likely to have the financial and technical capacity required to carry out mining activities;
- Non-consideration of the profits generated by transferring the ownership of mining and quarry rights;
- The excess profits generated by the high market prices and their distribution;
- The absence of a standard contract to serve as a reference for partnership contracts involving public companies in which the State is the majority shareholder;
- The absence of a memorandum of understanding specifying the socio-environmental obligations of mine operators vis-à-vis the local communities;
- Lack of transparency and the low profit made by the Congolese State in the exploitation of the country's mineral substances.

1.2.2 Participation of stakeholders in the Mining Code review process

The review discussions involved three main stakeholders: government, mining companies and civil society. After a decade of implementation of the Mining Code, the DRC government launched the mining reform

process by setting up an ad hoc commission, whose members were appointed by a Decree issued by the Minister of Mines to review the Mining Code.

The three parties initially worked separately and each group produced their own proposed amendments. After all the stakeholders had produced their respective documents, the government engaged an international consultant (Cabinet Duncan & Allen) and a national consultant (Cabinet Emery Mukendi), to work with the stakeholders and especially assist the government in the conduct of the 2002 reform of the mining legislation.

Five major steps were considered in the review of the DRC Mining Code:

- Each stakeholder's work
- Production of a Bill amending and supplementing the 2002 Act
- Holding of tripartite consultations at the Nganda Catholic Centre
- Holding of restricted tripartite consultations at the Grand Hotel Kinshasa, initiated by the mining companies under the leadership of the Chamber of Mines
- Organization of a more restricted tripartite consultation in the office of the Minister of Mines

Consultants (international and national) consulted with stakeholders to produce the final draft to be presented to the government. During the work at the Nganda Centre, the first tripartite commission, the representatives of the stakeholders were divided into four groups:

- Administration and Management of Mining Rights and Mines
- Social and environmental responsibility
- Tax, customs and exchange regime
- Industrial and commercial policy

The discussions held at the Nganda Centre led to several points of convergence, except for taxation issues. These issues were the subject of two sessions of tripartite consultations at the Grand Hotel and at the Ministry of Mines. In April 2014, the parties signed a tripartite report¹²

¹² Minutes

concluding the tripartite consultations; but rates and the tax base, especially, the mining royalty continued to divide the parties. In conclusion, three key players actively participated in the Mining Code review process and met several times to put their views across.

a. Government: consultant recruitment, drafting of the bill, tripartite consultations and submission of bill to parliament, government's position

The government's views were reflected in the Bill submitted to Parliament in March 2015. By recruiting an international consultant and a national consultant and setting up an ad hoc committee on the Mining Code review, the government was prepared to reform the 2002 mining legislation. After the withdrawal of the Bill on the amendment of the Mining Code submitted to Parliament, some inconsistencies were observed even within the government. Some members of the government supported the abandonment of the reform or a suspension in reviewing the Mining Code given the political context of the DRC and the international economic environment, especially the fall in metal prices.

b. Civil society: consultations of civil society organizations, draft amendments submitted to the government, proposed key points and advocacy activities

Civil society organizations, coordinated by SARW, organized a coordination process for the Mining Code review. Within this framework, civil society organizations dealing with natural resource issues held consultations on the review of the law which culminated in the adoption of proposals for amendments submitted to government. These consultations took place in July 2012 in three places (Kisangani, Lubumbashi and Kinshasa) and at a National Harmonization Workshop held from August 7 to 9, 2012 in Kinshasa. More than 150 delegates from civil society organizations, along with some traditional and religious authorities and university professors participated in the work. At the end of the same year, mining companies, through the Congolese Federation of Enterprises (FEC) organized their consultations on the Mining Code review, at the end of which comments and proposals for amendments were formulated.

In early 2013, the government produced a preliminary draft of the revised Mining Code. Civil society met from April 9 to 10, 2013 to review the points of divergence between the three documents of the proposed

amendments. This was to prepare for the tripartite consultations to be convened by the government supported by PROMINES. It was the duty of civil society to review the mining law, highlighting its weaknesses and proposing corrections for submission to government and Parliament. Civil society activities on reviewing the Mining Code was funded by the World Bank through PROMINES, SARW, OSISA, GIZ, World Vision, Lenten Switzerland, RRN, WWF, CERN, CEPAS, DIAKONIA and 11,11,11. The proposed amendments and recommendations in the report are therefore the compilation of the results of the consultations adopted at the National Workshop and the additional amendments made during the April 2013 consultations. The work done during the three events were preceded by a questionnaire sent to local civil society organizations and the report of four experts selected to identify several problems in the mining sector. The two reports (questionnaire and expert reports) were presented in all the three sections and were discussed by the participants. The consultation of April 2013 was supported by the work of a consultant tasked with identifying divergences in the proposals of the three stakeholders - government, mining companies and civil society.¹³

c. Mining companies: activities carried out, divergences, communications and other motivations

The Chamber of Mines organized, like the civil society organizations, its own consultations on the review of the Mining Code at Hotel Memling. The points of divergence that emerged during the tripartite consultations stemmed from the mining companies. They participated actively in all tripartite consultations, from the Nganda Centre to the Grand Hotel Kinshasa. The Chamber of Mines of the Federation of Congo Enterprises (FEC) urged the Congolese government to maintain the tax regime of the current Mining Code, stressing that unilateral amendments would have a detrimental effect on the sector and the economy. For the FEC, the 2002 Mining Code attracted investments that paid over a billion dollars into the public treasury in 2014 despite the fall in commodity prices.

International financial institutions and some organizations assisted the Democratic Republic of Congo in its effort to consolidate the macro-economic framework and the business climate. Within this framework,

¹³ Amendment Proposals of civil society organization on the review of the mining code, CEPAS Edition, Kinshasa 2012, pp 9 -10

the World Bank supported the 2002 Congolese mining sector reforms. The legal framework for this reform contained exclusive and exhaustive tax and customs regime in line with international standards. The same World Bank, through its PROMINES¹⁴ project, supported the ongoing review process in the DRC by funding all the work of the Review Commission, paying consultants' fees (national and international), and financing a portion of the work of civil society on the review of the Mining Code. The contract signed between SARW and PROMINES on July 24, 2012 came with a budget of US\$100,000 which covered mainly the civil society consultations organized in three sections involving organizations from all provinces. From November 19 to 21, 2013, PROMINES financed the tripartite workshop bringing together representatives of different stakeholders (government, civil society, private Sector) to review the Mining Code at the Nganda Catholic Centre.

For three days, government experts, representatives of quarry companies, delegates from public and private agencies and traditional authorities worked tirelessly to reconcile and examine views on the draft text amending and supplementing Law 007/2002 of July 11, 2002 on the Mining Code¹⁵. The PROMINES project remained the government policy implementation tool on mining until 2015. It comprises six components: 1) strengthening the basic mechanism for access to resources, 2) strengthening the management capacity of the mining sector, 3) strengthening the capacity to collect taxes, 4) support for the redistribution of incomes and the release of funds, 5) improvement of the capacity to ensure sustainable economic development, 6) steering, management and monitoring and evaluation of the project. The project was managed under World Bank procedures and applied its safeguard policies, including OP 4.10 on indigenous peoples.

¹⁴ PROMINES, the Democratic Republic of Congo received funding from the International Development Association (IDA) as well as the Department for International Development (DfID) of the UK, acting as administrator of the DfID TF to finance the Good Governance Project in the Mining Sector as a Factor of Growth also known as PROMINES.

¹⁵ www.prominesrdc.cd

1. 2. 3 The proposed tax regime in the new Mining Code Bill

Under Title IX of this Code, the tax and customs regime applicable to mining activities of the holder of a mining right on national territory is defined exclusively and exhaustively. This regime concerns taxes, duties, royalties and other non-tax revenues collected for the benefit of the central government, the provinces and decentralized entities.

Nineteen levies presented relate to:

- Stability;
- Value added tax;
- Mortgage registration fees;
- Royalties payable per plot;
- Levies on the area of mining and hydrocarbon concessions;
- Mining royalty;
- Income tax;
- Depreciation and amortization;
- Deduction of interest paid abroad to persons in interdependence relationships;
- Deduction of professional expenses;
- Provision for rehabilitation;
- Lease premium;
- Tax on transferring mining rights;
- Professional tax on the supply of services;
- Excess profits tax;
- Capital gains tax on the sale of shares or stocks;
- Participation of the State;
- Customs regime;
- Exchange rate regime.

These were covered under the 2002 law. However, only the rates of some of (the) taxes were adjusted upward and this was the subject of divergences between the parties. The tax regime in the draft Mining Code is provided for in Articles 219 to Article 260a. By way of illustration, this table explains the rate increases as provided for in the Bill submitted to Parliament:

Description	2002 Mining Code	2015 Bill
Iron	0.5%	1%
Nonferrous and/or base metal	2%	3.5%
Precious metals	2.5%	3.5 %
Precious stones	4%	6%
Industrial minerals, solid hydrocarbons	1%	1%
Building materials	0%	0%
State Participation	5%	10%
Strategic metals		5%

According to information gathered during the interviews, the parties agreed on several issues, which even led to signing a report on March 18, 2014 at the end of the tripartite consultations. However, the Chamber of Mines suggested that all issues about rates be bundled into a package for a comprehensive review of their impact. From this bundle, solutions were to be drawn for the Stability Clause. It also communicated the position of its members, the majority of whom accepted the immediate application of the 3% mining royalty rate for base metals and the change of its base using the ex-mine value. It added that some members of the Chamber of Mines would accept a rate of 3.5% for base metals when the Congolese state can supply them with the energy for their operations.

1.2.4. Critique of the proposed tax reform in the draft Mining Code submitted to Parliament

Members of the Chamber of Mines of the Congolese Federation of Enterprises were the first to criticize the way the government finalized the Mining Code review process. The process which was initially tripartite was in their opinion unilaterally finalized by the government. Criticisms of the changes proposed in the draft Mining Code submitted to Parliament bordered mainly on the increase in rates of certain taxes, fees and

charges. An example is the royalty for copper and cobalt, which was increased from 2.5% to 3.5%. In an internal document dated March 17, 2014, a Belgian consultant, Professor Goossens, recruited by the FEC Chamber of Mines, presented a report on his findings on the draft revised Mining Code. While taking stock of the mining industry in the Democratic Republic of Congo in 2013, the report outlines the bottlenecks still holding back the development of the Congolese mining industry.

The FEC Chamber of Mines said that the aim of its report was to “give as complete a picture as possible of the state of health of the country’s mining industry; look back and assess correctly the prospects of the industry ten years from now.” This would allow all stakeholders, on the basis of a factual description, to make the appropriate decisions and provide guidance, it argued. [“While for the FEC, 2013 was characterized by strong growth in the various sectors of the industry, that is “more than 50% for copper compared to 2012 and more than 1,300% for gold compared to 2011.”] Congolese employers estimate that “in the gold sector, the recent start of two Projects (Twangiza and Kibali) was made possible, thanks to the favourable prices that the market recorded until 2013.” However, they indicated that “these two projects would not have emerged in the context of a revised law as currently proposed by the government and current prices.” Even though the government has the right to review the 2002 Mining Code, the FEC is concerned that the government’s proposals may ultimately create panic in the mining sector. The FEC Chamber of Mines indicated that it had “analysed these proposals in depth and carried out a series of tax simulations aimed at assessing the impact of new legislation on basic mining projects both in the gold and copper-cobalt sectors.”

After mathematical simulations, the Chamber of Mines noted in its report that, “it will no longer be possible to develop mining projects or even pursue current ones if all the fiscal measures proposed by the government are maintained.” In its report, the Chamber of Mines identified the main concerns of major mining operators regarding the ongoing DRC’s Mining Code Review. Initially, the FEC was in favour of the new Mining Code guaranteeing legal and tax stability for more than ten years, but this was rejected by the government, which supports the reduction of this period from ten to three years. This is an option the FEC considers destabilizing because of “the peculiar nature of the mining industry; an industry which requires very huge investments and is profitable only in

the long term.” In its report, the FEC outlined the essential steps of a mining project before reaching maturity, considering their minimum duration. These steps include prospecting and exploration (3 to 5 years with possibility of failure); feasibility study (2 to 3 years); building and construction of the mine (2 to 3 years), operations and extraction (\pm 20 years); dismantling of the mine at the end of the operation and the rehabilitation of sites (\pm 3 years) and the sustainability of social interventions, notably in health, education, food and agricultural production. The FEC also opposed the government’s proposal to increase the non-dilatable share of the state in the capital of mining companies, and the rate of tax on profits and to increase other taxes, charges and royalties specific to mining companies.

As regards the tax benefits, the FEC Chamber of Mines believes that “it is better for the government and other stakeholders to obtain 20% of a profit of US\$ 1 billion rather than 50% of a reduced profit of US\$ 100 million.” It defended this argument by pointing out that “the large mining companies carry out overall calculations, as Professor Goossens did in his report.” According to the FEC, “it is useless to discuss isolated tax parameters.” It also argues that “it is counterproductive to overtax mining companies because their over-taxation will result in a reduction in their number and activities.” In doing so, the FEC pointed out that “this may result in the financial analysts of multinational corporations having no choice but to recommend that their decision-makers withdraw from the DRC or reduce their investment in the industrial activity in the country, or even stop investing.” It gave as example the Brazilian company, Vale and the Anglo-Australian BHP and Rio Tinto who have turned away from the DRC for the same reasons.¹⁶ If the government persists in this direction, the FEC is of the opinion that “it will pave the way for smaller operators to block or freeze mineral deposits and projects for speculative purposes that would not in any way benefit the country. It may intensify illegal mining operations or resort to an increase in fraudulent exports.” The Chamber of Mines welcomed the announcement by the government that it has decided not to proceed with the review of the Mining Code. Although the reason for this decision is that the current business climate is marked by declining prices, the Chamber of Mines encouraged the

¹⁶ Chamber of Mines of the Federation of Congolese Enterprises

government and asserted that this decision is likely to strengthen the competitiveness of the mining industry in the DRC. Despite some controversy surrounding the government's position, the Chamber noted that until then, the government had acted consistently in reaffirming the retention of the 2002 Mining Code.¹⁷ Civil society, while supporting the finalization of the Mining Code review process by generating the draft submitted to Parliament, criticized the government's reduction from 0.3% to 0.1% of gross metal sales revenues as provision for community development projects.

¹⁷ Chamber of Mines 2016 Mid-Year Report, p12

Part 2:

Renegotiation of mining contracts in the Democratic Republic of Congo

This part of the study will focus on the review and renegotiation of mining contracts organized in the DRC in 2007. There were major challenges in initiating these two interrelated processes, but the study will dwell mainly on the benefits and lessons learnt from them.

2.1. Objectives and motivations for the mining contracts review in DRC

This section identifies the factors that prompted the DRC to revisit its contracts and all the related issues.

2.1.1 Resolution of Inter-Congolese dialogue

In response to the call of the Security Council and especially to take ownership of a matter which concerns them primarily, delegates at the Inter-Congolese dialogue in Sun city, South Africa, adopted in April 2002 Resolution No. DIC/CEF/04 on the review of the validity of economic and financial agreements signed during the war. In this Resolution, the Transitional Parliament was asked to put in place a Special Commission to review the validity of economic and financial agreements concluded during the wars of 1996-1997 and 1998¹⁸.

Basically, since the preparatory meeting of the Inter-Congolese dialogue held in Gaborone, Botswana, in August 2001, the Congolese raised the issue of conventions, contracts, agreements and administrative acts concluded and signed during the two wars with the aim of:

¹⁸ BOKONDU, G The experience of revisiting mining contracts in the Democratic Republic of Congo, Kinshasa 2009, p6

- Establishing the truth and responsibilities;
- Assessing the economic and financial damage caused to the State by these wars;
- Restoring to the Congolese people their legitimate rights and safe guarding their best interests;
- Stopping the plunder of the country's wealth;
- Ending irregularities and impunity;
- Laying the foundations for the rule of law in Congo (one fundamental of the new political order under construction in the country).

It is against this backdrop of reconstructing the country, rebuilding the state and boosting the economy that two resolutions of the ICD, the National Assembly, with power to control and monitor the Resolutions conferred on it by Article 98 of the Transitional Constitution, established by Resolution No. AN/P/COM.SP/03/04, adopted at the plenary session of April 24, 2004, a Special Committee to review the validity of economic and financial agreements concluded during the 1996-1997 and 1998 wars.¹⁹ The Inter-Congolese dialogue sought to raise the issue of contracts in the mining sector which is marked by several flaws.

2.1.2. The Lutundula parliamentary commission report

By Resolution No. AN/COM.SP/03/04, voted at its plenary session of April 24, 2004, the National Assembly set up the "Special Committee to review the validity of economic and financial agreements, which included mining contracts, concluded during the wars of 1996-1997 and 1998." The National Assembly fulfilled not only its political obligation stemming from the Resolutions of the Inter-Congolese dialogue. It joined efforts by the international community to bring the DRC out of wartime economic management and return the country to the path of good governance through transparency, accountability and control. The action of the National Assembly was also expected to contribute to the consolidation of peace by cutting links with the sources funding the war and the effective reunification of the country.

The Special Committee was to compile the above-mentioned agreements, review them, assess their financial impact and validate or reject

¹⁹ Report of the Special Commission in charge of reviewing the validity of economic and financial agreements concluded during the wars of 1996-1997 and 1998 wars, 2006. P11.

them. In its conclusions, the Lutundula Committee revealed that it would be difficult for the Democratic Republic of Congo to derive maximum benefit from its natural resources without protecting regional regulations drawn up with neighbouring countries within the framework of regional cooperation. Such a regulation must be backed by international law and external partners so it is binding and effectively complements Congolese laws. The Commission strongly recommended a roundtable discussion on the exploitation of natural resources in the Great Lakes region, which would bring together development partners, civil society, public institutions and donors to propose to the countries of the region a code of good conduct on the matter under OECD guidelines. The Commission was convinced that only a concerted action and general mobilization, even beyond the borders of the DR Congo, can permanently stem the plunder of the natural resources and other wealth of the country.

2.2. Mining contracts in DRC

The 2002 law did not clearly define a mining contract, but after the enactment of the Mining Code especially its Mining Regulations in 2003, several mining contracts in the DRC raised issues about their governance.

2.2.1. Status of mining contracts in 2007

During the successive conflicts of 1996 and 1998 and the advent of the Alliance of Democratic Forces for the Liberation, together with the aggression war in the three-year transition period, a significant proportion of the mineral wealth of the DRC was divested through devious agreements. The opaque agreements either supported the war effort or replenished arms supplies as motivated by greed to benefit some political and military personalities, rebel leaders and especially foreign companies holding mining concessions or leases to the detriment of the national economy and local communities.

Following the Congolese Government's decision to review mining contracts signed under unacceptable conditions, the Minister of Mines, Mr Martin Kabwelulu, made an announcement on April 20, 2007. He conveyed the establishment of an Inter-ministerial Commission responsible for revisiting mining contracts signed between private companies and the State or public companies by Ministerial Decision No. 2745/CAB.MIN/MINES/01/2007 of April 20, 2007. This initiative was rolled out after

several years of pressure exerted at the national and international levels by civil society and other stakeholders calling for a review of unbalanced mining contracts that privileged mining companies' interests. This review undoubtedly was a unique opportunity to put an end to the systematic plunder of the country's resources and set a precedence for investment practices that are responsible and compliant with international standards²⁰.

2.2.2. Rationale for signing partnerships in the mining sector following the bankruptcy of state owned mining companies

Several reasons were behind signing various mining contracts covering a fixed period of ten years, from 1996 to 2006. This period was marked by many phenomena, the most striking being the wars and political transition. In a civil society report on 12 contracts, three reasons were identified. To begin with, the Congolese government faced an economic situation of extreme poverty among the people. The country was experiencing low growth, unsustainable debt levels and basic infrastructure needed to be rehabilitated or rebuilt. The government's aim was to revamp the mining sector, a catalyst of economic growth since the colonial era to derive revenue and resources as foundation for sustainable growth and eventually reduce poverty in the country.

Secondly, these partnerships were expected to restore and stabilize state mining enterprises faced with technical and financial difficulties for nearly two decades.

Also, private partners wanted to seize these new investment opportunities offered by the DRC and to use the favourable conditions in the mining sector to maximize returns on their investments.²¹ This partnership policy established by the government paved the way for the fragmentation of the mineral wealth of state enterprises into several joint ventures, with Gecamines holding the most significant of these partnerships for over 30 years. Thanks to these partnerships, there was a recovery in mining activity. Even so, the DRC faced bankruptcy in state mines such as Gecamines, SOKIMO, MIBA, l'EMK Mn, etc. The biggest challenge was

²⁰ Avocats verts, op cit, p19.

²¹ Civil Society Forum op cit. p7

the lack of management capacity and strategies on the Congolese side and this resulted in poor control over the partnerships.

2.3. Mining contracts review process

The Minister of Mines issued the Ministerial Directive No.2745/CAB.MIN/MINES/01/2007 establishing the Commission in charge of revisiting mining contracts²². Two processes made up the renegotiation of mining contracts: revisiting the mining contract and the formal renegotiation.

2.3.1. The Mining Contracts Review Commission

Article 1 of the Decree of April 20, 2007 provides that there shall be established a commission in charge of revisiting partnership contracts concluded by the State and/or state-owned companies or joint ventures with private investors in the mining sector. Article 2 of the Directive entrusts two mandates to the Commission:

- Review partnership contracts referred to in Article 1 and their impact on the recovery of the said companies and national development;
- Propose modalities for their revision to address the imbalances observed and related flaws.

To carry out its mandates, the Commission could invite parties to the contracts subject to review to provide details. The Commission was empowered to call for external expertise under Article 3 of the same Decree.

The Commission was under the leadership of the Ministry of Mines and comprised representatives from the Presidency, the Prime Minister's Office, Ministries of Mines, Portfolio, Finance, Budget, Justice and Industry²³. After issuing the Ministerial Directive establishing the Commission in charge of Revisiting Mining Contracts, the Minister of Mines and his colleague of the Portfolio jointly signed the Inter-ministerial Directive No. 007/CAB.MIN/PORTEFEUILLE/01/2007 and No. 2836/CAB.MIN/MINES/2007 on provisional measures prior to the review of partnership contracts concluded by state and parastatal mining companies. Article 1

²² Ministry of Mines, Commission in charge of Revisiting Mining Contracts, Report of Proceeding Volume 1, published by CEPAS, February 2009 page 3

²³ BOKONDU, G ; op cit, p12

of the Decree provides that “partners of public and parastatal companies must refrain from disposing of mining titles subject to partnership agreement or joint venture agreements either by themselves or their mother or affiliated company. All transfers of interests, sales of shares and stock exchange speculation shall be suspended from the date of signing of the Ministerial Order No. 2745/CAB.MIN/MINES/01/2007 of April 20, 2007 establishing the ad hoc commission in charge of revisiting mining contracts.

Article 2 of this inter-ministerial order addressed the legal certainty of agreements or partnerships subject to review by stating that any revision of a mining contract envisaged by the Commission, despite its nature, shall be subject to consultations with the private partner concerned before a final decision. The methodology adopted by the Commission involved the analysis of the contract and other documents, hearing of state and parastatal company officials and the parties to the contract and field visits to complement the information available.

Regarding the analysis of contracts the Commission adopted a procedure that defined the evaluation criteria and classified contracts into three categories (A, B, C). Besides, the Commission enriched its analysis with contributions from various sources, including national and international NGOs like OSISA and Carter Centre²⁴.

The Commission revisited 63 partnerships including 57 mining contracts and 6 mining agreements. The Commission’s analyses focused on:

- The establishment of the partnerships
- Rights and obligations of parties
- Feasibility studies
- Distribution of shares
- Representatives of parties to the contract
- Reimbursement of funds

2.3.2 The review commission report

The Commission was made public by the government. This report classified the contracts into three categories: Category A indicates contracts

²⁴ Ministry of Mines, Commission for Revisiting Mining Contracts, Report of Proceeding Volume 1, published by CEPAS, February 2009 page 4-5

considered as valid and having no need for renegotiation; Category B comprises contracts recommended for renegotiation due to some flaws, and Category C represents contracts that must be terminated. No contract was classified under Category A.²⁵

Several flaws were detected in all the contracts reviewed. The major ones are:

- Arbitrary allocation of shares without feasibility study and assessment of the parties' contribution as well as imbalances in distributing these shares
- Generous tax and customs incentives with no corresponding obligations throughout the duration of the agreements
- Embargo on mining mineral deposits
- Lack of feasibility study, exploration program and infrastructure rehabilitation
- Non-registration of lease agreements under the Mining Code
- Non-payment of surface fees
- Non-commencement of works
- Non-compliance with contractual obligations and imbalances in parties' obligations
- Insignificant lease premium and lease payment
- No royalties in Contracts of Association
- Lack of explicit funding plan for mining projects
- Non-compliance with the terms of tenders for some agreements and unjustified reduction in the benefits of state-owned companies
- The absence of state-owned companies in the day-to-day management of joint ventures
- Non-consideration of contributions made by state-owned companies.²⁶

The report was presented five months later by government's experts to the Minister of Mines. The Minister of Mines then presented it to the Prime Minister and the Head of State before it was published on the Ministry of Mines' website: www.congoming.cd. This covered essentially the

²⁵ BOKONDU, G ; op cit, p15

²⁶ SARW, Grievances and recommendations of the Commission in charge of Revisiting Mining Contracts, Kinshasa 2008

contracts below: five mining agreements directly signed by the government and other contracts signed by six state-owned companies.

Three types of partnership were reviewed:

- Mining agreements [5],
- Contracts establishing Joint-ventures [15],
- Lease contracts.

After the review phase, the government launched a second phase of the renegotiation of contracts. Overall, the Commission identified many problems grouped according to these possible solutions:

- Issues of validity or equity in the contract that can be addressed through a renegotiation, on the one hand; and
- Flawed procedures in the conclusion of some contracts undermined their validity and non-fulfilment of commitments made by the parties, on the other.

2.3.3. Mining contracts renegotiations

After receiving the findings of the Commission in charge of Revisiting Mining Contracts, the government notified each partnership about queries and requirements. These issues were referred to a panel responsible for renegotiating or terminating mining contracts. To meet national expectations, the government assigned to negotiators, targets in the terms of reference without prejudice to obligations stated in the partnerships.

Following the review of mining contracts, some breaches were identified, including defaults in the payment of fees due the State or state-owned companies. Outstanding payments included duties payable on plot area, lease premium, and rent arrears regarding leases or royalties. The government set as precondition for renegotiation the full payment of the above-mentioned fees. The terms of reference²⁷ for the renegotiation and/or termination of mining contracts defined by the government in August 2008 covered:

- Assessment of contributions from partners
- Short and long terms financial benefits

²⁷ Terms of Reference for the renegotiation and/or termination of mining contracts, Kinshasa, 2008

- Rate of returns on projects
- Compliance with laws
- Control over the movements of shares or stocks
- Effective participation in the day-to-day management of partnerships
- Consideration of blocking minority
- Fulfilment of partnership obligations
- Use of local resources
- Case of contracts or partnerships concluded based on an invitation to tender
- Social responsibility clause
- Right of application if dispute occurs
- Moratorium for the submission of the feasibility study
- Termination of contracts.

All these elements besides preconditions for the renegotiation were a guide for negotiators representing the government of state-owned companies. In the Government's document of April 8 on the renegotiation of mining contracts,²⁸ the key aspects of contracts subject to possible renegotiation are divided into two categories –legal and financial.

Regarding the legal aspects, the changes will aim at:

- Ensuring the appropriate environmental and social protection;
- Improving protection against transfer pricing;
- Improving the capacity to monitor: audit, conflict of interest, etc.;
- Increasing investment and labour requirements;
- Ensuring a sound financial structure, including financial guarantees;
- Adopting mechanisms to enable state-owned companies ensure that investors are fulfilling their obligations;
- Balancing termination rights;
- Increasing the right of government to monitor the development of projects.

Regarding financial aspects, changes would seek to:

- Introduce mechanism to increase government revenues when prices of natural resources, and profits are high;

²⁸ Government document on the renegotiation of mining contracts, Ministry of Mines, April 2008.

- Ensure adequate returns on assets provided by state-owned companies.

On the legal front, the contractual changes desired are justified by their being reasonable and fair. Besides, they are politically difficult to contest as they involve:

- Introducing mechanism to ensure that companies pay what they are expected to pay;
- Including binding mechanisms to ensure that social and environmental obligations are met;
- Developing mechanisms that are simple to manage and beneficial for both the DRC and the investors.

If fundamental changes in the implementation conditions of a contract occur, renegotiation of financial terms and conditions is to be expected. An increase or a drop in the prices of resources is considered a fundamental change. The Government, as a follow-up to the review process, established a “task force” comprising the Minister of Agriculture (in his capacity as the Chairperson of the Economic and Financial Commission of the Government), the Minister of State at the Presidency, the Minister of State at the Prime Minister’s Office, the Minister and Deputy Minister of Mines, the Minister of Finance, the Minister of Budget, Portfolio Minister and the Chief of Staff at the Presidency. Once the task force finished reviewing the reports and analysis mentioned above as well as responses from investors, the Minister of Mines contacted companies for the next steps of the process.

Civil society organizations conducted their own analysis of 12 major mining contracts and officially submitted the report to government for onward transmission to the Commission in charge of Revisiting Mining Contract. However, the conditions stated in the terms of reference were not fully observed. Civil society organized by SARW was very active during the renegotiation process. It organized advocacy activities around the finalization of the renegotiation of TFM and KMT contracts and was invited by the government to participate in negotiations between the government and Gecamines as an observer and again at the negotiations between government and Freeport MacMoran.

2.4. Impact of the review and mining contracts renegotiation

The impact of the review and renegotiation of contracts depends on the results achieved at the end of the process. Besides the results obtained from the negotiations, this section will be dedicated to civil society involvement and the strengths and weaknesses of the process.

2.4.1. Results of the renegotiations

The renegotiations of mining contracts were conducted over two periods; namely between September 5 and October 15, 2008 and between January 26 to March 26, 2009. The conclusions of the said negotiations approved by a Cabinet Meeting of December 19, 2008 and August 4, 2009 are:

- For Gecamines partners: 23 partnerships were maintained and 4 were terminated;
- For the Kisenge Manganese Mining Company: 1 contract was maintained and 1 was terminated;
- For MIBA: 5 contracts were maintained and 1 contract terminated;
- For OKIMO: 6 contracts were maintained and 2 terminated;
- For SODIMICO: 2 contracts were maintained and 4 terminated.

This brought the total number of contracts maintained to 37 and those terminated to 12.²⁹

As regards mining agreements involving the Congolese Government directly, their renegotiation was entrusted to state-owned companies, namely: OKIMO (AGK and Banro), Kisenge Manganese Mining Company, MDDK and Gecamines (Anvil Mining and TFM). After the negotiations, 5 agreements were directly approved and the parties continued the negotiations.³⁰

As regards the benefits of the renegotiations, the following can be identified, among others³¹:

- US\$307,283,040 as lease premium

²⁹ BOKONDU, op cit, p17

³⁰ Idem

³¹ BOKONDU, op cit, 18

- US\$5,206,000 of duties on plot area
- Royalties have been integrated and improved depending on the partnerships and are expected to be paid as soon as projects are commissioned.
- Increase in shares or stocks
- The non-transferability of shares or stocks prior to the commissioning of projects
- Active participation of state-owned companies in the day-to-day management of partnerships.
- Partners' commitment to contribute to the socio-economic development of communities affected by the project in consultation with the Minister of Mines and other ministries concerned.

2.4.2 Civil society involvement

On September 1 2007, a group of independent experts and civil society presented a report to the DRC Civil Society Forum. This report focused on the independent review of 12 mining contracts among the 60 most important contracts under review by the government commission. The legal, technical, economic and environmental aspects of the contract were studied to identify imbalances and flaws in the contracts. The group was expected to propose strategies for finding solutions for a harmonious exploitation of mineral resources. Its objective was to contribute to the mining contract review process organized by the government. This report was submitted to elicit comments from private and public companies concerned. In October 2007, a workshop was held in Kinshasa in Pere Boka Hall to discuss and validate the report of experts from civil society. The workshop was organized by the Congolese Civil Society Forum (CSF) under the coordination of CEPAS (Centre for Civil Action Studies) and supported by the Open Society Initiative for Southern Africa» (OSISA). This document is the report on proceedings of this workshop which brought together eleven (11) international organizations, ten (10) Congolese organizations, experts from the Congolese Civil Society Forum, representatives of public institutions, (the Presidency, Senate, National Assembly, Executive), four (4) representatives of mining companies, nineteen (19) journalists and reports from the print and broadcast media. The World Bank and US Embassy also participated as observers.³²

³² Civil Society Forum, Report of the Analysis of Twelve Mining Contracts CEPAS, October 2007, p2.

The critique made by civil society had its worth in gold. The summary of the 12 contracts from the legal perspective created the impression they were negotiated by people without the requisite skills (even as these contracts involved important national wealth). They entrusted the ownership of significant mineral assets to private companies with no regulation by the state. These contracts also led to the establishment of joint ventures in which the share of the minority shareholder, the state, seemed not to have been determined or assessed using an objective methodology or sound criteria. They were negotiated without the will to add value to mineral assets coveted by investors and some contracts were signed showing disregard for representation rules. Most contracts were not compliant with national and international legal instruments as they were signed to the detriment of national development and welfare of communities. They were concluded in contravention of the Mining Code.³³

From the economic and financial perspective, civil society experts stressed the enormous reconstruction needs of the nation after a long period of war. The mining sector in the DRC is capable of contributing all to the financial resources required to develop the country. Experts from civil society also noted that the contracts were concluded with no objective in mind. The potentials of Congolese mining companies were devalued; the bases for studies were distorted. There was no basis for distributing financial return. The joint ventures were poorly assessed; most did not impact the economic situation in the country.³⁴ Besides the analyses carried out by civil society, some also observed that two organizations were invited to participate in the review, namely the Carter Centre and the Congolese NGO of Green Lawyers but they did not participate in the deliberations of the Commission in charge of Revisiting Mining Contracts. However, civil society organizations operating in the natural resource sector were involved in the renegotiation of contracts by organizing advocacy activities around finalizing the renegotiation of TFM and KMT contracts. After visiting the two mines in Katanga, they published a report containing various recommendations to government and investors in these two partnerships.

Civil society raised the paradox of poverty in the mist of abundant wealth to emphasize the importance of revisiting the mining contracts.

³³ Idem

³⁴ Idem 2

This paradoxical situation is attributable to the poor management of mineral resources by the Congolese political elite. The one-sided contracts that outraged many observers and led to the renegotiation were only symptoms of a deep seated malaise plaguing the Congolese government and the extractive industry. So long as issues about good governance and transparency in the management of natural resources are not addressed, the problem of equitable distribution of revenues in the DRC cannot be solved. The second issue is the persistence of a mineral exploitation structure which is more beneficial to foreigners than the Congolese people. The exploitation of mineral resources in the DRC is the antidote to the description offered by Professor Wamba dia Wamba in his publication entitled "Congolisation of mineral resources". However, we are experiencing the "decongolisation," which is creating a Congo that is promoting the interests of foreigners more than the national interests. The worst of all is that the Congolese themselves, full of greed, are encouraging this wave of sophisticated and systematic plunder of mineral resources by foreign companies. The country is still operating as though it was in the colonial era. The country's natural resources are exploited for the benefit of other people. Western countries in connivance with Congolese political leaders are continuing the plunder. The dispossession is facilitated by the Congolese elite content with crumbs that the capitalists offer them while the majority of the people wallow in poverty.³⁵

2.4.3 Strengths and weaknesses of the process

The aim of the review process is to contribute to economic recovery and national development. This is attainable by laying foundations for good governance and the fight against corruption in the management of national resources for the welfare of citizens. The process had its strengths and weaknesses during the implementation. The strengths are reflected in the results obtained by the government side which imposed the renegotiation of the partnerships. The government reneged on commitments made when it had serious weaknesses. All the investors were at the negotiation table and all the grievances and flaws pertaining to each partnership were made public. The DRC is one of the African countries

³⁵ Advocacy Report of Civil Society Organizations operating in the natural resources sector for the finalization of the renegotiations of mining contracts in DRC, the case of TFM and KMT, p3

that acquired experience in the review of mining contracts and has been a source of inspiration to other countries. After the review, all the mining projects were reactivated, investments were made and finalized and production was launched. Pressures exerted on the government through criticisms against the partnerships compelled investors to develop their respective mining projects.

Regarding the weaknesses, the circumstances under which the partnerships were signed played a key role in destabilizing state-owned companies. This period was marked by the democratic transition and recurrent armed conflicts that weakened the state considerably; particularly where the state was a single or majority shareholder in state-owned companies³⁶. During the review process, state-owned companies were completely weakened by inadequate organizational structures. Corrupt officials sometimes participated in signing the contracts without the requisite negotiation skills. Entrusting negotiations to members of the government was a major setback, especially where negotiations were entrusted to the Deputy Prime Minister, who seemed inept at mining issues and all the challenges surrounding the review process. Another weakness is the inadequate resources placed at the disposal of members of the Commission in the face of temptations from investors. The OSISA Foundation had to provide funding for the launch of the Commission's activities. The field missions to Katanga especially were funded by Gemines and not the government.

³⁶ BOKONDU, op cit, p19.

Conclusion

The Democratic Republic of Congo is a country endowed with abundant mineral resources. These enormous natural resources, if well exploited, can serve as the engine of economic growth and contribute to the improved socio-economic conditions for the people. After independence in 1960, the Congolese government nationalized the mining sector till the 1990s when the first partnership contracts were signed. However, the number of these partnerships increased significantly after the promulgation of the 2002 Mining Code from 1996 to 2006. Implementing the Mining Code over ten years raised questions about the impact of this law on the economic development compelling the government to initiate the revision process. Over the entire period, issues of quality, validity, fairness, balance and impact of mining contracts caused serious debate on especially, the tax regime. The tax regime has undergone changes to ensure fairness in distributing profits.

The 2002 Mining Code was drafted by the World Bank to attract investors and not for developing the DRC. The review of the Mining Code underway is focusing on the reform of the tax regime to ensure fairness. The revised Mining Code is yet to be discussed in Parliament. Mining companies are exerting pressure on the government not to adopt the Code on the premise that the proposed tax regime is not favourable for them. Regarding the revision of mining contracts, the DRC is the leading African country that has conducted revisions on such a scale. In all, 63 contracts were renegotiated between 2007 and 2009. It must be admitted that the revision of the Mining Code and the review of mining contracts are all government initiatives, the first was implemented during the first legislature of the third republic after the first elections in 2006 and the second was carried out during the second legislature after the second elections in the DRC. These two processes were supported by civil society and some development partners.

References

Textes légaux et réglementaires:

- Loi n°007/2002 du 11 juillet 2002 portant code minier.
- Ordonnance-loi n°81/-013 du 2 avril 1981 portant législation générale sur les mines et les hydrocarbures,
- Ordonnance-loi n°66/326 du 21 mai 1966 portant création d'un droit du sous-sol sur les concessions minières.
- Ordonnance-loi n°67/231 du 11 mai 1967 portant législation générale sur les mines et les hydrocarbures
- Décret n° 038/2003 du 26 mars 2003 portant Règlement Minier

Ouvrage et autres rapport

- SARW, Analyse du système fiscal minier congolais et propositions de réforme, éditions MEDIASPAUL, Kinshasa 2015,
- EMWA, rapport de consultance sur la révision du code minier, p18.
- BGSM/GIZ, Analyse fiscale des revenus et des recettes générées en 2011, 2012, 2013 et 2014 par le secteur minier et projection de croissance du potentiel fiscal réalisable dans les 5 prochaines années dans le secteur minier industriel de la RDC, Kinshasa 2015,
- BGSM/GIZ, Projection décennale du potentiel fiscal du secteur minier industriel de la RDC (2016-2025), Kinshasa Juin 2016,
- Emile Lambert OWENGA ODINGA, Huit questions récurrentes de droit fiscal congolais, Kinshasa, avril 2016,
- AVOCATS VERTS, Analyse de la législation environnementale et sociale du secteur minier en RDC, Kinshasa 2010,
- Mike PFISTER, Une fiscalité orientée vers l'investissement et le développement : Aperçu de quelques enjeux de politique fiscale en Afrique,

- PHILIPPE-ALEXANDRE SONDEJI MULANZA KATING, EGMONT PAPER; le projet de révision du code minier de la RDC : de l'incitation à la dissuasion ?
- Propositions d'amendements des organisations de la société civile sur la révision du code minier, édition du CEPAS, Kinshasa août 2012,
- AVOCATS VERTS, Analyse de la législation environnementale et sociale du secteur minier en RDC, Kinshasa, octobre 2010,
- BOKONDU, G ; L'expérience de la révisitation des contrats miniers en République Démocratique du Congo, Kinshasa 2009,
- Rapport de la Commission Spéciale chargée de l'examen de la validité des conventions à caractère économique et financier conclues pendant les guerres de 1996-1997 et 1998, 2006,
- SARW, Grievs et Recommandations de la Commission de révisitation des contrats miniers, Kinshasa, 2008.
- Rapport de la Chambre des Mines du Premier semestre 2016,
- Ministère des Mines, Commission de revisitation des contrats miniers, Rapport des travaux, Volume 1, éditions CEPAS, février 2009, p3
- Ministère des Mines, Termes de référence pour la renégociation et/ou la résiliation des contrats miniers, Kinshasa, Août 2008,
- Forum de la Société civile, Rapport d'analyse des douze contrats miniers, CEPAS, octobre 2007,
- OSISA, la révision des contrats miniers, Cinq cas d'études, édition CEPAS, septembre 2006.
- Rapport des travaux de la commission spéciales chargée de l'examen de la validité des conventions à caractères économiques et financiers conclues pendant les guerres de 1996-1997 et de 1998 (Commission Lutundula), 26 juin 2005.

Interviews

Institutions Internationales

Sites web:

www.mines-rdc.cd

www.prominesrdc.cd