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Defusing the social minefield of gold sites in Kamituga, South Kivu. From legal pluralism to the re-making of institutions?[☆]

Janvier Kilosho Buraye[a,b], Nik Stoop[a,c,d], Marijke Verpoorten[a,*]

[a] IOB, Institute of Development Policy and Management (University of Antwerp), Belgium
[b] CEGEMI, Centre d'Expertise en Gestion Minière (Catholic University of Bukavu), Democratic Republic of Congo
[c] LICOS, Centre for Institutions and Economic Performance (KU Leuven), Belgium
[d] FWO, Research Foundation, Flanders, Belgium

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ABSTRACT

DRC's 2002 Mining Code has attracted Large-Scale Mining (LSM) through favorable fiscal conditions, but is detrimental to Artisanal and Small-scale Mining (ASM). The Code specifies that ASM should take place in Artisanal Exploitation Zones (AEZ), but far too few AEZ were created to accommodate the large number of artisanal miners. This has triggered an explosive situation, as many artisanal miners operate in mining concessions granted to LSM companies. While LSM companies justify their operations referring to statutory law, miners claim traditional rights to the land. We study how this situation of legal pluralism plays out in Kamituga, a gold mining area in South-Kivu. To what extent do the artisanal miners and the LSM company stick to their opposing frames of reference? To what extent do they look for compromises? Can these compromises give way to the re-making of institutions?

1. Introduction

South-Kivu – located in eastern DRC and bordering Rwanda, Burundi, and Tanzania – holds important deposits of gold. In the colonial period, these gold deposits came to be dominated by industrial mining (Geenen, 2014; Kyanga Wasso, 2013; Vlassenroot and Raeymaekers, 2004). From the 1960s onward, Artisanal and Small-scale Mining (ASM) resurged – first in the margins, but then more prominently. ASM really boomed after 1982, when President Mobutu liberalized the production and trade in minerals.[1] During the two Congo wars (1996–1997 and 1998–2003) Large-Scale Mining (LSM) came to a standstill, while ASM continued to expand.

Presently, ASM is an important livelihood strategy in DRC. A (gu) estimate by the World Bank (2008), p.56) puts employment in DRC's artisanal mining sector in the range of 0.5–2 million miners.[2] The ASM-based livelihood is however under pressure, as the pendulum is swinging back to LSM. Over the past decade, mining companies have shown renewed interest in DRC – triggered first by increasing world prices for minerals, and later by a stabilization of the security situation in eastern DRC. Since ASM cannot easily be taxed,[3] the Congolese state is eager to further stimulate LSM-development. A revised Mining Code, issued in 2002, aimed to attract more investments from private companies, among others by offering an advantageous fiscal regime (Mazalto, 2005).

While the 2002 Mining Code has helped in attracting Foreign

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* Corresponding author.
E-mail addresses: janvier.kilosho@gmail.com (J. Kilosho Buraye), nik.stoop@uantwerp.be (N. Stoop), marijke.verpoorten@uantwerp.be (M. Verpoorten).

[1] Law n°82/039 of November 5th, 1982.

[2] Other estimates are provided by Spittaels et al. (2014) and Geenen (2014). In collaboration with the Congolese mining administration, the International Peace Information Service counted 1088 mining sites in the two Kivu provinces, Maniema, North Katanga, and the Ituri District of Province Orientale. Because of security reasons, only half of these sites were visited, yielding a count of 221,500 artisanal miners (Spittaels et al., 2014: 8). Geenen (2014): p.95) estimates the number of artisanal miners in two of South-Kivu's mining sites, and finds a number in between 6000 and 12,000 out of a population of 65,0000 inhabitants in Twangiza; and between 10,000 and 15,000 out of a population of more than 100,000 in Kamituga in 2013.

[3] The bulk of the ASM produce is smuggled out of the country (World Bank, 2008, p.56).

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Direct Investment to the sector,[4] it may prove detrimental to the sector's ASM segment. Although the code recognizes ASM as a valid production mode, it specifies that artisanal activities should take place in clearly demarcated Artisanal Exploitation Zones (AEZ). In practice, very few AEZ were created and the DRC Mining Code provides the possibility to close them down if "a new deposit which does not lend itself to artisanal mining has been discovered".[5] Consequently, LSM companies have the upper hand, while artisanal mining largely takes place outside the state's regulatory framework (Geenen and Claessens, 2013; Van Puijenbroek and Schouten, 2013).

Where mining concessions have been granted to LSM companies, artisanal miners become *de jure* invaders engaged in illegal activities. But, the miners see things differently. Taking recourse to customary rules and traditional rights, they perceive their claims to the land as legitimate (Geenen and Claessens, 2013). Furthermore, mining is often perceived by artisanal miners as the only way to make ends meet (Matthysen and Zaragoza Montejano, 2013; Morisho and Rutinigirwa, 2015). In practice, the production mode is therefore characterized by a duality and tension between LSM and ASM.

We study how this tension plays out in Kamituga, a gold mining concession in South-Kivu, owned by Banro – a Canadian multinational. To what extent do the artisanal miners and the LSM company stick to their opposing frames of reference? To what extent do they look for compromises? Can these compromises give way to the re-making of institutions?

In answering these questions, we add to the literature on artisanal mining (Bryceson and Jønsson, 2010; Campbell, 2009; Fisher et al., 2009; Grätz, 2009; Hilson, 2009; Siegel and Veiga, 2009); in particular to studies looking at its relation with large-scale mining (Banchirigah, 2008; Bush, 2009; Carstens and Hilson, 2009; Geenen, 2014; Geenen and Claessens, 2013). Our specific contributions are threefold. First, on the methodological front, we take a mixed methods approach, in which we combine quantitative and qualitative data. Importantly, the data collection does not capture just one snapshot in time, but was collected during four consecutive visits in a 2-year time span, allowing to monitor actions and reactions of the artisanal miners and the LSM company through time. Second, on the conceptual front, we propose a simple payoff-matrix that provides insight into the key factors that shape the strategic interaction between these two players. Although a simplification of the complex situation on the ground, this initial abstraction helps us to situate the concrete actions and reactions that we observe in the field. Third, studying the case of Kamituga is highly relevant at this point in time. Although the war in eastern DRC has formally ended, peace remains fragile, among others because many young people cannot find productive employment, thus receiving the label "high-risk youth" (Blattman and Ralston, 2015). Kamituga, being the third largest city in South-Kivu, with a population that depends almost entirely on artisanal mining, has the potential to greatly contribute to the army of high-risk youth. Furthermore, in response to calls for a revision of the 2002 Mining Code,[6] a new revision process may be launched in 2017. [7] We hope that our research may contribute to better informed decisions.

The next section provides a background on the DRC Mining Code and the mining site of Kamituga. In Section 3, we present our conceptual framework. In Sections 4 and 5, we move to the empirics, discussing the methodology and results of our data collection process. Section 6 provides a discussion of our findings and their policy implications.

2. Background

DRC's 2002 Mining Code defines artisanal exploitation as "any activity by means of which a person of Congolese nationality carries out extraction and concentration of mineral substances using artisanal tools, methods and processes, within an artisanal exploitation area limited in terms of surface area and depth up to a maximum of thirty meters" (DRC, 2002 :3).[8] According to the Code, artisanal miners should operate in designated AEZ, located outside LSM concessions.[9] The Congolese state however has few incentives to create such zones, because striking deals with a limited number of LSM companies brings in much easier money than trying to regulate and tax hundreds of thousands of artisanal miners.

The 2015 update of the Congolese Mining Registry (CAMI) indicates that, in Eastern Congo,[10] there are 177 AEZs that cover only 1% of the mineral concessions surface area. Among those 177, seven are located in the province of South-Kivu, where they also represent only 1% of the mineral concessions surface area. When combining this dataset with the latest information wave (2009–2015) about artisanal mining sites from the International Peace Information Service (IPIS), we find that less than 1% of the artisanal miners registered by IPIS operates in an AEZ. The large majority operates in concessions held by LSM or in areas that are not covered by a mining permit (For more details and maps, see Stoop et al., mimeo).

Regarding industrial exploration, the 2002 Mining Code applies, except in cases where a mining convention between the company and the Congolese government was signed before 2002.[11] The Mining Code specifies that an exploration permit is valid for 4 years, and renewable twice for a period of two years.[12] An exploration permit is considered to be 'dormant' if the holder has not started exploration activities within 4 years or if the license has not been renewed. If an LSM company wishes to proceed from the exploration to the production phase, an exploitation permit needs to be obtained. Within two months of issue, the title holder has to provide a clear demarcation of the concession: the perimeter has to be surveyed, and corner markers have to be placed.[13] Furthermore, since the demarcation and start of production activities are likely to entail important consequences for local communities and individuals living or working within the demarcated zone, a 'Cahier de Charge' or Memorandum of Understanding (MoU) between the affected populations and the company should be agreed upon.[14]

Agreeing on a MoU only at the time of the production may however be quite late from the viewpoint of the population, which already faces restrictions and large uncertainty during the exploration phase. Moreover, the 2002 Mining Code nor its related 2003 Mining Regulations provide a model for such MoU. Although the Mining

[4] In 2012, mineral rents accounted for an estimated 23.4% of GDP, up from 10.6% in 2006 and 0.3% in 2002 (World Bank, 2013).

[5] Mining Code, Title 4, Chapter 1, Art. 110.

[6] The Civil Society's memorandum to the Congolese prime Minister is available at http://cern-cenco.cd/?p = 2334 (last consulted on May 28, 2016).

[7] In June 2017, the bill of revision of the Mining Code was discussed in the DRC's national Assembly. See e.g. http://www.radiookapi.net/2017/06/07/actualite/societe/rdc-la-revision-du-code-minier-en-discussion-au-parlement (last consulted on June 20, 2017). The bill of the revision can be found at: http://www.congomines.org/reports/765-projet-de-loi-2015-sur-la-revision-du-code-minier (last consulted on July 25, 2017).

[8] English version of the 2003 Mining Regulation: Title1, Chapter 1, Section 1, Art. 1; available at: http://mines-rdc.cd/fr/documents/codeminier_eng.pdf (last consulted on May 25, 2016).

[9] Mining Regulation, Title 4, Chapter 1, Art. 223.

[10] Eastern Congo encompasses eleven of the country's 26 provinces, namely Bas-Uele, Haut-Uele, Tshopo, Ituri, North-Kivu, South-Kivu, Maniema, Tanganyka, Haut-Lomami, Lualaba and Haut-Katanga.

[11] Mining conventions are regulated by the Legislative Order nr. 81-013 of April 2, 1981. This Legislative Order is available at: http://www.leganet.cd/Legislation/Droit%20economique/Code%20Minier/OL.81.013.02.04.1981.htm#_ftn2 (last consulted on July 25, 2017).

[12] Mining Code, Title 3, Chapter 1, Art. 52 (English version, available at: http://mines-rdc.cd/fr/documents/codeminier_eng.pdf (last consulted on May 18, 2016).

[13] Mining Code, Title 2, Chapter 2, Art. 31.

[14] Title 10, Chapter 4, Art. 285 & 217, Bill of revision of the DRC Mining Code (May 2015). Also see the summary of the discussions to revise the Code (CEPAS, 2014).