



A dangerous bet: The challenges of formalizing artisanal mining in the Democratic Republic of Congo

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ABSTRACT

Among policy-makers and governments, there is a broad consensus that artisanal and small-scale mining (ASM) needs to be ‘formalized’ – embodied in a standardized legal framework that is registered in and governed by a central state system-, the basic condition being that artisanal miners are given formal property rights. This article aims to contribute to this discussion, drawing on a case study from the Eastern Democratic Republic of Congo (DRC), where it is estimated that up to 90 percent of mineral production and export is ‘informal’. After having pointed out some of the theoretical assumptions behind the formalization canon, we study the challenges of formalizing the mining sector in the DRC. Next, we provide an in-depth analysis of one concrete policy measure of the Congolese government, the temporary ban on all artisanal activities. We argue that the mining ban was not only a radical example of a top-down formalization policy, but also an illustration of a bureaucratic and technical measure that compounds but does not address different problems associated with ASM: conflict, informality, poverty, illegality, state control. Looking at the empirical evidence from the DRC, we argue that these kinds of technical solutions can never address the broader socio-economic and political issues at stake.

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Introduction

Despite the recognition of the potential of artisanal and small-scale mining (ASM) for economic development and poverty reduction, a consensus exists that ASM has so far generated few benefits for both governments and artisanal and small-scale miners. The key problem so it is argued, is the fact that these artisanal activities operate outside the regulatory framework of the state, in an ‘illegal’ or ‘informal’ sphere. Hence the sector needs to be ‘formalized’, or embodied in a standardized legal framework that is registered in and governed by a central state system. The basic condition for formalization, according to many, is ‘property’, or the fact that “artisanal miners are given full legal and transferable mining titles to their claims” (Barry, 1995: 2). This accounts for a broad consensus among policy-makers and researchers (Siegel and Veiga, 2009: 51). But on which assumptions is this consensus based? Why is it argued that a formalized sector will have a more positive impact on national development and local livelihoods? And if this is the case, how should policy makers proceed to implement formalization?

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This article aims to contribute to this debate, drawing on a case study on the mining sector in Eastern Democratic Republic of Congo (DRC), where it is estimated that more than half of the cassiterite and coltan production and more than 90 percent of gold production and export is ‘informal’,¹ which means that it takes place beyond state control. In the second section we point out some of the theoretical assumptions behind the formalization canon and a number of critiques on this. In the third section we study the challenges of formalizing the mining sector in the DRC, a mineral-rich country that has faced a lasting conflict fueled by the scramble for mineral resources, and where a major part of the current mineral production is artisanal and ‘informal’. In the fourth section we analyze a concrete policy measure of the Congolese government, namely the temporary ban on all artisanal activities, which was presented as an attempt to bring the entire sector under state control and formalize it.

In conclusion, we argue that the mining ban was not only a radical example of a top-down formalization policy, but also an illustration of a bureaucratic and technical measure that compounds but does not address different problems associated

¹ Estimates in different research reports, see for example Tegera and Johnson, 2007: 5; Garrett and Mitchell, 2009: 23.

with ASM: conflict, informality, poverty, illegality, state control. Looking at the empirical evidence from the DRC, we argue that these kinds of technical solutions can never address the broader socio-economic and political issues at stake.

Formalizing artisanal mining

The formalization canon

In this section we first point out some of the theoretical assumptions behind the formalization canon, according to which the basic condition for economic development is the establishment of formal property rights. The importance of property rights as exclusive, transferable and legal rights to use, exchange and change resources has been recognized by New Institutional Economists like Demsetz (1967), Alchian and Demsetz (1973) and North (1990). They distinguish between private property rights, assigned to an individual, and common property rights, assigned to the state. Analyzing the establishment of private property rights in the gold mines of the US and Australia in the mid-19th century, authors like Umbeck (1977), Libecap (1986, 2007) and La Croix (1992) argue that as the value of the resources and the number of miners increased, and technologies changed, it became more efficient to establish private property rights over the mines. Umbeck (1977: 215–216) described this as a natural process: as resources grew scarcer and their value rose, competition increased and miners began to feel the need to form explicit contracts for exclusive property rights.² These property rights needed to be protected and enforced, which first happened through miner's meetings and the establishment of mining codes, and later through the adoption of these codes in state law.

Property economists like Steiger (2006) and De Soto (2000, 2002) articulate the link between property and economic development more explicitly. The basic condition for economic growth, so it is argued, is to guarantee people full property rights, which are transferable and protected by state law. Full formal titles would create incentives for investments and development of a resource, they allow access to credit and can be transformed into standardized instruments of exchange and capital. This way individuals will be included in the market economy. Eventually, so the argument goes, formal titles will increase total wealth and economic growth. Yet these formal property rights will not emerge naturally. They must be created through legal reforms. In other words, the existing 'informal' titles must be transformed into full formal titles by a legal process of 'formalization'. This discourse has proved to be extremely prominent in policy circles (Gilbert, 2002: 1). In his influential work, Hernando De Soto identified a clash between what he calls the legal economy and the informal, extralegal economy, consisting of a bundle of customary rights and 'possessory relationships'. The poor, operating in the informal economy and lacking formal titles, cannot transform their assets into collateral and credit, hence their assets are tied up in 'dead capital' (Siegel and Veiga, 2009: 52). What the poor need, so the argument goes, are secure titles, safeguarded and enforced by the state's legislative framework. For De Soto, formalization is the key to development, a necessary and sufficient condition for fostering economic growth and productivity for the whole society (De Soto, 2002: 355).

Other authors put forward an argument based on 'order' and 'security', saying that when titles are formalized, owners will also respect other people's titles, and physical and human security in general will be enhanced. For example, artisanal miners are often victims of extortion and excessive bribes; or governments or mining companies threaten them with violent evictions. In this case, it is argued that formal titles are "the basis of a miner's access to legal redress when rights are violated" (Siegel and Veiga, 2009: 52) and give them 'voice' in decision-making processes (Hilson and Potter, 2005: 108). Apart from the security arguments, all theories we have discussed so far rely on the 'efficiency' argument to justify the need for, or to explain the natural evolution towards, formalization and privatization of property rights. But the efficiency argument itself has also been questioned in various ways.

Questioning the formalization canon

First of all, fundamental questions may be raised about the need for ASM to be efficient and profitable. Since the 1990s, the 'poverty-driven' character of ASM has been emphasized over and over again (Barry, 1995; Hilson, 2009: 2), arguing that people 'branch out' to mining activities in order to escape poverty. ASM may thus become one of the possible livelihood options, next to, for example, agriculture; but in some areas it has also become the principal livelihood and employment option. Taking this into account, it becomes obvious that issues like poverty, employment, livelihoods and economic survival may matter more than efficiency, or as Maconachie and Hilson (2011: 295) frame it:

[...] formalization strategies [...] continue to be concerned with creating a legislative framework, licensing, and tracking artisanal mining in order to capture revenue for the government, rather than addressing the livelihood demands and welfare issues of those enduring poor working conditions, low pay and job insecurity.

Second, the formalization discourse assumes that everyone will eventually benefit from strong property rights. Yet it has been argued that artisanal miners do not necessarily want strong and formal property rights. They may not think of their 'illegal' status as a problem, as long as they have 'perceived' tenure security (Gilbert, 2002: 8). For example, despite their lack of formal titles they may have customary titles, which are just as strong in their eyes, and even more legitimate.³ What kind of property rights are preferred, also depends on the context and the nature of the mining activities. The history of property rights in the Californian mines of the mid-19th century provides a good illustration. Clay and Wright (2005) show that by introducing the claim system, miners deliberately chose a system of restricted ('weak') property rights, with numerous restrictions on claims and protection of the interests of both claim-holders and claim-jumpers. McDowell (2002) attributes this among others to the specific nature of the gold mining activities, the fact that claim-holders never knew how much their claim would yield, and the resulting mobility of miners. Therefore, it was in everyone's interest to secure their claims, but at the same time facilitate the acquisition of a new claim.

Third, the standard formalization canon does not take into account a number of structural elements in 'informal' economic systems. As we have argued elsewhere (Geenen, 2011a, b) the system of artisanal gold exploitation and trade in the DRC is not

² This argument conforms the view of property rights theorists saying that as the scarcity of a resource increases, a point will be reached where the gains from its privatization exceed the costs, so privatization will be desirable on efficiency grounds (see North, 1990: 51 and Platteau, 2000). Platteau criticizes the 'evolutionary theory of land rights'.

³ Artisanal miners often refer to their 'traditional' rights or 'customary' rights to work the land, and explicitly frame their activities in a discourse of legitimacy/illegitimacy instead of legality/illegality. Source: interviews in South-Kivu.

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