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The problem with transnational corporations in the DRC's mining sector by Ben Radley

A new Congolese mining code signed earlier this year is intended to increase the mining sector's contribution to state revenue, which should in theory lead to improvements in the daily lives of the Congolese. However, if the misappropriation of mining revenue continues under the new code, little is likely to change. State misappropriation of mining revenue, while so often the focus of analysis, is just part of the problem. Tax evasion and avoidance strategies practiced by transnational corporations are of greater importance.

On March 9th, 2018, just two days after a six-hour meeting with some of the world's most important mining executives, DRC President Joseph Kabila signed into law a new Congolese mining code, updating the 2002 code following years of parliamentary process and debate. Through this new legislation, the Democratic Republic of Congo (DRC) hopes to reap higher benefits from its huge resource wealth. Royalties on copper and cobalt have risen to 3.5 percent, up from 2 percent, and the government's stake in new mining projects has been set at 10 percent, up from the previous 5 percent. Congolese Parliament also introduced a number of new elements (https://www.reuters.com/article/us-congo-mining-insight/how-congo-faced-down-some-of-the-worlds-biggest-mining-firms-idUSKCN1GR2HD) late on in proceedings, most notably a 10 percent royalty tax on "strategic substances", a 50 percent super-profits tax, and the annulation of a 10-year stability clause to ensure the new provisions come into effect immediately.

Liberal Regime, Low State Revenue

The intention behind these changes is that they will increase the mining sector's contribution to state revenue, which under the Kabila administration to date has been low, and significantly below its potential. Based on data from 2010 and 2011, one study found (http://www.editions-harmattan.fr/index.asp?navig=catalogue&obj=numero&no=39923) the Congolese state exerted around a 13 percent tax rate over the sector—well below the 46 percent tax rate (https://siteresources.worldbank.org/INTOGMC/Resources/336099-1156955107170/drcgrowthgovernanceenglish.pdf) considered reasonable for the DRC by the World Bank. Another, more recent study, conducted by the German Society for International Cooperation (GIZ), calculated that between 2011 and 2014, total state revenue collected from the sector amounted to a mere 6 percent of total mining sector revenue across the same period.

Even the former IMF DRC Head of Mission, Norbet Toé, commented (https://www.imf.org/fr/News/Articles/2015/09/28/04/53/socar101315a) that 'the 2002 mining code is too generous, so much so that the state captures very little in the end'. From this perspective, the new mining code represents a welcome correction, and is part of a current trend across Africa (https://www.sciencedirect.com/science/article/pii/S2214790X17301090?via%3Dihub) whereby African states are beginning to reassert themselves following generations of World Bank-led neoliberal mining sector restructuring.

Yet while mainstream media coverage has focused on the various tax increases and the resultant stand-off between President Kabila and mining executives, a wider issue has been generally overlooked: that if old problems continue into the new code, the fiscal increases are unlikely to lead to significantly increased state revenue (and therefore, in theory at least, to improvements in the daily lives of Congolese).

Transnational Corporation Behaviour

One reason for this is the Congolese state's misappropriation of mining revenue intended for the treasury. This has been demonstrated by a near constant flow of academic and advocacy reports over the last several years (see here (https://www.cartercenter.org/resources/pdfs/news/peace_publications/democracy/congo-report-carter-center-nov-2017.pdf), here (https://www.globalwitness.org/en-gb/campaigns/democratic-republic-congo/regime-cash-machine/) and here (http://www.atlanticcouncil.org/images/publications/Congo_Blues_0512_web.pdf) for some of the most recent), which rarely fail to generate international headlines and spark public and media debate in the DRC. The popularity of these reports has its roots in the ideological primacy of "bad governance" (African governance, that is) as the prime causal explanation for the failure of the DRC to benefit from its resource wealth.

To be sure, state misappropriation of mining revenue has been a serious problem under the Kabila administration, and it is correct that the government be held accountable for its actions when they work directly against the interests of the Congolese people. However, as research by Stefan Marysse and Claudine Tshimanga (http://www.franceloisirs.com/essais/conjonctures-congolaises-2013-percee-securitaire-flottements-politiques-et-essor-economique-9782343033044.html) (2014: 155) has noted, this is not the "most important black hole" when it comes to low state revenues in the DRC. The quantitatively bigger problem, they concluded, is corporate tax evasion and avoidance practiced by transnational corporations (TNCs).

Based on an analysis of mining company financial reports, Marysse and Tshimanga (Ibid.) found "international companies in joint ventures with Gécamines try to pay the least possible, resorting to juridical-accounting techniques…to shift their profits to countries where they pay less tax". This is achieved primarily by transfer pricing, whereby through intra-company trade (trade between two or more companies within the same legal entity) TNCs artificially manipulate the real prices of goods and services entering and leaving a country to shift their profits to low-tax or no-tax jurisdictions.

A transnational could, for example, set up a subsidiary in the DRC that extracts copper and then sells it at a loss to a subsidiary in Switzerland. This subsidiary could then sell it on for a profit. The balance sheet of the transnational that owns both these subsidiaries would much look the same, but the Congolese company would record major losses, while the Swiss one would enjoy big profits.

This is, in fact, exactly what research indicates is happening. The result is that TNC subsidiaries in the DRC invariably run at a loss and therefore do not pay Congolese profit tax. For example, a 2014 study of Swiss-based Glencore (https://fastenopfer.ch/content/uploads/2016/12/PR-or-Progress_-Glencores-Social-Responsability-in-the-Democratic-Republic-of-Congo_2014.pdf) found its Congolese subsidiary Kamoto Copper Company (KCC) to run at a loss of hundreds of millions of dollars per year from 2009 to 2013. Over the same timeframe, its Canadian-registered subsidiary Katanga Mining Limited ran at a net profit of $401 million over the same period. This resulted in a loss of revenue to the Congolese state of $153.7 million. Recent KCC financials (https://twitter.com/thomas_m_wilson/status/970598750442983424) demonstrate gross debt of $8.9 billion and a capital deficit of $3.9 billion.

Five mining company case studies (http://congomines.org/system/attachments/assets/000/001/220/original/TCC_EIGP_REV_Improving_Governance_of_Revenues_--_Cross-Cutting_Lessons_(....pdf?1487024488) conducted by Congolese civil society organisations between 2015 and 2017 came to the same conclusion. They found that 'profit tax payments to the Congolese state are minimized by mining companies, and thus…this very important flow often remains hypothetical, or even almost zero' (The Carter Centre 2017: 4). As MP Alain Lubamba reflected recently (https://www.reuters.com/article/us-congo-mining-insight/how-congo-faced-down-some-of-the-worlds-biggest-mining-firms-idUSKCN1GR2HD), 'there is this contradiction that emerges each time…when the miners declare losses [in the DRC] when their mother company is only enjoying success'.

Given these practices, an improved fiscal regime and better state management of government revenue will do little to address the state's low capture of mining revenue as ultimately, you cannot tax losses. The profit tax and the much-discussed new super-profits tax—by far the most important fiscal measures of the new code—are rendered impotent.

A first step to addressing this problem in the DRC must be to push subsidiary financial reports into the public domain, in the same way that TNCs registered on the New York or Toronto stock exchanges must publish their financial reports. This would bolster domestic (https://www2.deloitte.com/content/dam/Deloitte/global/Documents/Tax/dttl-tax-drcongohighlights-2015.pdf) and international (http://www.nortonrosefulbright.com/knowledge/publications/69441/the-democratic-republic-of-congo-joins-ohada) efforts to address the issue. Currently, subsidiary financials are jealously guarded by both companies and government officials, and with good reason. Once made public, the game will be up, and TNC misappropriation of government revenue might begin to spark a similar level of debate as we currently see in the DRC around state misappropriation. Indeed, whisper it quietly, it might even come to be seen as of greater importance.

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