

THE LIMITS OF CORPORATE SOCIAL RESPONSIBILITY AND THE POSSIBILITIES FOR HARNESSING MINING TO REINSTITUTE PROCESSES OF STATE-LED LOCAL DEVELOPMENT IN THE DRC

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Résumé

Depuis le tournant du siècle, la délégation progressive des fonctions exercées par l'État congolais (RDC) aux entreprises (notamment internationales) a été parallèle à la libéralisation progressive de l'économie congolaise. Ce phénomène a été expliqué théoriquement par un effondrement de l'État congolais dans les années 1990 dû principalement à la corruption et à la mauvaise gestion du gouvernement. Ancré dans une interprétation historique alternative de cet effondrement, et basé sur des interviews et un passage en revue de la littérature qui révèlent l'impact limité du développement local dirigé par des entreprises dans les principales régions minières de la RDC, le présent article examine les possibilités de profiter de la présence des sociétés minières transnationales pour soutenir les processus de développement local dirigés par l'État. On fait valoir que la réalisation de ceci nécessitera une maximisation de l'appropriation par l'État du surplus créé par l'exploitation minière industrielle et la redistribution de ce surplus aux structures gouvernementales locales – autrement dit : aux « entités territoriales décentralisées ». Les principaux défis et opportunités qui entourent ces processus seront identifiés et discutés. Les résultats sont fondés sur des recherches menées entre janvier et mars 2016 à Kinshasa et dans six des principales provinces minières de la RDC.

1. INTRODUCTION¹

As early as 2000, Ugandan political economist Yash Tandon noted “that development theory is increasingly turning to see if capital can be made more accountable to concerns of human welfare”.² The increasingly developmental function expected of corporations can be seen today in the UN's ‘Global Compact’ with transnational corporations and the emergence of organisations such as the International Organisation for Standardisation and the International Council of Mining and Metals. The outcome has been a broad shift away from the developmental state and towards a more privatised model of social and spatial regulation.³

Dynamics in the Democratic Republic of the Congo (DRC) reflect this global trend. Since the collapse of the Congolese state in the 1990s, and with

¹ The author would like to thank Oxfam for its generous contribution to the field research undertaken for this article, and the two anonymous reviewers for improving its overall quality and coherence.

² TANDON, Y., “FDI, Globalization, UNCTAD and Human Development”, *Third World Network*, 2000, p. 1.

³ LARSEN, M., LANKSEN, P., FOLD, N., “Does FDI Create Linkages in Mining? The Case of Gold Mining in Ghana”, in RUGRAFF, E., SANCHEZ-ANCOCHEA, D., SUMNER, A. (eds.), *Transnational Corporations and Development Policy: Critical Perspectives*, London, Palgrave MacMillan, 2009, pp. 246-273.

the liberalisation of the economy since the turn of the century, previously state-held functions have been increasingly delegated to corporate actors. In particular, given the centrality of mining to the Congolese economy, these functions have been transferred to transnational mining corporations (TN-MCs) through the now sectorally mainstreamed concept of 'corporate social responsibility' (CSR).⁴ The rise of CSR in the DRC has been theoretically supported and sustained by the 'good governance' agenda – adhered to by a number of Congo scholars – which posits government corruption and mismanagement as prime causal explanations for the failure of the DRC to benefit from its resource wealth.⁵ To remedy this situation, Englebert advocates that "what is...generally needed is a disengagement of the state from the economy and society".⁶

This article departs from such a diagnosis and prescription, and is guided instead by an alternative literature, which highlights the historical significance of the early years of President Mobutu's rule, and the importance of external economic shocks in bringing this period to an abrupt end. During this period, from 1966 to 1974, the country embarked on its only sustained attempt to construct a nation-state capable of transcending regional and ethnic divides. The number of provinces was reduced from 21 to nine, and state representatives were moved around the country every three years and "normally could not serve in their home area".⁷ Citizenship was extended to include marginalised and discriminated groups in the east of the country. The education system was nationalised, achieving 92 per cent primary school enrolment and increased access to the secondary and tertiary sectors.⁸ A national health system numbering 500,000 employees was established that "was generally regarded as a model for primary and community health care in the developing world".⁹ The economy was growing, as "Congo rivalled Nigeria and South Africa for the economic leadership of Africa".¹⁰

⁴ MCMAHON, G., "The World Bank's Evolutionary Approach to Mining Sector Reform", *World Bank*, 2010.

⁵ GARRETT, N., LINTZER, M., "Can Katanga's Mining Sector Drive Growth and Development in the DRC?", *Journal of Eastern African Studies*, Vol. 4, No. 3, 2010, pp. 400-424; DE PUTTER, T., DECREE, S., "Le potentiel minier de La RDC: Mythes et composantes d'une dynamique minière", in MARYSSE, S., TSHONDA, J. (eds.), *Conjonctures Congolaises 2012: Politique, secteur minier et gestion des ressources naturelles en RD Congo*, Paris, L'Harmattan, 2013; ENGLEBERT, P. "Democratic Republic of Congo: Growth for All? Challenges and Opportunities for a New Economic Future", *The Brenthurst Foundation*, 2014.

⁶ ENGLEBERT, P., *op. cit.*, 2014, p. 16.

⁷ HESSELBEIN, G., "The Rise and Decline of the Congolese State: An Analytical Narrative on State-Making", *Crisis States Research Centre*, 2007, p. 25.

⁸ PUTZEL, J., LINDEMANN, S., SCHOUTEN, C., "Drivers of Change in the Democratic Republic of Congo: The Rise and Decline of the State and Challenges for Reconstruction", *Crisis States Research Centre*, 2008, p. v.

⁹ *Ibidem*, p. 31.

¹⁰ TREFON, T., VAN HOYWEGHEN, S., SMIS, S., "State Failure in the Congo: Perceptions &

Yet from 1974, things quickly fell apart. Copper prices crashed and the cost of oil rose enormously. As an industrialising country still heavily dependent on imported inputs, “the sudden lack of foreign exchange affected industrial sector output immediately”.¹¹ Many Congolese who found themselves running state-owned or private enterprises as a result of the ‘Zairianisation’ of the economy were ill prepared and ill equipped to assume their roles. By the early 1980s, “black markets and smuggling had taken over, the control of foreign exchange had become meaningless, and the subsistence economy was significantly increased”.¹² In 1983 the government received a World Bank Structural Adjustment Programme, which set about dismantling what was left of the state administration Mobutu had been working to modernise and expand.¹³

The reduction of bureaucratic structures and central government resources led Mobutu to abandon his efforts to construct a horizontal integration of elites and expand access to social services, moving instead to “consolidate his power through the multiplication of vertical networks based on ethnic and regional affiliation.... This is when he began to privilege his own ethnic group from Equateur in both administrative and military offices”.¹⁴ It was this fundamental shift, away from a project of nation-state building and towards a mode of political survival based on “reviving a tribalist logic at the core of the state”,¹⁵ that set in motion eventual patterns of state disintegration, conflict and civil war that have plagued the DRC up until today.

From this perspective, the Congolese state is more a victim of its peripherality in the global economy of the 1970s – dependent on price and demand mechanisms beyond its control – than an innately corrupt and mismanaged institution. Situated in this historical understanding, and based on interviews and a review of the DRC CSR literature which reveal the limited impact of corporate-led local development in the mining regions of the DRC, this article explores instead the possibilities for harnessing the presence of TNMCs operating in the DRC to support the reinstatement of processes of state-led local development. The findings are based on research conducted by the author between January and March 2016 in Kinshasa and six of the DRC’s major mining provinces (Haut-Katanga, Lualaba, Kasai Oriental, Ituri, North Kivu and South Kivu), including field visits to mining areas in Mbuji-Mayi (Kasai Oriental), Kolwezi (Lualaba) and Bunia (Ituri). A total of 178 people were

Realities”, *Review of African Political Economy*, Vol. 29, No. 93-94, 2002, p. 380.

¹¹ HESSELBEIN, G., “The Economic Foundations of State-Building and State-Failure: A Political Economy of Sub-Saharan African States”, PhD Thesis, *University of Zurich*, 2009, p. 209.

¹² *Ibidem*, p. 214.

¹³ PUTZEL, J., LINDEMANN, S., SCHOUTEN, C., *op. cit.*, pp. vii and 24.

¹⁴ *Ibidem*, p. vi.

¹⁵ *Ibidem*, p. vi.

interviewed during the course of the research, including villagers living in mining areas, government officials, private sector representatives, academics and members of Congolese civil society.

2. METHODOLOGY

As a point of departure for this article, a literature review of academic articles and popular reports assessing the impact of CSR programming led by TNMCs in the DRC was conducted. This included research available online, as well as a number of reports only distributed in the DRC and not accessible internationally at the time of writing. Following this, six provinces outside of Kinshasa were selected for fieldwork due to their importance to the DRC's mining sector: Haut-Katanga, Lualaba, Kasai Oriental, Ituri, North Kivu and South Kivu. Research on an additional seventh mining province – Haut-Uélé – was conducted from Bunia in Ituri Province. Time was also spent in Kinshasa at the beginning and end of the fieldwork to speak with national-level government, civil society, private sector and other representatives. Finally, a number of academics and international experts based outside of the DRC were consulted, either by email or by telephone.

A total of 178 people were interviewed during the course of the research. Table 1 divides these interviewees by group and provides an overview of the number interviewed from each group, as well as this number expressed as a percentage of the total. The largest group consulted was Congolese civil society, representing 23 per cent of interviewees, followed by local residents and the private sector. Geographically, 21 per cent of the interviewees were located in Kinshasa, 18 per cent in Haut-Katanga, 18 per cent in Lualaba, 15 per cent in Kasai Oriental, 14 per cent in North Kivu and South Kivu, seven per cent in Ituri, and seven per cent internationally. All interviews were conducted between January 8th and March 6th 2016.

Table 1. Interviewee Groups

| Group | Number Interviewed | As a % of the Total |
|----------------------|---------------------------|----------------------------|
| Civil society | 41 | 23 |
| Local residents | 37 | 21 |
| Private sector | 27 | 15 |
| International NGOs | 23 | 13 |
| Government officials | 22 | 12 |
| Donors | 14 | 8 |
| Academics | 11 | 6 |
| Journalists | 3 | 2 |
| Total | 178 | 100 |

While purposive sampling was used to ensure that each group in Table 1 was reached, snowball sampling was the main technique employed to identify interviewees within each group. At the local level, during field visits to villages located in industrial mining concessions, convenience sampling was employed, speaking to those who appeared most interested and open to talking and sharing their experiences. Semi-structured interviews were used throughout, in addition to group interviews in villages, with the latter technique deemed more suitable when conducting research in mining regions to the formal requirements of holding a focus group.¹⁶

Interviews were guided by questions related to three topics: the impact and effects of TNMC CSR programming; the mining sector's tax requirements, including TNMC adherence to these requirements; and available mechanisms to redistribute mining sector revenue to the local level, including government adherence to these mechanisms. Interviews dealt with a combination of one or all three topics, depending on the interviewee's areas of knowledge and experience. Upon completion of the fieldwork, data analysis was conducted by reviewing and coding all interview content to identify emerging themes and recurring patterns within the data. Some elementary quantitative data analysis was also conducted, pertaining to the Congolese government's capture and redistribution of revenue generated by the mining sector.

3. BEYOND THE RHETORIC OF CORPORATE SOCIAL RESPONSIBILITY

Reflecting the shift away from state-led and towards corporate-driven local development in the DRC's mining sector, Article 452 of the country's Mining Regulations stipulates that titleholders must develop an Environmental Management Plan to «improve the well-being of local populations by putting in place social and economic development programmes».¹⁷ Article 458 of the same Regulations specifies that the titleholder must submit an annual report to the Environmental Protection Agency in the Ministry of Mines; to include information on the implementation of a Sustainable Development Plan designed to improve the human development of local populations.¹⁸

While these plans are only exceptionally made public, numerous recent case studies provide detailed descriptive portraits and analysis of the planning, implementation and impact of mining sector CSR programming across the country. The overall picture presented by this literature is of a CSR sector that is ad hoc, non-strategic, non-consultative, prone to elite capture and lar-

¹⁶ GEENEN, S., "The Political Economy of Access to Gold Mining and Trade in South Kivu, DRC", PhD Thesis, University of Antwerp, 2014, p. 91.

¹⁷ DRC GOVERNMENT, "Mining Regulations", 2003, p. 210. Author translation.

¹⁸ *Ibidem*, p. 214. Author translation.

gely unresponsive to local needs and concerns.¹⁹ Research on the CSR programming of the Canadian gold corporation Banro, operating in South Kivu Province, concludes that – despite positive efforts by Banro to commit to transnational voluntary standards – the programming is largely ineffective and the company has ultimately “reproduced an elite alliance for stability that is fairly exclusive and not perceived as legitimate by the local population”.²⁰ Research on the local development impact of the Congolese subsidiary KibaliGold, directly managing one of sub-Saharan Africa’s largest gold mines in Haut-Uélé Province and jointly owned by RandGold and AngloGold Ashanti, presents similar findings. The report notes, “the lack of a true understanding and dialogue between KibaliGold and the population living in its area of impact”, with the result that the company’s arrival has created local conflict, discontent and tension.²¹

The literature also notes that, far from promoting local development, the arrival of TNMCs into rural areas of the DRC has created new processes of social dislocation and exclusion through the forced displacement of thousands of villagers and artisanal miners,²² the mass expropriation of land without fair compensation,²³ and the forced resettlement of those displaced, often to remote areas in poorly constructed houses, and with decreased quality of ac-

¹⁹ PEYER, C., MAILLARD, Y., “Contract, Human Rights and Taxation: How a Company Exploits a Country, The Case of Glencore in the DRC”, *Bread for All & Fastenopfer*, 2009; THE CARTER CENTER, “Les investissements miniers en République Démocratique du Congo: Développement ou appauvrissement des communautés locales?”, 2012; AMNESTY INTERNATIONAL, “Profits and Loss, Mining and Human Rights in Katanga”, 2013; GEENEN, S., CLAESSENS, K., “Disputed Access to the Gold Sites in Luhwindja, Eastern Democratic Republic of Congo”, *The Journal of Modern African Studies*, Vol. 51, No. 1, 2013, pp. 85-108; ASADHO, “Quel est la part des communautés locales de Luano, Kalukuluku et Kawama dans le projet Ruashi Mining?”, 2014; GEENEN, S., “Dispossession, Displacement and Resistance: Artisanal Miners in a Gold Concession in South-Kivu, DRC”, *Resources Policy*, Vol. 40, 2014, pp. 90-99; GEENEN, S., HONKE, J., “Land Grabbing by Mining Companies: Local Contentions and State Reconfiguration in South Kivu (DRC)”, in ANSOMS, A., HILHORST, T. (eds.), *Losing Your Land: Dispossession in the Great Lakes*, Oxford, James Currey, 2014, pp. 58-81; RUGARABURA, P., BATUMIKE, P., “Contribution à l’analyse de la nature juridique des mesures de délocalisation des populations au profit de Banro Corporation à Twangiza”, in MARYSSE, S., TSHONDA, J. (eds.), *Conjonctures congolaises 2013: Percée sécuritaire, flottements politiques et essor économique*, Paris, L’Harmattan, 2014, pp. 199-222; MAKULA, A., KAMBOLA, D., “Rapport d’évaluation des impacts du projet Sicominés sur les droits des communautés locales dans la région de Kolwezi”, *ASIBOG & IBGDH*, 2014 ; CORDAID, “L’exploitation minière au coeur des zones rurales: Quel développement pour les communautés locales?”, 2015; MAISON DES MINES DU KIVU, “Evaluation des impacts des investissements miniers de Banro Corporation sur les droits humains en RDC”, 2015; ORN/CDJP, CERN, PAX, “Géant minier Kibali: Oter les impuretés pour que l’or soit pur”, 2015.

²⁰ GEENEN, S., HONKE, J., *op. cit.*, p. 25. See also GEENEN, S., CLAESSENS, K., *op. cit.*, pp. 85-108; GEENEN, S., *op. cit.*, pp. 90-99.

²¹ ORN/CDJP, CERN, PAX, *op. cit.*, p. 49. Author translation.

²² ORN/CDJP, CERN, PAX, *op. cit.*, 2015.

²³ ASADHO, *op. cit.*, 2014.

cess to water and arable land.²⁴ The findings from the DRC reflect those of the wider literature, which finds mining sector CSR programming across Africa to: propose ill-suited technical solutions to political problems;²⁵ be ineffective in improving the lives of targeted populations;²⁶ lead to elite capture;²⁷ and create regional imbalances as communities in resource-rich areas receive CSR funding and those in non-resource-rich areas do not.²⁸

Interviews across the DRC exploring the impact of CSR programming provide further support to these findings, with the overall impression of general frustration at the lack of CSR-led local development reflected in one interviewee's statement that "the absence of social and economic development around mining areas is shameful".²⁹ While there was a strong sentiment that some Western mining companies had better CSR policies and practices than non-Western (in particular Chinese) companies, many interviewees bemoaned the fact that most CSR work is ad-hoc, non-strategic and non-consultative.³⁰ One extreme example was given by a community in Kolwezi, where a TNMC distributed footballs and children's football kits to a local community, with no prior consultation. More than three years later, the company had yet to return.³¹ Particularly striking was the oft-noted problem of a one-way dialogue, led by mining companies, with civil society and local groups unable to access the companies or hold them accountable. Elite capture was another theme to emerge from the interviews, with customary and government structures accused by interviewees across the country of monopolising the benefits of the presence of industrial mining to the exclusion of local communities.³²

Yet despite the weaknesses and limits of CSR highlighted by the literature review and the interviews, many of the recommendations arising out of the DRC literature remain within the CSR framework, calling for the need to strengthen the quality and impact of CSR programming and expand its coverage. One study calls on mining companies in the DRC to "adopt more innova-

²⁴ AMNESTY INTERNATIONAL, *op. cit.*, 2013.

²⁵ LUNING, "Corporate Social Responsibility (CSR) for Exploration: Consultants, Companies and Communities in Processes of Engagements", *Resources Policy*, Vol. 12, 2012, pp. 205-211.

²⁶ BUSH, R., "Soon There Will Be No-One Left to Take the Corpses to the Morgue": Accumulation and Abjection in Ghana's Mining Communities", *Resources Policy*, Vol. 34, 2009, pp. 57-63.

²⁷ NEGI, R., "The Mining Boom, Capital, and Chiefs in the New Copperbelt", in FRASER, A., LARMER, M. (eds.), *Zambia, Mining and Neoliberalism*, New York, Palgrave MacMillan, 2010, pp- 209-236.

²⁸ LARSEN, M., LANKSEN, P., FOLD, N., *op. cit.*, pp. 246-273.

²⁹ Interview with civil society representative, January 2016, Lubumbashi.

³⁰ Interviews with civil society representatives, January and February 2016, Kinshasa, Lubumbashi and Bukavu.

³¹ Interview with community members, February 2016, Kolwezi.

³² Interviews with civil society representatives, donors and academics, January, February and March 2016, Kinshasa, Lubumbashi, Mbuji-Mayi, Kolwezi, Bunia and Bukavu.

tive [CSR] approaches”,³³ one on a mining company to “apply the Voluntary Principles on human rights security” in its CSR approach,³⁴ and another for a mining company to “organise new consultations that involve all social strata of the affected communities”.³⁵ Meanwhile, the role of the state is largely restricted to overseeing the implementation of CSR programming, such as the recommendation that the Congolese Government “ensure the [community] consultations made by mining companies are effective and in respect of the mining regulations”.³⁶

These are all examples, to return to Tandon’s earlier phrase, of working to make corporate capital more accountable to concerns of human welfare. Yet in so doing, the literature undermines the Congolese state’s developmental role by implicitly endorsing its replacement with what Negi has called “the weaker institution of CSR”.³⁷ Departing from this perspective, the remainder of this article explores the possibilities for harnessing the presence of TNMCs in the DRC to support not improved and expanded corporate-led development, but the reinstatement of local processes of state-led development.

4. MAXIMISING STATE CAPTURE OF MINING SECTOR SURPLUS

The starting point for such efforts must first and foremost revolve around maximising state capture of the surplus generated by the DRC’s mining sector, from which improvements in the state’s developmental capabilities and the redistribution of this surplus to provincial and local levels of government can flow. The two most comprehensive fiscal studies assessing the mining sector’s contribution to state revenue find it to be significantly below its potential. The first and most 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 5.98 per cent of total mining sector revenue during the same period.³⁸ The second study concluded that in 2010 and 2011 the Congolese state levied around a 13 per cent tax rate over the sector, in contrast to the 45 per cent tax rate considered reasonable by the World Bank.³⁹ Consequently, the authors recommend a tripling of receipts to the state as a realistic goal without strangling the sector.⁴⁰ These studies

³³ CORDAID, *op. cit.*, p. 8. Author translation.

³⁴ ORN/CDJP, CERN, PAX, *op. cit.*, p. 71. Author translation.

³⁵ MAKULA, A., KAMBOLA, D., *op. cit.*, p. 13. Author translation.

³⁶ ASADHO, *op. cit.*, p. 37.

³⁷ NEGI, R., *op. cit.*, p. 39.

³⁸ GIZ, “Analyse et potentiel de croissance des revenus du secteur minier en RDC”, 2015, p. 33.

³⁹ LUBABU, T., “Stefaan Marysse: ‘Au Congo, un secret ne reste pas longtemps un secret’, *Business et Finances*, 2015, pp. 4-5.

⁴⁰ MARYSSE, S., TSHIMANGA, C., “La renaissance spectaculaire du secteur minier en RDC: Ou va la Rente Minière?”, in MARYSSE, S., TSHONDA, J. (eds.), *Conjonctures Congolaises*

suggest that there is significant scope in the DRC for increasing the state's capture of the surplus generated by industrial mining.

There are two ways in which this increased tax contribution can be achieved: enforcing TNMC adherence to their fiscal responsibilities; and enacting fiscal reform to increase the tax rate. This second possibility has been underway since 2012 through the Mining Code revision process, which carries the potential to increase state revenue from the sector and better align the DRC's mining tax system with other low- and lower-middle-income Francophone African countries.⁴¹ It would for example increase the profit tax rate from 30 to 35 per cent, matching the rate in Cameroon. It would also increase the range of mining royalty rates to 0.5 to 6 per cent (depending on the mineral), comparable with the rates in Burkina Faso (three to seven per cent), Cameroon (two to eight per cent), and Cote d'Ivoire (2.5 to three per cent).⁴² However, since this revision process has been completed and has been suspended indefinitely in Parliament,⁴³ the focus here will be on exploring the first possibility of ensuring TNMC adherence to existing fiscal responsibilities.

As one interviewee put it, "many if not all [mining companies] are trying to avoid as many taxes as possible".⁴⁴ While outright avoidance is clearly an issue (in 2013, for example, 80 percent of mining title holders did not pay their annual surface area taxes⁴⁵), transfer pricing was raised by multiple interviewees as the most serious issue, through which TNMCs avoid paying taxes in the DRC and syphon profits overseas, to the net loss of Congolese state revenue. Transfer pricing refers to all aspects of intra-company trade (trade between two or more companies within the same legal entity), summarised in Peyer et al.'s work exploring the practice in the DRC:

"Sophisticated strategies allow multinational companies to 'optimise' their tax burden and move profits to tax havens or non-transparent jurisdictions. One commonly used option consists of over-invoicing for imports and under-invoicing for exports to reduce company profits in a given country. Granting licences or loans to companies in the same group can also reduce the profits of a subsidiary and correspondingly increase those of another subsidiary registered in a tax haven. It is difficult to establish – in the absence of lengthy and costly legal proceedings – whether such practices are legal or

2012: *Politique, secteur minier et gestion des ressources naturelles en RD Congo*, Paris, L'Harmattan, 2013, pp. 11–46.

⁴¹ For a summary of the proposed fiscal reform, see GIZ, "Analyse et potentiel de croissance des revenus du secteur minier en RDC", 2015.

⁴² LAPORTE, B., DE QUATREBARBES, C., "What Do We Know About the Sharing of Mineral Resource Rent in Africa?", *Resources Policy*, Vol. 46, 2015, pp. 241–247.

⁴³ <http://af.reuters.com/article/drcNews/idAFL5N1615EV>, visited on 11 March 2016.

⁴⁴ Interview with DRC mining sector expert, February 2016, phone call. All interview quotations from interviews conducted in French have been translated into English by the author.

⁴⁵ GIZ, *op. cit.*, p. 25.

illegal”.⁴⁶

The over-invoicing for imports by TNMCs was raised on several occasions by interviewees. According to a civil society representative monitoring TNMC investment levels, companies artificially increase the total amount of imported material during the construction phase to raise the overall size of the investment and prolong avoidance of corporate tax payment.⁴⁷ As one Congolese mining journalist has written, “the problem of the Congolese state’s understanding of the true value of mining investments and their certification constitutes a hole for the national economy”.⁴⁸ The scope for the under-invoicing of exports in the DRC is also considerable, and was highlighted by many during interviews. Senior government officials in Kinshasa and Lubumbashi noted that the government lacks the capacity to verify the quality of the ore being exported, and depends upon the mining companies to conduct the required tests and declare this quality themselves.⁴⁹ This raises the risk that the true export value might far exceed its declared value, resulting in the Congolese subsidiary avoiding the payment of royalties and corporate tax.⁵⁰

Case studies of TNMC accounting practices in the DRC support the widely held sentiment among Congolese civil society and government official interviewees that transfer pricing is a serious problem in the country. A 2014 study of Swiss-based Glencore found that its subsidiaries “transfer a substantial proportion of profits abroad. This practice...is not illegal, but is a way of avoiding payment of taxes on profits and dividends to the DRC state”.⁵¹ The practice is facilitated by Glencore’s organisational structure, whereby its Congolese subsidiary (Kamoto Copper Company, or KCC) is majority owned by companies registered in the British Virgin Islands, Guernsey and the Isle of Man (jurisdictions with a zero or very low rate of taxation). These companies, in turn, are controlled by Canada-registered Katanga Mining Limited (KML), which Glencore controls through a 75 per cent stake. With this elaborate structure in place, the DRC-based subsidiary KCC sells its products to Canada-based KML. During the five-year period studied, from 2009 to 2013, KCC ran at a loss of hundreds of millions of dollars per year, while KML ran at a net profit of \$401 million.⁵² The report concluded that over the five years, Glencore’s tax strategy resulted in a net loss of revenue to the Congolese state

⁴⁶ PEYER, C., FEENEY, P., MERCIER, F., “PR or Progress? Glencore’s Corporate Responsibility in the DRC”, *Bread for All, Rights and Accountability in Development and Fastenopfer*, 2014.

⁴⁷ Interview with civil society representative, January 2016, Kinshasa.

⁴⁸ <http://www.nresources.cd/index.php/reportage>, visited on 12 March 2016. Author translation.

⁴⁹ Interviews with senior government officials at the Ministry of Mines and the Ministry of Finance, February 2016, Kinshasa and Lubumbashi.

⁵⁰ Interview with civil society representative, January 2016, Kinshasa.

⁵¹ PEYER, C., FEENEY, P., MERCIER, F., *op. cit.*, p. 97.

⁵² The use of the dollar sign throughout the paper represents US dollars.

of \$153.7 million.⁵³

Similarly, Marysse and Tshimanga found that Tenke Fungurume Holdings, the Congolese subsidiary of the American TNMC Freeport McMoRan – considered by many as an industry leader for its transparency and commitment to operating in accordance with the highest international standards – adopts the same practices, artificially reducing its profits made in the DRC through transactions between itself and its subsidiaries.⁵⁴ The authors conclude that alongside government-focused initiatives such as EITI, “we would like an international mechanism to control as effectively the totality of multinational [mining] company operations”.⁵⁵

The valuation of mining-related imports to and exports from the DRC was felt by many government official and Congolese civil society interviewees to be “a very big problem here in Congo... [because] it’s the company who manages it alone”.⁵⁶ The unequal power relations between the “under-equipped, poorly trained and under-paid” Congolese fiscal administration⁵⁷ and the superior technical and financial resources of TNMCs, often staffed with international teams of legal specialists and tax advisors, clearly leads – as the above case studies demonstrate – to significant financial losses to the Congolese public treasury.

One argument put forward by TNMCs in response to claims regarding the weak fiscal contribution of the mining sector, and heard several times during interviews with mining company and private sector representatives, is that most mining projects in the DRC have yet to recover their investment, and as a result are not yet paying the 30 per cent corporate tax on profits made.⁵⁸ Thus, interviewees stated, rather than criticising the fiscal system for being insufficient and advocating a revision of the Mining Code to increase the tax rate, patience is required until more projects begin turning profits.

Given that mineral production at many mining projects began relatively recently, it should indeed be the case that over the coming years, corporate tax – one of the most important mining taxes – will increase, as more TNMCs begin to recover their investments. At the same time, Articles 222 and 340 of the Mining Code allow for the establishment of conventions with “more favourable fiscal dispositions” that exist outside of and take precedent over

⁵³ PEYER, C., FEENEY, P., MERCIER, F., *op. cit.*, p. 104.

⁵⁴ MARYSSE, S., TSHIMANGA, C., “Les ‘trous noirs’ de la rente minière en RDC”, in MARYSSE, S., TSHONDA, J. (eds.), *Conjonctures congolaises 2013: Percée sécuritaire, flottements politiques et essor économique*, Paris, L’Harmattan, 2014, p. 149.

⁵⁵ *Ibidem*, p. 162. Author translation.

⁵⁶ Interview with civil society representative, January 2016, Kinshasa.

⁵⁷ GIZ, *op. cit.*, p. 13.

⁵⁸ Interviews with mining company and private sector representatives, January and February 2016, Kinshasa and Lubumbashi.

the Mining Code.⁵⁹ Many TNMCs hold such conventions, which contain generous tax holidays on corporate and other taxes. For example, the convention of the Canadian corporation Banro exonerates it from paying mining royalties and corporate tax for the first ten years of production.⁶⁰ This legal loophole, combined with the transfer pricing practices discussed above, question the extent to which corporate investment recovery will represent a boon for state revenue, although it is to be hoped that the overall corporate tax contributions of the sector will indeed increase significantly over the next decade.

Considering the above, and in line with Marysse and Tshimanga's conclusion, establishing an international mechanism to control TNMC financial practices and strengthening the Congolese state's ability to provide fiscal oversight to and regulation of the mining sector should be higher priorities for international stakeholders than is currently the case. The tenets of 'good governance' and CSR programming appear to present more of a distraction from, rather than a contribution to, these most critical of tasks. If the state is deprived of its expected share of the surplus, and in light of the limits of CSR highlighted in the preceding section, how is the DRC to benefit from the presence of a foreign-controlled mining economy?

5. REDISTRIBUTING THE SURPLUS TO THE LOCAL LEVEL

Once captured by the state, there are two primary mechanisms through which state revenue generated by the mining sector can be redistributed to the 'decentralised territorial entities' (ETDs) – comprised of the city, the municipality, the sector and the chiefdom – to support local processes of state-led development. First, Article 1 of the Congolese Constitution outlines that each province has the right to retain 40 percent of the revenue it raises, with 60 percent allocated to central government.⁶¹ Article 115 of Law No. 08/016 of October 2008, related to the composition, organisation and functioning of the ETDs, states that "the decentralised territorial entities have the right to 40 percent of the national revenue allocated to the provinces".⁶² In other words, if a province raises \$100 million in tax revenue, central government would receive \$60 million and the ETDs \$16 million (40 percent of the \$40 million allocated to the province), leaving the provincial government with \$24 million.

Second, Article 242 of the Mining Code stipulates a specific repartition for mining royalties, with 60 percent going to central government, 25 percent

⁵⁹ DRC GOVERNMENT, "Mining Code", 2002, p. 103. Author translation.

⁶⁰ MAISON DES MINES DU KIVU, *op. cit.*, pp. 26-30.

⁶¹ DRC GOVERNMENT, "Constitution de la Republique Democratique du Congo", 2006, p. 2. Author translation.

⁶² COURT OF AUDITORS, "Audit des recettes à caractère national des régies financières (DGDA, DGI et DGRAD)", *DRC Government*, 2013, p. 8. Author translation.

to provincial government and 15 percent to the “Town or Territory” in which the mining project that paid the royalties is located.⁶³ The 15 percent of the royalties that go to the ETDs are to be “affected exclusively to the achievement of infrastructure with a community interest”.⁶⁴ However, it is clear from interviews and analysis of available data that the redistribution of state revenue to the provincial and local level is not adhered to as per the requirements of the Constitution and the Mining Code.

The main agencies within the Ministry of Finance responsible for collecting taxes from the mining sector are the General Directorate of Tax (DGI), the General Directorate of Customs and Excise (DGDA) and the Revenue Department (DGRAD). In 2013, the Court of Auditors ran an audit of these three agencies for a four-year period covering 2007 to 2010, with the objective of determining the amount of revenue each province had the right to expect given their contribution to the public treasury, and how much they actually received.

The audit found that, across the four-year period, only 42 percent of the total amount that should have been redistributed by central government was redistributed, and that within this redistribution, there were significant discrepancies across the provinces.⁶⁵ For example, in 2010 Bandundu received 2,725 percent of the total it was due by central government, Equateur 1,563 percent, Kasai-Occidental 1,332 percent and Maniema 1,108 percent. By contrast, Kinshasa received 9.9 percent, Bas-Congo 15 percent and Katanga 19.2 percent.⁶⁶

According to a former senior government official, the results of the Court of Auditors report are due to the fact that the three provinces of ex-Katanga, ex-Bas Congo and Kinshasa contribute around 90 percent of total state revenue, a finding confirmed by the audit report itself. Given this reality, respecting the Constitutional redistribution of national receipts would create highly unbalanced provincial and local development processes and risk accentuating inter-regional conflict, with some provinces receiving very little money and some receiving significant amounts. Thus, according to a number of interviewees, in 2009 the government decided to redistribute revenue to the provinces according to the three criteria of population, surface area and performance (with this latter criteria understood as a province’s capacity to absorb the financing and oversee its expenditure).⁶⁷

This would appear to explain why, for example, in 2010 Bandundu received 2,725 percent of the revenue it was due and North Kivu only 47.4

⁶³ DRC GOVERNMENT, “MINING CODE”, 2002, p. 108. Author translation.

⁶⁴ *Ibidem*, p. 109. Author translation.

⁶⁵ COURT OF AUDITORS, *op. cit.*, p. 19.

⁶⁶ *Ibidem*, pp. 18-19.

⁶⁷ Interviews with government officials and a former senior government official, January and February 2016, Kinshasa and Lubumbashi.

percent, as in absolute terms Bandundu received 10.4 billion Congolese Francs and North Kivu received 9.7 billion Congolese Francs.⁶⁸ Indeed, in terms of total amount received per province, the allocations revealed by the audit were relatively egalitarian, with Maniema receiving the lowest absolute level of redistribution at 6.8 billion Congolese Francs and Katanga the highest, at 25.7 billion Congolese Francs.⁶⁹ It does not explain, however, why central government failed to redistribute more than half of the total amount due to the provinces between 2007 and 2010.

According to a mining sector expert, the government explanation for this failure, stated by the Budget Minister, is that when overall revenue is too low, it is not possible to redistribute 40 percent of this revenue, as government officials in Kinshasa would not be paid.⁷⁰ A senior government official at the Ministry of Finance added that all provincial-level civil servants are paid by central government, and that this salary support is taken into consideration when calculating the amount to be redistributed to the provinces.⁷¹ In addition, according to one civil society representative, certain provincial-level taxes (such as those introduced in ex-Katanga) are successful in raising more than the 40 percent of national receipts intended for the province, and so in certain circumstances there is no need for this redistribution to take place.⁷²

A similar logic extends to the failure to redistribute to local government, with provincial governments citing lack of adequate funding as the reason for the non-redistribution of revenue to the ETDs.⁷³ Data from the Court of Auditors shows that in 2012, an average of just 3.1 percent of the constitutionally required 40 percent was redistributed from the provinces to the ETDs, ranging from 0 percent in South Kivu to 6.8 percent in ex-Katanga.⁷⁴ GIZ found the Congolese taxation system to be characterised by “its weak capacity...to redistribute revenue intended for poverty reduction”.⁷⁵ These findings were supported by several civil society and mining company representative interviewees who stated their belief that, beyond covering minimal administrative costs, local-level revenue redistribution is not taking place.⁷⁶

For the redistribution of mining royalties, the most recent reports by the Extractive Industries Transparency Initiative (EITI) have analysed adherence to Article 242 of the Mining Code, using data from the former province of

⁶⁸ COURT OF AUDITORS, *op. cit.*, p. 18-19.

⁶⁹ *Ibidem*, pp. 18-19.

⁷⁰ Interview with mining sector expert, January, Kinshasa.

⁷¹ Interview with senior Ministry of Finance official, February 2016, Kinshasa.

⁷² Interview with civil society representative, January 2016, Kinshasa.

⁷³ COURT OF AUDITORS, *op. cit.*, p. 8.

⁷⁴ ENGLEBERT, P., MUNGONGO, E. K., “Misguided and Misdiagnosed: The Failure of Decentralization Reforms in the DR Congo”, *African Studies Review*, Vol. 59, No. 1, 2016.

⁷⁵ GIZ, *op. cit.*, p. 32. Author translation.

⁷⁶ Interviews with civil society and mining company representatives, January and February 2016, Kinshasa, Lubumbashi, North Kivu and Ituri.

Katanga. For 2013, only \$12 million of the \$118 million DGRAD declared to have been received in mining royalties was redistributed to ex-Katanga, or 10 percent, significantly below the 25 percent foreseen by the Mining Code.⁷⁷ In 2014, this figure dropped to eight percent, with only \$12.2 million of \$160 million received in royalties from ex-Katanga sent back to the provincial government.⁷⁸ Both reports also confirmed that, in contravention of Article 175 of the Constitution and as per the finding of the previously-cited Court of Auditors assessment,⁷⁹ the provincial allocations were not retained ‘at the source’, but collected centrally and reallocated by the Ministry of Finance in Kinshasa.⁸⁰

Data for the 15 percent of mining royalties meant to reach the ETDs is less easy to come by. The most recent EITI report notes “the declaration of the Ministry of Finance only relates to the part of the mining royalties transferred to the provincial government, it doesn’t mention the 15 percent to be sent to an account designated by the Town or the Territory in which mining activity takes place”.⁸¹ Government officials in the provinces of North Kivu and Ituri stated they did not have access to and had not seen data for the local level of mining royalty redistribution.⁸² Multiple attempts to meet with DGRAD – the agency at the Ministry of Finance responsible for collecting mining royalties – and other staff at the Ministry of Finance in Kinshasa to request this data were unsuccessful. However, interviewees were unanimous in their view that the redistribution of mining royalties to the ETDs is only partially taking place, or not at all, with a civil society representative in Kinshasa calling the redistribution of mining royalties “a disaster”.⁸³

The common proposal put forward by many interviewees to improve the redistribution of mining royalties is for companies to make three separate royalty payments to central government, provincial government and local government respectively, rather than making one payment to central government as is currently the case. According to one interviewee, this proposal has already been incorporated into the Forestry Code, thus setting a precedent to be followed in the mining sector.⁸⁴

The obvious consequence of the failure to redistribute state revenue to the lowest levels of government for development financing is that, as one civil society representative put it, “mining revenue generated by the compa-

⁷⁷ EITI, “EITI-DRC 2013 Report”, 2014, p. 106.

⁷⁸ EITI, “EITI-DRC 2014 Report”, 2015, p. 98.

⁷⁹ COURT OF AUDITORS, *op. cit.*, p. 8.

⁸⁰ EITI, “EITI-DRC 2013 Report”, 2014, p. 106; EITI, “EITI-DRC 2014 Report”, 2015, p. 100.

⁸¹ EITI, “EITI-DRC 2014 Report”, 2015, p. 100. Author translation.

⁸² Interviews with government officials, January and February 2016, Goma and Bunia.

⁸³ Interview with civil society representative, January 2016, Kinshasa.

⁸⁴ Interview with civil society representative, February 2016, Kinshasa.

nies doesn't benefit the local population".⁸⁵ A Bukavu-based academic argued "there is a real need for the provinces to have the resources to finance their development", noting that currently available resources are insufficient to allow for this to happen.⁸⁶ According to a number of civil society representatives in the mining provinces of Haut Katanga and Lualaba, many Local Development Plans are in place – recently developed under the authority of the Ministry of Planning – but lack the required financing, which improved redistribution of national revenue and mining royalties to the ETDs would provide.⁸⁷

Recently released government data indicates that ex-Katanga Province generated a total of \$145.3 million in mining royalties in 2014 and \$131.1 million in 2015.⁸⁸ This means that across both years, from one tax alone, a total of \$41.5 million should have reached the ETDs. This indicates the existing potential to provide significant development financing to the chronically under-equipped and under-funded local government structures, if better adherence to existing mechanisms for the redistribution of state revenue can be achieved.

6. CONCLUSION

Questioning whether corporate mining capital can be made more accountable to concerns of human welfare, the DRC's CSR literature responds with a resounding 'no'. The central problem arising from this conclusion is neatly captured by Marshall's recent assessment of mining sector CSR efforts globally:

"The companies project themselves as globally responsible players through glossy in-house publications with no third-party verification of the contents. The branding also happens at national and local levels. Rather than exercising corporate citizenship by paying royalties or taxes, enabling host governments' revenue sources to build infrastructure and implement social programmes, mining companies fight for tax breaks. Then they project themselves as good corporate citizens through high profile and inexpensive 'corporate social responsibility' programmes".⁸⁹

We must then explore instead how to bring the state back into local development processes. Such an effort must be structured around reviving local

⁸⁵ Interview with civil society representative, February 2016, Mbuji-Mayi.

⁸⁶ Interview with academic, February 2016, Bukavu.

⁸⁷ Interview with civil society representatives, January and February, Kinshasa, Lubumbashi and Bukavu.

⁸⁸ Katanga Province Provincial Mining Division, "Statistiques des notes de débit relatives à la redevance minière émises", DRC Government, 2014; Katanga Province Provincial Mining Division, "Statistiques des notes de débit relatives à la redevance minière émises", DRC Government, 2015.

⁸⁹ MARSHALL, J., "Contesting Big Mining from Canada to Mozambique", *Transnational Institute*, 2015, p. 9.

government structures with much-needed development financing, to be achieved by maximising state capture and redistribution of the surplus generated by industrial mining.

Internally, it appears an opportune moment to engage in the task of maximising state revenue redistribution, given recent fiscal reform in the DRC. According to the staff of a Congolese organisation monitoring public expenditure, 2016 marks the first year data will be made publically available on the amount of money, broken down by sector, being sent to central government by the provinces and localities and the amount received back at the provincial and local level in return. The interviewees stated that this new data would make it possible to closely scrutinise ETD financing for the first time, including the collection and repartition of mining royalties.⁹⁰ Thus, while non-adherence to the redistribution of state revenue generated by the mining sector in the DRC appears systemic, recent advances in budget transparency are favourable to progress on this issue going forward.

This is, however, a profoundly political issue. Kuediasala contends that the Congolese mining sector is tightly controlled by a small political clique in Kinshasa, centred on the Presidency, without whose agreement nothing can be undertaken, and who protect certain interests that have little in common with the collective interest of the Congolese people.⁹¹ In addition, recent research indicates that decentralisation in the DRC has left the ‘rules of the game’ at the lower levels of governance unaffected, as it has not been coupled with change in the informal institutions and networks that condition state behaviour.⁹² This suggests there is little reason to expect that better financed ETD structures would automatically counteract the tendencies observed of corporate-led local development, such as local elite capture.

Yet it also hints at the solution, found during the early years of Mobutu’s Presidency, where administrative decentralisation was coupled with a politically centralised nation-state project that attempted to overcome regional and ethnically based networks of power. At the outset, Mobutu’s model “enjoyed... a remarkably broad consensus of approval as a political formula... the centralised strong nation-state vision of the polity seemed to most the only salvation”.⁹³ The revival of such a political formula would represent a profound change in the political networks that define the Kabila regime today. Yet with political conflict in the country historically rooted in the divide between nationalists and federalists, it will undoubtedly be a long struggle to achieve

⁹⁰ Interview with civil society representatives, February 2016, Kinshasa.

⁹¹ KUEDIASALA, F. “Code minier, dix and déjà; Quel avenir pour les mines de la RDC?”, in MARYSSE, S., TSHONDA, J. (eds.), *Conjonctures congolaises 2011: Chroniques et analyses de la RD Congo*, Paris, L’Harmattan, 2012, pp. 75–96.

⁹² ENGLEBERT, P., MUNGONGO, E. K., *op. cit.*

⁹³ YOUNG, C., TURNER, T., “The Rise and Decline of the Zairian State”, Wisconsin, University of Wisconsin Press, 1985, p. 43.

this change, and enact a more equitable and developmental distribution and expenditure of the surplus generated by industrial mining. However, it is a struggle many Congolese interviewees appeared strongly committed to, often grounded in an awareness of the limits of CSR and the potential of state-led local development to sustainably overcome these limits.⁹⁴

Externally, and in relation to the task of maximising state revenue capture, the priorities are clear. Significant economic losses are incurred by often legally justified capital relations that exist within global mining production networks. As discussed above, Peyer et al. found the practices of one TNMC over one five-year period to result in \$153.7 million of lost revenue to the Congolese state.⁹⁵ Extending this finding across the mining sector and across time, it is plausible to imagine a scenario whereby lost state revenue tallies into the billions of dollars. Overseas tax havens must be closed down, and transfer pricing regulated and brought under control. Given the origin and international nature of these problems, this is not a task that Congolese actors can achieve alone. It must become a higher priority than is currently the case for external actors and institutions, who are often more concerned with searching for problems and proposing solutions in the DRC, than they are with confronting structural disequilibria conditioning these problems in their home countries.

Rotterdam, July 2016

⁹⁴ Freeport McMoran's sale of its 56 percent stake in the Tenke Fungurume mine to China Molybdenum in May 2016 provides a recent case in point. As Freeport McMoran prepares to leave the DRC, what will remain of its much-heralded CSR programming?

⁹⁵ PEYER, C., FEENEY, P., MERCIER, F., *op. cit.*, p. 104.