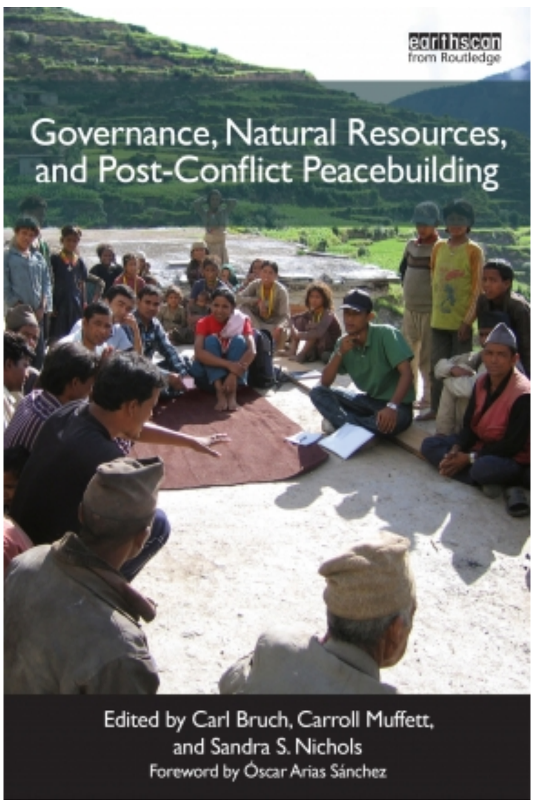

Taming Predatory Elites in the Democratic Republic of the Congo: Regulation of Property Rights to Adjust Incentives and Improve Economic Performance in the Mining Sector

Nicholas Garrett[a]
[a] *Freie Universität Berlin*

Online publication date: 30 November 2016

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Nicholas Garrett

In Paris, in February 2010, the International Finance Corporation (IFC)—the private-sector lending arm of the World Bank—and South Africa's Industrial Development Corporation (IDC) joined First Quantum Minerals Ltd. (FQM), a Canadian company, in seeking international arbitration to determine the ownership of the Kingamyambo Musonoi Tailings mining project in the Democratic Republic of the Congo (DRC) (Wallis 2010; Creamer Media Reporter 2010; Global Witness 2011b). This unusual development occurred after the government of the DRC (GODRC), which held a nondilutable interest in the project, had revoked the project's mining license, claiming that the IFC, the IDC, and FQM were not the rightful titleholders. The dispute provoked an intense debate over contract sanctity and tenure security in a country with several world-class mineral and metal deposits,[1] overshadowing not only negotiations over debt relief for the DRC but also the country's celebration of fifty years of independence.

The revocation of the mining license for the Kingamyambo Musonoi Tailings project is illustrative of the renewed interest—within the field of international development policy and theory—in the political economy of governance and growth. During the 1980s, following the disappointing or indifferent results of the structural adjustment programs administered by international financial institutions in many developing countries, the Washington Consensus (the idea of "getting prices right") was replaced by the post-Washington Consensus (the idea of "getting institutions right"). Under the more recent doctrine, markets and states are complementary: the state establishes the institutional infrastructure for markets through its government, while government credibility and the predictability of government behavior (enshrined in rules and policies) serve to attract and reassure investors. In theory, markets and states can be regarded as rule systems

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Nicholas Garrett has written a doctoral dissertation on the mining sector in the Democratic Republic of the Congo at the Freie Universität Berlin.

[1] Various definitions of *secure tenure* exist. This chapter uses the definition agreed upon during the October 2002 Expert Group Meeting on Urban Indicators—"the right of all individuals and groups to effective protection by the state against forced evictions" (Augustinus and Benschop 2003).

that structure the interactions of entities that are subject to those rules (North 1990); such interactions directly affect the allocation of property rights.[2]

International development organizations often focus on improving the investment climate in developing countries, with the intention of achieving private sector–led growth and development (Stern 2002). In keeping with this perspective, interventions include the establishment of reliable legal and regulatory structures and the protection and enforcement of property rights and contracts (Stiglitz 1994). Such interventions, which are joined together under the umbrella of "good governance," all share a common theme: the notion that successful "market economies depend crucially on effective state institutions . . . to create [and enforce] growth-enhancing 'rules of the game,' or 'incentives'" (Di John 2009, 140).

The Congolese wars (1996–1997; 1998–2003), which were among the most severe humanitarian disasters since World War II, involved about a half-dozen African nations and more than a dozen rebel groups. The first war ended when Laurent Désiré Kabila's armed rebels marched into the capital, Kinshasa, declared him president, and changed the name of the country (which had been known as Zaire) to the Democratic Republic of the Congo,[3] thus ending the reign of President Mobutu Sese Seko, who had ruled as a dictator for decades.[4] During the two wars, hundreds of thousands of civilians died—and millions were displaced, lost their belongings and assets, or suffered from the destruction of economic and social infrastructure.[5]

In December 2002, the main warring parties in the DRC signed a comprehensive peace agreement. As part of the post-conflict reconstruction process that began in that year (and increasingly since 2003, when implementation of the peace agreement began), international development organizations have planned or implemented interventions addressing various aspects of mining sector reform. Early interventions focused on regulatory institutions and state-owned enterprises; such initiatives included, for example, the introduction of a new mining law (the Mining Code) and reductions in the size of the workforce at La Générale des Carrières et des Mines (GÉCAMINES), the principal parastatal (state-owned company) (World Bank 2008).[6] Later interventions, particularly in

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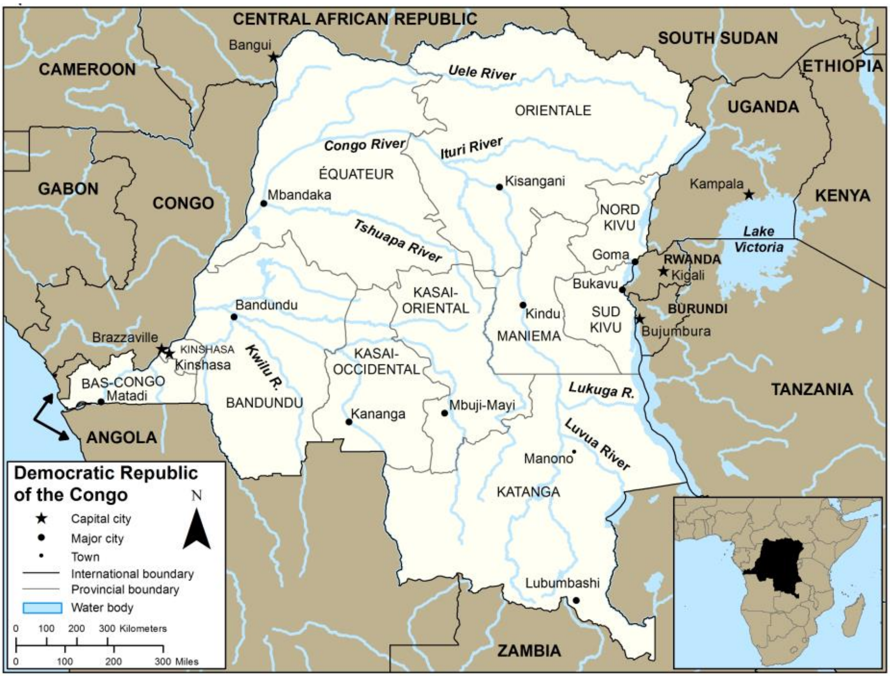
[2] A property right specifies the power to consume, generate income from, and alienate (that is, sell, give, or otherwise dispose of) a given asset (Barzel 1989).

[3] From October 1971 to May 1997, what is now known as the Democratic Republic of the Congo was known as Zaire (République du Zaïre).

[4] Joseph Kabila, the current president, took office in January 2001, ten days after his father, Laurent Désiré Kabila, was murdered.

[5] Although the Second Congo War officially ended in July 2003, when the Transitional Government of the Democratic Republic of the Congo took power, hostilities were still ongoing at the time of writing.

[6] Law No. 007/2002 of July 11, 2002, relating to the Mining Code. The 2002 Mining Code replaced the 1981 mining law, which had become obsolete with respect to environmental, health, and security obligations and gave the government too much decision-making authority, notably with regard to negotiated mining agreements (often referred to as "mining conventions"), which sometimes allowed excessive tax holidays (André-Dumont 2007). The Mining Regulation, enacted by Decree No. 038/2003 on



eastern DRC,[7] often reflected the view that economic incentives were contributing to slow growth—and, at worst, were providing incentives for armed groups, including the Congolese army, to perpetuate conflict. More recent interventions have often focused on preventing the commercialization of gold, tantalum, tin, and tungsten—so-called conflict minerals—from financing conflict in eastern DRC, and on improving mining sector governance more generally (World Bank 2008; Garrett and Mitchell 2009).

This chapter explores the regulation of property rights in the mining sector, which is among the most important elements of reform in the sector. Specifically, the chapter examines underlying structures and processes that perpetuate insecure property rights. The basic argument is that unstable property rights benefit rent-seeking elites in the DRC, creating a disincentive for those elites to support the development of more stable property rights.[8] This perspective is grounded in

March 26, 2003, implements the Mining Code. For the complete text of the 2002 Mining Code, see http://mines-rdc.cd/fr/documents/codeminier_eng.pdf.

[7] In eastern DRC, severe and chronic insecurity continues to undermine institution building and governance reform; particularly in this region, armed groups are using minerals and metals to fund conflict (Garrett and Mitchell 2009).

[8] Charles Wright Mills's definition of *power elites* is useful in this context: "those political, economic, and military circles, which as an intricate set of overlapping small but dominant groups share decisions having at least national consequences" (Mills 1956, 18). Stephanie Matti defines *rent seeking* as "the use of government revenue without benefiting society"; Matti notes that, in particular, rent-seeking elites "work to undermine institutional integrity in order to protect their interests" (Matti 2010, 403).

a paradox: despite the failure of the Congolese state as an instrument of collective action, it inspires tremendous loyalty; as Pierre Englebert notes, "where one would expect to observe the formation or the rise to salience of alternative identities, one sees a nearly unanimous profession of loyalty to decrepit Congo, whether among government supporters, rebels or other opposition groups" (Englebert 2003, 5).

The support for the Congolese state derives from two principal sources: First, the weak state is a formidable resource for entrepreneurial citizens—who, in much of the country, provide public services that the state cannot. Second, the state is a resource for Congolese elites, who benefit from having co-opted the Congolese state as an instrument of patronage—a crucial resource for survival and bids for power (Chabal and Daloz 1999; Clark 2001; Tull 2002). Thus, by seeking to preserve the state in its current shape—as an entity that facilitates rent seeking—the elites strengthen the resilience of what is in many other respects a fragile state. Englebert illustrates this point by drawing on the example of past violent rebellions in the DRC, which revolved "around the terms of the rebels' integration in the state rather than . . . the nature of the state itself" (Englebert 2003, 5).

Through substantial development assistance (US$2.3 billion in 2011), the international community not only contributes to the continued existence of the Congolese state, but also provides additional resources that are vulnerable to rent seeking, given the elites' co-optation of the state (GHA n.d.). To explore the practical implications of this observation, this chapter discusses the approaches used by international development organizations in the mining sector and analyzes the underlying sector-specific incentive structures, drawing principally on theories that address the ways in which the regulation of property rights affects economic performance. Ultimately, the chapter suggests that for mining sector reforms to succeed, they must recognize and address the economic incentives that shape behavior—particularly the behavior of elites.

The chapter is divided into five sections: (1) a discussion of the theoretical relationship between the regulation of property rights and economic performance; (2) background on the DRC's mining sector; (3) an examination of the regulation of property rights in the DRC's industrial mining sector, focusing particularly on a review of mining contracts; (4) an analysis of the regulation of property rights in the DRC's artisanal and small-scale mining sector; and (5) a brief conclusion.

ECONOMIC PERFORMANCE AND THE REGULATION OF PROPERTY RIGHTS

The allocation of property rights affects the economic performance and development contribution of the DRC's mining sector. Jonathan Di John presents two arguments for this phenomenon: First, by assigning ownership or use rights to valuable assets and determining who bears the costs and receives the benefits of natural resource use, property rights systems structure incentives for economic behavior. Second, because decision-making authority is allocated along with property rights, allocations of property rights determine the distribution of power, including the control of resources, in the economy (Di John 2009). In this regard, Di John notes that "property rights are *political* since the *state* is the set of institutions responsible for specifying such rights" (Di John 2009, 139).

In the developed world, the state serves as the arbiter of property rights and contracts, and therefore has a strong role in shaping institutional structure—and, hence, economic performance. Not only has the state historically created the conditions for the development of the market, but it can also defend and enforce the property rights that shape the basic incentive structure of the economy (Polanyi 1978). The question is how relevant is this theoretical view of state regulatory capacity in the post-conflict context of the DRC, where formal state regulatory capacity remains weak.

In 2004, the World Bank–commissioned Extractive Industries Review evinced considerable skepticism about the capacity of fragile states (such as the DRC) to implement development strategies through extractive industries, stating that this is possible only "when the right conditions are in place" (EIR 2003, 45). In the DRC-specific study *Growth with Governance in the Mining Sector*, the World Bank identifies three specific conditions under which mining sectors could tangibly contribute to development (World Bank 2008):

- To attract private investment and empower the state to capture a fair share of the resulting rents, the mining sector needs internationally competitive legal, regulatory, and taxation structures.
- Governmental institutions need to enforce applicable laws, regulations, and tax codes. In practical terms, institutions should (1) have the jurisdiction to enforce laws; (2) provide sufficient logistical and financial support, and knowledgeable and motivated personnel; and (3) be guided by policies that assure equitable and transparent relations with stakeholders.
- Government officials, private firms, and civil society should adhere to basic principles of good governance, such as transparency, disclosure, and accountability.

As was noted in the introduction to this chapter, the DRC faces particular challenges when it comes to implementing reform. Di John has observed that, where technical capacity and political incentives to support reform are weak, effective reform requires "a *change* in the entitlement/rule structure that the state sanctions" (Di John 2009, 141). This fact has not eluded domestic policy makers or the international community: the most prominent donor-supported intervention in the DRC's mining sector thus far has been the introduction, in 2002, of a new mining code that was developed with the support of the World Bank (de Koning 2009).

The structure embodied within the Mining Code was designed with the following goals in mind:

- To enable the state to become the arbiter of property and other rights.
- To enable the state to become (1) the guarantor of certainty of process and (2) the guarantor of security of tenure for investors.

To achieve these goals, the code establishes transparent procedures based on objective criteria, including a nonnegotiable application process that reduces the need for government discretion (André-Dumont 2007). Thus far, the Mining Code has achieved only limited results in terms of (1) expanding statutory rule in the mining sector and (2) superseding the existing fragmented institutional infrastructure, which consists of statutory, customary, and martial rule systems that have historically perpetuated unstable property rights and catered to the interests of elites.

The following sections explore the political and economic structures of the DRC's mining sector in more detail. One question underlying this analysis is whether the limited success of mining sector reform can be attributed to the fact that it was externally supported and applied, rather than having been the product of "sets of conflicts . . . resolved by the relative power and coercive capacity of competing factions with historically specific sets of demands and organizational power" (Di John 2009, 141). If this is indeed the case, then in weak states such as the DRC, institutional reform and organizational capacity building (whether general or specific to a sector) will have to go beyond the provision of, for example, technical assistance. Instead, such efforts must reflect an understanding of, be tailored to, and address the realities of the implementation environment. While many may consider this to be an obvious point, putting efforts into practice that meet these criteria is particularly difficult in the DRC.

THE DRC MINING SECTOR: SETTING THE SCENE

From the 1980s to the early 2000s, conflict and economic decline had a profound impact on the ability of the mining sector to drive the DRC's gross domestic product (GDP). Since 2003, however, when the peace process officially ended, there has been renewed interest on the part of investors, and a number of industrial mines have moved into production in both Katanga and Sud Kivu provinces.

By 2008, the World Bank had forecast that within ten years, a mining sector led by private investment could contribute 20 to 25 percent of the GDP and one-third of total tax receipts (World Bank 2008)—a prediction that requires some brief historical context.[9] After independence in 1960, the state attempted,

[9] For a detailed historical perspective on the DRC, see Putzel, Lindemann, and Schouten (2008).

albeit minimally, to gain control of the country's extensive mineral resource base. The first significant effort to increase state authority over the mining sector occurred in 1966, with the nationalization of the Union Minière du Haut Katanga (UMHK). In 1967, UMHK—which had been providing 50 percent of government revenues and 70 percent of foreign exchange—became the basis for a new company, GÉCAMINES,[10] whose copper production made it the country's main earner of foreign exchange until 1974 (Hesselbein 2007).

Between 1973 and 1975, President Mobutu used his "Zairianisation" campaign to extend state influence in the economy. In its various phases, Zairianisation redistributed a wide range of businesses, from shops to large enterprises, by replacing European owners with Zairians. Because many of the new owners were members of the president's patronage network and not necessarily qualified to run businesses, many formerly profitable companies went bankrupt (Askin and Collins 1993).[11] Some scholars regard Zairianisation as a failure because it disrupted commerce and undermined the legitimacy of the regime (Young 1967), while others emphasize that some enduring business empires emerged (Askin and Collins 1993), and that numerous parastatals were established (Hesselbein 2007).

Despite the presence of a formal state administrative structure, authority in the mining sector was effectively exercised by six parastatals whose de facto and de jure property rights gave them exclusive access to the country's mineral and metal deposits (World Bank 2008); the parastatals, in turn, were largely under the control of Mobutu.[12] The strength of the parastatals' position, as the sole holders of mineral and metal rights, allowed the statutory governance structures to be marginalized by the (often extralegal) governance processes controlled by the presidency. Mobutu's influence over the parastatals not only perpetuated a dualistic governance structure in the mining sector but also provided the president with the revenue and assets to co-opt elite interests, ensure the continued loyalty of supporters, sustain control of the country, enrich himself, and, ultimately, wield power (Bayart 1993).[13] Thus, by controlling

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[10] UMHK was nationalized in 1966 and replaced in 1967 by a parastatal called La Générale Congolaise des Minerais (GÉCOMIN), which then became GÉCAMINES. GÉCAMINES subsequently underwent a number of transformations and restructurings —and, in 2009, became a commercial company with a limited number of shares owned by the GODRC.

[11] One example is GÉOMINES, which had been operating profitable industrial tin mines in the vicinity of Manono, in northern Katanga. After having been taken over by Zairian owners, the company went into liquidation in 1985 (Murison 2004).

[12] The companies were GÉCAMINES, the Office of Mines of Kilo-Moto, the Compagnie Minière de Bakwanga, the Société Minière et Industrielle du Kivu, the Entreprise Minière de Kisenge-Manganèse, and Zaïre Etain (formerly GÉOMINES).

[13] Between the early 1980s and the early 1990s, studies by the World Bank and other organizations documented annual diversions of between US$150 million and US$400 million from Zaire's copper and cobalt revenues, amounting to up to 30 percent of the annual revenues from exports of those materials (Askin and Collins 1993).

the mining sector through the parastatals, Mobutu consolidated and financed his power base; at the same time, by making the national administrative structure strictly hierarchical and centralized, and by continually rotating his appointees from position to position, he prevented others from building a rival power base (Schatzberg 1988).

Paradoxically, however, Mobutu's strategy significantly undermined his long-term revenue base: the often arbitrary political appointments of managers during and after Zairianisation weakened management in the parastatals—and led, in turn, to economic decline. In the wake of a 1972 price collapse, the international minerals and metals markets became increasingly competitive, and the parastatals—hobbled by widespread corruption, high transaction costs, and generally low productivity—became increasingly unable to compete, and ultimately collapsed (Garrett and Lintzer 2010). As a result, the DRC has been unable to leverage its mineral wealth for development since the 1960s, when the heyday of copper came to an end. Instead, mining has been informalized, and the artisanal and small-scale mining sector has risen to prominence as an employer of last resort for a significant part of the population (MacGaffey 1991). This sequence of events—along with Mobutu's policy of turning a blind eye to informal mining, under the slogan *Débrouillez-vous* (Fend for yourself)—helped to sustain the regime by providing the population with a means of surviving under adverse conditions.

CLARIFYING AND REGULATING PROPERTY RIGHTS: MINING SECTOR GOVERNANCE AND CONTRACT REVIEW

Following the collapse of the Mobutu regime, in 1997, and the end of the Second Congo War, in 2003, international financial institutions promoted the notion that the state should serve as a regulator, rather than an operator, of the mining sector (World Bank 2008). This role was enshrined in the Mining Code, adopted in July 2002, and in the accompanying regulations, adopted in 2003 (Garrett 2007).[14] As noted earlier, the code was written with the help of the World Bank, and is designed to ensure that the DRC's mineral resources are developed largely through the private sector. To this end, the code is intended to provide (1) a stable investment climate, (2) secure property rights (that is, security of title), and (3) certainty of process. In 2006, the Kabila government publicly endorsed the Mining Code (World Bank 2008).

The World Bank's promotion of private sector–led mining development came at a time when information on the size and quality of the DRC's mineral reserves was based largely on two sources: historical exploratory records held by the parastatals, and colonial records held in the Royal Museum for Central

[14] Decree No. 038/2003 of 26 March 2003 relating to the Mining Regulations.

Africa, in Tervuren, Belgium.[15] These records were sufficiently promising to attract investor interest: by early 2008, the Mining Cadastre Service (Cadastre Minier, or CAMI)[16] had processed more than 9,220 applications and awarded more than 5,359 permits, 471 of which were exploitation permits. Of the 471, however, only 166 were granted to private enterprises that were not bound by a partnership agreement with a parastatal (World Bank 2008). The parastatals thus remained significant stakeholders in the mining sector, allowing the Congolese government significant influence over joint-venture projects.

The 2008 crash in commodities prices hurt most of the mining operations in the DRC and highlighted the vulnerability of the country's economy. At the time of the crash, few of the industrial operations had moved into exploitation. For that reason, it was relatively easy for operators to set aside activities until prices recovered. Moreover, unlike other mineral- and metal-dependent countries—such as Ghana, which managed to capture revenues from buoyant gold prices, and thereby cushion the economic impact of the drop in prices for other minerals and metals—the DRC was unable to secure additional revenues from gold mining to make up for the drop in prices in other minerals and metals. The failures of the DRC in this regard were twofold: (1) it lacked industrial gold production (which did not restart until 2012, in Sud Kivu), and (2) virtually all artisanally mined gold was exported informally (Garrett, Mitchell, and Lintzer 2010). Nevertheless, strong gold prices did lead major mining companies, including AngloGold Ashanti, Mwana Africa, Newmont, and Randgold, to invest in or accelerate mining exploration, particularly in the Kilo-Moto gold belt, in Orientale Province.

The regulatory environment—including the protection of property rights—is critical to the industrial mining sector's contribution to economic growth and development. Provided that certain requirements are met, the Mining Code allows private entities to apply for separate permits—first to explore and then to exploit mineral and metal deposits (World Bank 2008). Exploitation permits are granted only to companies that are registered in the DRC (although they may have foreign shareholders), and the state automatically receives, free of charge, a 5 percent nondilutable share of each exploitation contract.[17] Thus, apart from the fact that the state receives a nondilutable minority share, the code enshrines private property rights—which, as long as they are adequately protected, can have a positive impact on economic performance.

[15] Fresh exploration—initially focused on the provinces of Katanga, Orientale, and Sud Kivu—revealed that the DRC possesses attractive deposits of gold, copper, and cobalt (Garrett and Lintzer 2010).

[16] A mining cadastre, sometimes referred to as a mineral rights cadastre, is a public registry of mineral rights for all types of mining concessions and other mining-related rights—from reconnaissance and exploration through extraction (Girones, Pugachevsky, and Walser 2009).

[17] Mining Code, art. 71(d). As of 2013, the GODRC was seeking to increase its share beyond 5 percent (André-Dumont 2013; Kavanagh 2013).

Property rights are widely regarded as an inherent part of a sound investment climate. Nicholas Stern argues that "[a] sound investment climate leads to the kind of sustained productivity improvements and vibrant entrepreneurship that induce a virtuous spiral of investment, growth, and poverty reduction" (Stern 2002, 148). Thus, improving the investment climate in a producer country—by, for example, implementing anticorruption measures, strengthening institutions, and building state organizational capacity—can make extractive activities more supportive of developmental objectives. The divergent development experiences of Botswana and the DRC support this hypothesis. Botswana's comparative institutional strength has translated into significant growth, founded on natural resource exploitation. In the DRC, in contrast, the combination of technical interventions by donors and public sector efforts to improve the investment climate—in particular, through the introduction of the Mining Code—has so far inadequately increased the development dividend from the mining sector, primarily because corruption and other ills remain widespread. In addition to assigning the DRC a rank of 183 out of 189, *Doing Business*, one of the World Bank's annual publications, confirms that corruption continues to interfere with the development benefits that might otherwise have been associated with implementation of the Mining Code (World Bank and IFC 2013). The Mining Code specifies the governance structure for the mining sector, including the state organizations charged with law enforcement and oversight of the sector. Although this organizational structure is, in theory, consistent with international practice, evidence suggests that the sector's governance structure is lacking in capacity, and therefore ineffective overall (World Bank 2008). A World Bank publication notes that "the organizational fragmentation and weak capacity itself appears to be very much the raison d'être underlying pervasive rent seeking across all government institutions engaged in the management of the resource sector" (Kaiser 2010, 3). Another possibility is that the causality is reversed: instead of fragmentation being the underlying reason for rent seeking, rent seeking may be the underlying reason for fragmentation—because fragmentation sustains rent seeking.

This perspective suggests that donor interventions focusing on institutional reform may fail if they ignore a basic fact: although the DRC's institutional infrastructure is dysfunctional when it comes to meeting development goals, it provides benefits to a variety of vested interests (Englebert 2003).[18] The failure, on the part of the GODRC, to fully promulgate and apply the Mining Code supports this view; it also highlights the difficulty of implementing reforms unless the

[18] For example, the DRC Growth with Governance in the Mineral Sector program, known as PROMINES, which was endowed with US$95 million and supported by the World Bank and the United Kingdom's Department for International Development, among others, was established to enable the Congolese government to (1) manage the country's natural resources more effectively and transparently and (2) foster development by increasing the mining sector's contributions to the national and subnational resource base (World Bank 2010).

reforms are tailored to the realities of the country's political economy. The next section explores the mining registry, CAMI, to further elaborate on this point.

The DRC's mining cadastre

CAMI, a semiautonomous agency in the Ministry of Mines, was established under the Mining Code to implement the licensing system provided for in the code. Under the supervision of the Minister of Mines and the Minister of Finance, CAMI "is responsible for issuance of 'mineral rights' exploration and exploitation permits" (World Bank 2008, 129).

CAMI was intended to function "smoothly, transparently, and impartially in order to provide security of tenure for holders of mineral rights" (World Bank 2008, 37); however, CAMI has encountered operational difficulties ever since it came into operation, in 2003. For example, under the Mining Code, CAMI is to be financed by annual surface duties. Nevertheless, in 2005, this direct revenue stream was cut by ministerial decree, and CAMI has since depended on funding from the GODRC, seriously compromising CAMI's ability to operate (Kaiser 2010).[19] Thus, at the end of 2008, despite having generated nearly US$45 million in state revenues over the course of the year, CAMI was left with no funding, and its employees had not been paid for November or December of 2008, further limiting the operational capacity of this key state organization. In keeping with this chapter's perspective on the functioning of the DRC's weak state, employees had resorted to selling CAMI's data to interested parties.[20]

The World Bank's efforts to promote private sector–driven mining in the DRC were, at least in principle, in line with Stern's suggestion to "promote the institutional adjustments, anticorruption measures, and policy changes that will change the rules and their enforcement, together with the way in which individuals and organizations behave and function, with the goal of directly improving the investment climate" (Stern 2002, 150). Nevertheless, the DRC's experience confirms that reforming the organizational structure of the mining sector is one thing; effectively operationalizing that structure is another. In a political environment in which stakeholders have become adroit at co-opting and outmaneuvering reform initiatives—in order to maintain or open up new opportunities for rent seeking—it is difficult to effectively build the capacity and ensure the operational effectiveness of an organizational structure.

The next section discusses the mining contract review process—in particular, whether the GODRC has the incentive to enforce and protect property rights.

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[19] One can speculate that the ministerial decree was a deliberate attempt to marginalize CAMI by starving it of funds, but the author has not found sound evidence for this hypothesis.

[20] Interviews conducted by the author as part of an economic governance assessment for an international development organization, Kinshasa, DRC, December 2009–January 2010. Interviewees spoke on condition of anonymity.

The contract review process

The decision to void, renegotiate, or alter government-granted mining contracts is a delicate matter.[21] The World Bank points out that

> [i]nternational law and practice (as well as the contracts themselves) do recognize the right of contracting parties to modify the agreements by common accord, in light of changing circumstances. Additionally, international law and practice also recognize a government's right to impose severe sanctions—including, in extreme circumstances, cancellation or annulment of contracts (World Bank 2008, 46).

Instead of being seen as a genuine effort to improve contracts so as to ensure that they are in the DRC's interest, however, the review process could also be viewed as a rent-seeking exercise designed to help sustain the existing elite coalition.

Beginning in the mid-1990s, to assist struggling mining parastatals, the GODRC authorized partnership agreements between parastatals and private companies. When forged, such an agreement (1) bestowed upon the partnership rights to mineral and metal deposits, (2) detailed the share ownership and the partnership's administrative structure, and (3) specified the approaches for reconnaissance, mine development, operations, and commercialization (Lutundula Commission 2006; World Bank 2008).

The mid-1990s were a time of conflict in the DRC, and it has been alleged that some of these partnership agreements were made—and other contracts awarded—"under opaque and suspicious circumstances" (World Bank 2008, 46; Lutundula Commission 2006). Specifically, a number of parastatals entered into partnerships when they were at risk of failing, and many did so without satisfactorily assessing the assets to which the agreements gave their new partners access (World Bank 2008; Garrett and Lintzer 2010). At the same time, the private companies took on significant risk when entering into such partnerships. They were entering into partnerships during a time of conflict and therefore during a time of uncertainty (Garrett and Lintzer 2010). The private-sector partners were also subject to sizable up-front fees. In consideration of these drawbacks, partnership agreements often included provisions that benefited the private company, such as tax exemptions agreed to by the state.

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[21] There are a number of reasons why a country may decide to review existing natural resource contracts. Existing contracts may not comply with domestic legal requirements or international best practices. They may not have been negotiated in good faith. They may have been signed prior to conflict, during hostilities, or by an unelected transitional administration. Any or all of these circumstances can lock a country into terms that are illegal, that do not serve the country's best interests, or both. To avoid undermining investor confidence or violating bilateral investment treaties and other legal agreements, however, contract reviews, renegotiations, and cancellations must be handled with caution. For more information, see Le Billon (2012) and Altman, Nichols, and Woods (2012).

Partnerships between parastatals and private companies have continued to be forged, from the beginning of the post-conflict period in 2003 to the present. The contracts upon which these partnerships are based vary greatly with regard to disclosure and transparency (World Bank 2008).[22] While these arrangements do not precisely replicate the dual governance structures of the Mobutu era, they do represent decision-making structures and processes that are parallel to, but separate from, those enshrined in the Mining Code. In addition to benefiting the elites, these structures and processes inhibit the DRC from realizing its development potential and prevent the organizational structure established in the Mining Code from functioning as intended.

The Governance Contract, which the GODRC adopted in February 2007, is supposed to work to prevent future disputes through the promotion of good governance (World Bank 2008).[23] The document acknowledges that good governance is based on rule of law—two components of which are due regard for property rights and adherence to contracts. During the years leading up to the adoption of the Governance Contract, the GODRC established the Lutundula Commission, an interministerial commission tasked with reviewing fifty-seven contracts and six mining agreements in effect between private companies and the parastatals. The commission, which was formed in 2004, conducted its work under the direction of the Ministry of Mines and issued a report and recommendations to the government in June 2005. The report, published in early 2006, recommended the renegotiation of forty-one contracts and the cancellation of sixteen (Lutundula Commission 2006).

The commission's contract review officially concluded in October 2010, after several rounds of negotiation with key operators—particularly those in active exploration, mine development, or exploitation phases; some sources have suggested, however, that negotiations continued in secret.[24] Although the commission diligently scrutinized some of the contracts, other assessments were—in the words of the World Bank—"'rushed through' in haste, without in-depth analysis" (World Bank 2008, 47).

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[22] The Carter Center and others have expressed concern, for example, about approximately several hundred million dollars in *pas-de-porte* payments (up-front payments that are made even before extraction occurs) (Carter Center 2009).

[23] The Governance Contract is an annex to the Programme du Gouvernement (2007–2011), a "strategic framework to implement the Head of State's vision for the construction of a unified, strong and prosperous state" (GODRC 2007; translation from the French by the author.)

[24] In September 2008, six companies (AngloGold Ashanti, Banro, FQM, Gold Fields, Mwana Africa, and Tenke Fungurume Mining) stopped discussions with the GODRC, claiming that the terms being imposed were excessively onerous, not applicable to their respective projects, or in clear violation of the contracts they had signed (Kaiser 2010). In February 2009, the GODRC invited these companies to engage in final negotiations; by August of that year, the GODRC had approved major mining contracts with AngloGold Ashanti, Banro, Gold Fields, and Mwana Africa (Hubert 2009). The contract for the Tenke Fungurume Mining copper and cobalt project was officially finalized in October 2010 (Manson 2010).

The decision of the GODRC that is most relevant to the theme of this chapter is the revocation of the mining license in 2009 for the Kingamyambo Musonoi Tailings (KMT) project, a joint venture operated by FQM, which held a 65 percent share;[25] other stakeholders included the GODRC (which held the legally required 5 percent nondilutable interest), GÉCAMINES (12.5 percent share), the IDC (10 percent share), and the IFC (7.5 percent share) (Creamer Media Reporter 2010). The stated reason for the revocation was "irregularities"—a claim that is perhaps suspect, given that FQM had invested approximately US$750 million in the KMT plant (including US$250 million to acquire Adastra, which had previously owned KMT), and that such a level of investment would inevitably have evoked some oversight (Global Witness 2011b; Wallis 2010). In 2010, FQM, the IFC, and the IDC sought international arbitration to determine the validity of the GODRC's decision to withdraw the KMT contract (Creamer Media Reporter 2010). That same year, the Canadian government took on FQM's case—and, in the course of discussions about debt relief for the highly indebted country, raised serious concerns about governance in the DRC.

Under the settlement reached in 2012, FQM received US$1.25 billion (Koven 2012). The process that led from the initial revocation of the license to the settlement was complex. Immediately after having revoked the KMT contract, the GODRC had initially signed a contract handing the KMT project to Metalkol, a company in which Highwind Properties Ltd. had a 70 percent stake (Global Witness 2011b). Highwind Properties Ltd. was, at the time, owned by Dan Gertler, an Israeli businessman and friend of President Kabila's (Koven 2011)—a connection that could explain FQM's initial reluctance to name the "unspecified third parties" that it believed to be behind an "orchestrated attack" on its operations (Sergeant 2010). In 2010, Kazakh mining giant ENRC purchased a 50.5 percent interest in Camrose Resources Ltd. for US$175 million. Camrose Resources Ltd. controlled Highwind Properties Ltd.; thus, the purchase gave ENRC, an FTSE 100 index–listed company, control of the KMT project (*Mining Journal* 2010).[26]

FQM's experience mirrors an established extortion technique: first, a target company is placed under pressure by a second party; next, the target is approached by a third party, which persuades the target to enter into a bargain or to make other investments or concessions. Whether the third party is paid in cash, investment shares, or both, the second and third parties gain significant sums of money, which they then split.

It is not surprising that, as of 2010, there had been no in-depth assessment of the benefits the GODRC may have gained from the contract review process

[25] In 2010, the mining licenses for two other FQM mines, Lonshi and Frontier, were also revoked and transferred to Sodimico, a parastatal (Global Witness 2011b).

[26] Companies listed in the FTSE 100 index have the highest market capitalization of all the companies on the London Stock Exchange.

(Kaiser 2010). What was clear, however, was that at least in the short term, the process disrupted the international markets, where investment capital is raised. Financial institutions and mining-investment underwriters were closely observing the contract review process, waiting to see how it would affect the security of property rights (and, thus, the basis for further investment) in the DRC (World Bank 2008); their reaction suggested that the outcome of the contract negotiations brought about by the commission's review—such as the Tenke Fungurume Mining contract renegotiation—would be an important indicator of investment risk (Hubert 2009). The fact that Tenke Fungurume Mining retained its mining rights can thus be considered a positive outcome in an otherwise questionably implemented process (Manson 2010).

Suspicions have been aroused that the GODRC exploited the review process, compelling private companies to forfeit their mining permits—permits that the government subsequently awarded to Chinese companies (World Bank 2008). One example that appeared to justify such concerns was that of Katanga Mining, which was asked to give up its Mashamba and Diluluwe permits; the permits were then given to SICOMINES, a new joint-venture company created by GÉCAMINES and a consortium of Chinese companies. It is questionable, however, whether the contract review process as a whole was really intended to benefit Chinese investors, as opposed to the Congolese elites, particularly since Chinese companies are unlikely to invest in legally contested concessions; moreover, at the time of writing, the Chinese government had yet to fully implement a high-profile contract that grants access to mining concessions in return for infrastructure investment worth US$6 billion (Global Witness 2011a).

In sum, the conduct of the contract review has cast uncertainty over property rights in the DRC. The process also demonstrated how institutional frameworks and their respective governance outcomes evolve, sometimes in unpredictable ways. Such unpredictability not only serves the rent-seeking ambitions of the elites, but also perpetuates the elites' incentive to give greater priority to short-term rents than to longer-term benefit streams.

Uncertainty is detrimental to long-term planning. Because of the substantial investment required to get an industrial mine started, it is difficult for a mining company to pull out once the initial investment has been made, even if the investment climate subsequently becomes unfavorable. Scholars have therefore argued that long production cycles and the terms of concession agreements may render extractive industries particularly inclined to give in to elitist rent seeking (Deacon and Rode 2012). Given the pervasive corruption in the DRC, pressure from rent-seeking elites remains a major risk for mining investors and mine operators.

Despite a GODRC decree, passed in May 2011, committing the government to publishing natural resource contracts (Global Witness 2011b), observers of the DRC and the mining industry, in general, are likely to continue to question the development impact of mining projects. In the face of such scrutiny, the industry will need to articulate a carefully developed response—both by engaging with key stakeholders, and by effectively communicating to those stakeholders the extent of the industry's socioeconomic contributions.

Major mining companies have committed to the DRC, particularly in Katanga's mining sector, but it remains to be seen how they will navigate the country's operating environment over the long term, and how the deficiencies within that operating environment will affect the security of title and investments. Vale, the Brazilian mining giant, abandoned a takeover bid for Metorex (a company that had mining rights in Katanga) after the Chinese mining company Jinchuan made an offer that was financially more attractive to Metorex shareholders (Lourens 2011). Vale would have been another major player to enter Katanga, following ENRC, Glencore, and Freeport-McMoRan. Meanwhile, the contract review process—although not necessarily supportive of mining output and seemingly inimical to the formation of stable property rights—continues to maximize short-term rents for Congolese elites, because each time a mining right is negotiated or renegotiated, new rent-seeking opportunities arise.

The next section, which focuses on the DRC's economically vital artisanal mining sector, reveals an equally pronounced picture of uncertain property rights.

THE REGULATION OF PROPERTY RIGHTS IN THE ARTISANAL MINING SECTOR

Artisanal and small-scale mining (ASM) is the largest segment of the mining sector in the DRC (World Bank 2008); in the case of some minerals and metals, ASM is the sole source of production (Garrett 2007). ASM is also one of the DRC's most significant sources of employment, providing work for a fluctuating number of between 500,000 and 2 million *creuseurs* (diggers) (World Bank 2008). It is estimated that 12.5 million people—representing up to one-fifth of the population and including diggers and their dependents—depend on ASM for their livelihoods (Garrett 2007).

Under the Mining Code, an exploitation permit is granted on the basis of an application that assesses eligibility, financial capacity, and the quality of the proposed mining development. Thus, the Mining Code awards exploitation permits to investors with significant financial resources, while making it impossible for individual artisanal miners to obtain secure property rights.

A mix of formal and informal rules governs both the large-scale mining (LSM) and ASM sectors. With respect to property rights, there are two key differences between the sets of rules that govern the LSM and ASM realms: (1) customary land claims can play an important part in the allocation of ASM mine sites, and (2) in some areas, ASM is subject to military predation and control. While the trade in artisanally produced minerals and metals formalizes, to varying degrees, at the export stage, ASM production is almost exclusively informal and thus outside the purview of the state. Local elites, in particular, engage in rent seeking in the ASM sector, often by channeling kickbacks to members of the national elites—especially those in the army. Like the LSM sector, the ASM sector is subject to disagreements and legal disputes over, as well as competition for, property rights.

The principle that the DRC's soil and subsoil—including any minerals and metals found therein—are the property of the state dates back to the colonial-era mining legislation of 1937 and was enshrined in the Mining Code of 2002. Under customary law, in contrast, the person who finds a mineral- or metal-bearing area has the first right to exploit the discovery, pending approval by the customary chiefs—a process that is clearly incompatible with the Mining Code. The differing interpretations of property rights found in statutory and customary law evidence "the deep-rooted and historical dichotomy in Congolese society between a centralised Kinshasa-based national identity and a provincial one claiming local and often community and customary-based rights and ownership" (Sunman and Bates 2007, 41).

The coexistence of statutory and customary laws yields conflicting definitions of rights. One particular consequence is ambiguity about the validity of the property rights that stem from customary laws, which govern production and trade in the ASM sector. Because the Mining Code provides stability only where statutory law tends to be enforced, the actors in the ASM trading chain to whom the code is of greatest relevance are the *comptoirs* (trading companies), which formally export artisanally produced minerals and metals; these companies are supported by both the formal economy and the informal ASM sector, and hence subject to both statutory and customary laws (World Bank 2008; Garrett 2008). Some comptoirs are in compliance with most of the legal requirements, such as licenses and tax payments, stated in the Mining Code, but the majority are not.

To operate legally under the Mining Code, an artisanal miner must obtain a *carte d'exploitant artisanal* (an artisanal mining card, which is an individual permit that cannot always be directly obtained in key mining areas), and can mine only in designated ASM zones (which have not been designated in most provinces) (Garrett 2008; Pact 2010). This compliance burden means that artisanal miners may be unable to meet the requirements of statutory law—which implies, in turn, that ASM often exists outside the law, rather than in deliberate violation of it.

Thus, because of the state's failure to promulgate, apply, and enforce statutory regulations, particularly concerning property rights, most artisanal miners cannot comply with the law even if they want to (Garrett, Mitchell, and Levin 2008). An example of this paradox at the production level is the designation of so-called artisanal mining zones (AMZs). Under article 109 of the Mining Code, the Ministry of Mines may, upon recommendation of the Directorate of Mines and the governor of the relevant province, designate as AMZs areas in which neither industrial nor semi-industrial mining is feasible (Pact 2010; Garrett 2008). Artisanal miners are granted extraction rights, renewable annually, to the AMZs that are specified on their artisanal mining cards.

The Mining Code stipulates that AMZs may be closed if two conditions are met: (1) the Geology Directorate recommends closure, and (2) the factors upon which the AMZ was originally based have ceased to exist. Thus, a fully operational AMZ could easily be shut down. If this fact is taken together with the one-year validity of the permits, uncertainty over property rights is likely to undermine productivity-enhancing investments in ASM—such as those that would lead to somewhat more mechanized (but still small-scale) production.

Adding further complexity and uncertainty to the situation, both formal authorities, such as provincial governors and mining ministries, and mining parastatals often orally (and thus informally) authorize artisanal mining that is technically illegal. Provincial governors and mining ministries have also been known to alleviate disputes between artisanal miners and industrial mining operators by helping artisanal miners to resettle in inactive concessions (de Koning 2009). Additionally, in return for exclusive buying rights, GÉCAMINES has in the past permitted miners to dig on its concessions (Lutundula Commission 2006).[27]

Despite the fact that they may not provide legal, long-term security—particularly since the Mining Code explicitly prohibits ASM on industrial mining concessions—such informal or semiformal agreements are of potentially greater importance to ASM than the legal designation of AMZs. Experience with AMZs elsewhere in the world suggests that they are often either not rich enough in minerals or metals to be worth mining, or cannot be designated (because of the prior allocation of land to industrial mining concessions) (Pact 2010).[28]

In many ASM areas, the state is not fulfilling its regulatory role, and traditional authorities have filled the regulatory gap. For example, individual village chiefs, or management committees made up of village chiefs or local landowners, often designate dig sites; in the case of a new and valuable find, such customary authorities may also allocate individual plots within the digging area (Pact 2010). Under customary law, local chiefs receive a significant amount of money or other benefits for enforcing customary law, and thus have an incentive to monitor and regulate mining operations (Garrett and Mitchell 2009). In addition, members of the state bureaucracy, such as administrators, police, and members of the military—as well as nonstate actors, such as armed groups and chiefs—prey on various operators in the ASM value chain, including individual miners, transporters, and traders (Garrett 2008; World Bank 2008). In 2009, for example, in a particularly productive mining area in Nord Kivu, a local army unit was estimated to have been earning more than US$4 million per year from preying on mineral production and trade (Garrett, Sergiou, and Vlassenroot 2009).

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[27] Such arrangements have been made through Nouvelle Compagnie (NOUCO), later known as Congolaise des Mines et de Développement (COMIDE), and now known as Exploitants Miniers Artisanaux du Katanga (EMAK) (Pact 2010).

[28] Although often fraught with conflict over competition for access to the same resources, there have been attempts, on the part of the industrial mining sector in various countries, to accommodate both industrial and artisanal mining on industrial mining concessions (Pact 2010; de Koning 2009); there is little evidence, however, of the success of such initiatives.

The ASM sector thus provides rents for local and provincial elites—including military personnel—who have links to national elites. Meanwhile, customary law remains the de facto legal basis for those who depend upon ASM for their livelihoods. The lack of familiarity with and understanding of customary law, especially by Westerners, has led to the view that the DRC's artisanal mining sector is chaotic. Such an ill-informed view devalues the customary frameworks that regulate the sector in many DRC mining regions. These frameworks are based on realistic, albeit often inequitable, configurations for production and trade, including the regulation of property rights (Garrett 2008).

In sum, the DRC currently lacks an enabling environment that is sufficiently sound to allow the ASM sector to contribute more tangibly to poverty reduction and development. As a largely ignored parallel system, the statutory institutional infrastructure is unable to regulate property rights and other aspects of the ASM sector. At the same time, the customary institutional infrastructure fails to generate equitable development outcomes, and thus leaves ample space for rent seeking.

CONCLUSION

The chapter suggests that instead of ensuring the long-term security of property rights, which would provide industrial mining investors with an incentive to increase and accelerate investment and move mining operations from exploration to exploitation, the DRC's elites are extracting revenues from the negotiation, cancellation, and renegotiation of mining contracts. Such high-level rent seeking mirrors practices in many dimensions of DRC society, among them the ASM sector, where both nonstate actors and elements of the state (such as government employees and the military) seek rents from mine operators and other elements of the mining value chain.

In the context of the DRC's mining sector, the processes that allocate property rights are often captured by fragmented—but nevertheless strong and interconnected—local, national, and international elites. The capture of such processes has led to allocations of property rights that are occasionally functional, often contested, and largely developmentally ineffective (Garrett, Sergiou, and Vlassenroot 2009). Despite international efforts to reconstruct the Congolese state, governance arrangements continue to include parallel decision-making structures: elites have co-opted parastatals and other state organizations and used them to enter into negotiations with economic operators, with the goal of extracting rents. If, as has been proposed in theory, the security of property rights is central to economic performance, these parallel structures weaken an already fragile state and hinder the economic performance of the mining sector by sometimes forcing the negotiation of property rights to occur outside the statutory domain.

The current system, while seemingly inimical to the formation of stable property rights and undesirable in terms of mining development, is valuable to the elites. Moreover, contrary to theory, the system has not prevented investors from coming to the DRC, although it could be argued that the stream of investors is not as strong and steady as it could be, considering the potential value of the country's natural resources. It is therefore likely that in the DRC, at least for the time being, reform and rent seeking will have to coexist. If this is correct, then what are the practical implications for reform efforts in the DRC?

Reform programs in the DRC's mining sector will need to be informed by and accommodate both the theories and the realities of power and legitimacy.[29] Thus, in order to mobilize the necessary resources to sustain growth and development, the international community needs to pay more attention to the political processes that underlie the power and legitimacy that the state relies on in order to enforce rights (including property rights). In practice, this means that enforcement mechanisms, such as international arbitration, need to be accompanied by reform initiatives that (1) are based on an in-depth understanding of the incentives that motivate the elites to support, reject, accept, or co-opt reform processes; and (2) include a domestic political bargaining component that can support inclusive reform—and, by including civil society and the private sector in the bargaining process, widen the political platform for reform.

A first step to building momentum for inclusive reform may be to support development processes that are comparatively noncontentious—that is, processes in which diverse participants, including representatives of the state, civil society, the private sector, and political and economic elites, can work together, while regarding themselves (even if temporarily, and on a limited basis) as interdependent and as having aligned incentive structures. Donors could support provincial governments' efforts to create economic linkages—for example, by encouraging local sourcing and processing in order to strengthen the economic ties between a mining company and the larger economic system within which it operates. Such initiatives would increase the development dividend the mining sector currently generates, as well as the stakes of noncompany and nonstate stakeholders, without overtly jeopardizing the immediate rent-seeking opportunities of the elites.

Under such a participatory approach, reform and rent seeking would coexist; however, as the elites' stake in the growth of the mining sector increases—to the point where it would make more sense to work toward accelerated mining investment than toward short-term rent seeking—the elites' incentives could shift. In other words, the process would potentially instill, in the elites, enough confidence in the idea of a developing DRC to overcome, or at least mitigate, the elites' uncertainty about what the future may bring. This uncertainty lies at the heart of rent-seeking behavior, trumping other incentives to work toward typical government objectives, such as increasing foreign investment, improving revenue collection, and maintaining good international standing.

The approaches suggested here are not panaceas for reforming bad governance in the DRC, but they may be a step in the right direction—namely, to increase

[29] For a review of theory relating to power and legitimacy, see Hirshleifer and Riley (1992) and Khan (2005).

the economic performance of the country's mining sector and the development benefits it generates for the Congolese people. If such approaches succeeded in transforming the focus of the elites, the approaches may eventually help pave the way for more fundamental reforms, including some that would ameliorate uncertainty over the security of property rights.

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