



**Critical Analysis of
The Local Content
Legislation in
The Democratic
Republic Of Congo**



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Improved human conditions through good
governance of the region's resources.

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INTRODUCTION

This study aims to critically analyse, highlight the weaknesses, and make recommendations for the effective implementation of provisions in the Congolese local content legislation. Our hope is that this will contribute towards the fight against poverty through sound natural resource management.

The wealth of the soil should benefit the people who live on it first. For this cause, it is critical for extractive projects to develop and include a local content policy. Local content is the value that a local, regional or national economy derives from extractive projects. Mining companies have to create jobs for the communities/countries where they operate. Mining activity should benefit the communities/countries where they take place, including through the procurement of local goods and services.

The local content concept originated in the United Kingdom in the 1970s. Following heavy dependency on US investments to exploit its oil fields, the UK developed a network of oil companies (Wikipedia, 2020). The latter grew to the point of manufacturing all the equipment necessary for oil exploration and production, thus ending that dependency.

Today, most countries with significant mining, oil and gas industries employ this concept that urges multinationals to promote ‘industrial diversity, ensure sustainable growth, and tackle poverty’ (Wikipedia, 2020). The concept could be based on ‘tax incentives’, ‘contract clauses’ or a ‘mining code’. The concept details all ‘national preference’ requirements. It is an obligation imposed on multinationals to mainstream

local components into the production process, which can be measured in percentages or quotas, and which can include subcontracting, the use of local labour, the training of local staff, the transfer of technology and skills, funding for the local production of goods and services (promotion of local entrepreneurship), and the possibility for citizens to own shares in the company (Inès Féviliyé, 2015).

Local content could be applied in three ways: first, through the construction of plants, energy and transport infrastructure in a country where the industrial sector is so underdeveloped that it cannot absorb the output of multinationals operating on its territory; second, through hiring local labour and vocational training for the locals; and third, by promoting local entrepreneurship via private direct investment by the multinationals.

Copper, cobalt, diamond, gold, manganese, tin, coltan and tinstone are some of the most famous amongst the plethora of mineral resources found in the DRC. Their exploitation is yet to yield tangible benefits for the national economy, including jobs for the locals (De Putter & Decrée, 2012). As a country overflowing with natural resources, the DRC would benefit from mainstreaming the local content concept in its legislation to drive socio-economic development.

This report features three sections, each with a critical assessment of the legal provisions related to local content on subcontracting in the mining and oil sectors.

I. Local Content and Legislation on Subcontracting In The Private

To begin with, in the DRC there is no law specific to local content as is the case in Senegal. The one piece of legislation that can be considered as a legal framework is the Law No. 17/001 of February 8, 2017, that sets the rules applicable to subcontracting in the private sector. It has two key components.

a) Local Content Innovations in the Subcontracting Law

This law is to 'promote small and medium enterprises with Congolese capital and to protect the national labour force' (Article 1 Par. 2). Subcontracting is reserved exclusively for companies that have their head offices in the DRC with Congolese capital and promoted by Congolese nationals, regardless of their legal status (Law No. 17/001 of February 8, 2017: Article 6).

The only exceptions to this principle are the unavailability or inaccessibility of Congolese expertise. The multinational has to provide proof of the unavailability or inaccessibility of Congolese expertise to the relevant authority before hiring the services of other or otherwise foreign enterprises. Subcontracting of foreign companies should not exceed six (6) months. Beyond that period, the subcontracted company will be required to create a branch that will be registered in the DRC (Law No. 17/001 of February 8, 2017: Article 6).

Decree No. 18/019 on the application of the Law No. 17-001 of February 8, 2017, establishes the rules applicable for subcontracting in the private sector. It defines the notion

of 'small and medium enterprises with Congolese capital' as a company that: 1. is headquartered in the DRC; 2. is majority-owned by natural or legal persons of Congolese nationality; 3. has management bodies that are mainly managed by natural Congolese persons; 4. has staff mainly consisting of natural Congolese persons (Article 3 of Decree No. 18/019).

Control of subcontracting activities begins with the obligation for all multinationals operating on Congolese territory to declare the annual turnover they made through subcontracting, and a list of their subcontractors. In other words, the multinationals have to implement a **training policy to upskill and equip Congolese nationals with the technical qualifications necessary for the subcontracting activity** (Law No. 17/001 of February 8, 2017: Article 12).

The ministers of the economy, of the industry and of Small and Medium Enterprises, the Governor of the province or the local administrative authority are competent to take the administrative measure of temporarily close any company that contravenes

the legal provisions on subcontracting (Article 21).

All legal provisions on subcontracting are binding and any breaches would lead to any of three types of sanctions: fines, administrative measure of temporary closure or revocation of the subcontract. The authority responsible for regulating subcontracts in the private sector will determine the conditions of these sanctions upon approval by the minister of Small and Medium Enterprises (Decree No. 18/019 of 24 May 2018: Article 14).

The mission of the authority responsible for regulating subcontracts in the private sector (ARSP) is to identify and approve the enterprises that qualify for subcontracting based on their domain of activity; to help Congolese enterprises transition from informality to formality; to enforce the rules on

subcontracting; to ensure compliance with the conditions necessary for subcontracts; to promote SMEs that are majority-owned by Congolese nationals; to ensure the implementation (and monitoring and evaluation) of the national and sector-specific local content policies (www.arsp.cd; Nadine Fula 2020 & DESKECO 2020).

The Executive Director of the ARSP reckons the current 839 subcontractors out of the 1134 enterprises that are registered with the ARSP are insufficient. He also points out that many Congolese SMEs experience great difficulty in accessing funds amidst significantly lower prices for goods and fees for services by the main companies (Kalej, 2021a). Since its creation in 2019, the ARSP has focused on disseminating the law on subcontracting (Kalej, 2021b).

b) Critical Assessment of the Local Content in the Subcontracting Law

- Fundamental observations on the legal framework are as follows: The law has instituted a restrictive or limited conception of local content insofar as it only aims to 'promote small and medium enterprises with Congolese capital in order to protect the national workforce'. In other words, this law only targets local procurement by major companies;

- There is a risk of politicising subcontracting since the ARSP management is appointed by the government without engagement with any other public institutions. This could compromise the need for transparency and accountability, as well as create a platform for embezzlement and money laundering;

- Decree No. 18/019 of May 24, 2018, on enforcement action does not specify quantifiable or measurable objectives to reach by a certain timeframe.

- As of 2017, the government had no plans in place to enable Congolese SMEs to meet the demands of multinationals in extractive industries such as mining and oil. There is a potential risk for circumvention of the law through practices such as nominees or temporary assignment of securities (Madimba, Mudikongo, Kabemba & Mbatshi, 2018).

However, it should be noted that the existence of this law provides a basis for the promotion of local content, including by strengthening the institutional framework. Besides the Ministry of Labour, which is responsible for protecting the national workforce against foreign competition, the Ministry of Entrepreneurship, Small and Medium Enterprises has been established to implement government policy on the creation of a middle class, the culture of entrepreneurship and handicrafts, incubators for SMEs and handicrafts (PMEAs), subcontracting in the private sector, chambers of crafts, professional organisations of SMEs, and the use of standards and weights by PMEAs. This ministry will also define, promote and develop alternative and innovative means of financing SMEs in collaboration with the Ministry of Finance.

II. LOCAL CONTENT IN THE MINING LAW

a) Local Content Innovations in the Mining Law

The first innovation is the legal definition of subcontracting given in the Mining Code. It defines subcontracting as ‘any legal entity under Congolese law with Congolese capital that provides equipment or performs work and/or services required on behalf of the holder in the context of its mining activities under its mining title and including, in particular, the construction of industrial, administrative, socio-cultural and other infrastructure required for the project, as well as all other services directly related to the mining project’ (Mining Code: Article 1.48).

The second innovation is that the government must define and implement the employment and training policy for Congolese nationals in the mining sector (Article 16 bis). There are quotas in place to regulate the employment of foreign nationals, there is a list of jobs prohibited to foreign nationals, and there are regulations that determine the conditions of their employment. Priority must be given to Congolese nationals with the same skills as their competitors (Decree No. 038/2003 of March 26, 2003, on the Mining Regulation: Article 405).

The DRC government set the minimum quota of Congolese nationals per job category at different stages of mining projects.

Minimum quota of Congolese nationals per job category

Job Category	Phases of the Mining Project				
	Mining Research	Development & Construction	Year of Commercial Production		
			1st - 5 th	6 th - 10 th	11 th and beyond
Managers	20%	25%	60%	65%	70%
Supervisors	30%	35%	70%	75%	80%
Skilled workers	60%	40%	80%	85%	90%
Labourers	80%	85%	90%	95%	100%

The Mining Code requires mining operators to set up training programmes to upskill their Congolese staff, covering all qualifications, and allow them to occupy management positions within the timeframes indicated in the table above (Article 405). Mining operators are required to establish and send their training and staff development plans to the Technical Unit for Coordination and Mining Planning (CTCPM) at the Ministry of Mines for information and follow-up. Furthermore, the training and development plan of mining companies must include training courses for mining-related science and technology students (Article 405 sexes).

The third innovation is the opening of the mining sector to local shareholders through the mandatory participation of Congolese nationals in at least 10 percent of the share capital of mining companies (Article 71). This condition is also extended to designated places of purchase, sale and processing of precious materials. These shares are releasable when the Exploration Permit (EP) is converted into an Operating Permit (OP) or when a new mining company is created. Congolese nationals must be involved in setting up trading posts.

It is worth noting that the legal provision of the Mining Code that enshrines the opening of shareholding to Congolese nationals in the mining sector has not been implemented, as enforcement measures in terms of ministerial decrees are still missing. It is the Minister of SMEs and SMIs who should develop this decree and submit it to the Council of Ministers for approval.

Meanwhile, it can be argued that the Minister in charge of SMEs and SMIs, in consultation with

the Minister of Mines, should ensure that the 10 percent of shares reserved for Congolese nationals are the subject of a transparent and competitive call for tenders. This would allow interested citizens with the financial means to compete. This call for tenders will likely contribute towards the fight against money laundering and prevent ineligible persons from mining activities.

The fourth innovation relates to the industrialisation of the mining sector. It consists of three types of obligations that have a strong impact on the promotion of local content in the mining sector. First, any holder of a mining permit or permanent quarrying authorisation is required to process or have processed the mineral substances into marketable products in their own facilities or in approved processing entities established on the national territory. To this end, the permit holder must submit to the Mining Directorate their industrialisation plan containing a programme for processing the minerals extracted from their site in their own facilities or with approved processing entities established on the national territory (Article 108). So far, no enforcement action has been determined to support this provision.

The fifth innovation is the consecration of the authorisation to create processing entities and processing plants. Indeed, any person who does not hold an exploitation mining title and who proposes to engage solely in the processing of minerals must obtain a processing authorisation from the Minister of Mines. A company that does not have a mining title but proposes to engage solely in the processing of minerals must reserve at least 50% of its share capital for Congolese nationals (Article 108 quater).

b) Critical Assessment of Local Content in the Mining Legislation

On subcontracting or procurement in the mining sector, Article 108 quinquies of the Mining Code states that mining operators must follow the provisions of Law No. 17/001 of February 8, 2017, which sets out the rules applicable to subcontracting in the private sector. As indicated above, this law has gaps that are detrimental to the development of subcontracting insofar as it does not set measurable objectives for the main companies. The Minister of Mines should issue an order to determine the equipment, consumables, products and services that must come from Congolese SMEs. The Minister of Planning should issue an order recognising the right of the ITIE to require companies to declare their expenditures on local purchases.

The mining legislation lacks clarity in terms of training. It is hoped that the training of Congolese managers will be quantified and determined over time given that the expected lifespan of a mine varies between 25 and 30 years.

On the industrialisation of the mining sector, the derogation to process raw minerals outside the national territory (Article 108 ter) runs the risk of becoming a general rule in violation of the obligation to process minerals locally. The Congolese government should provide enough electricity for mining operators to process and transform the minerals locally.

The only provision relating to technology transfer is the one that recognises the competence of the Minister of Mines to rule on the industrialisation plan presented by the holder and containing a program for the processing of mining products extracted from their perimeter in their own facilities or with approved processing entities established on national territory (Article 7). The Mining Regulations do not specify the content of the industrialisation plan nor the procedures for filing, reviewing, approving and monitoring it. There are no guidelines on industrialisation in the Congolese mining legislation.

III. LOCAL CONTENT IN THE HYDROCARBON LEGISLATURE

a) Innovations from the Law No. 15/012 of August 1, 2015, on local content in the hydrocarbon regulation

In the hydrocarbons sector, local content comes in the form of the obligation for oil and gas companies to promote the development of local companies (Article 5.3) by giving them priority in subcontracting when they display equal technical qualities and commercial conditions (Article 7). The obligation for the government to take the necessary measures to encourage the participation of nationals in hydrocarbons-related activities (Article 6-1) by giving them priority when jobs are offered and in application of the principle of equality of competence with respect to foreigners (Article 6). In terms of employment, oil companies, their subsidiaries and their subcontractors are required to submit, at the beginning of the year and each time the need arises, the profile of candidates to be recruited with the specifications of skills and description of positions to be filled and the schedule of training of local staff (Articles 8 & 9). The Minister of Hydrocarbons must approve the training schedule in consultation with the Secretary General (Articles 8 & 9).

The State guarantees access to job opportunities to nationals and foreigners at all levels of responsibility, in the proportion determined by an inter-ministerial order of the Minister of Hydrocarbons and the Minister of Labour (Article 10). This order has not yet been enacted.

With respect to technology transfer, oil companies are required to train Congolese nationals in the technologies they use in their activities. The legislator has obliged the government to take the necessary measures to encourage the participation of nationals in hydrocarbon-related activities (Article 6 Loi). These measures may include the supervision of Congolese en-

trepreneurs to take shares in oil companies, the granting of credit to allow nationals to create subcontracting companies, and the creation and equipping of schools and training centres specialising in the oil sector.

In the hydrocarbon sector, oil companies, their subsidiaries and their subcontractors are required to submit, at the beginning of the year and each time the need arises, their annual procurement plan for the selection of their goods and services suppliers. The Minister of Hydrocarbons, in consultation with the Secretary General, approves the training schedule and issues an opinion on the annual procurement plan (Decree No. 16/010 of April 19, 2016: Articles 8 & 9).

The State guarantees the supply of services and goods to companies in the hydrocarbon sector, in the proportion set by an inter-ministerial order of the Minister of Hydrocarbons and the Minister of Labour (Decree No. 16/010 of April 19, 2016: Article 10). Any upstream oil company established in the DRC may subcontract certain activities or tasks that contribute to the achievement of its corporate purpose, giving priority to Congolese companies. Local companies offer their services to oil companies at all levels of the production chain (Decree No. 16/010 of April 19, 2016: Article 11).

The provision of goods and services that contribute indirectly to the realisation of the oil operator purpose—such as catering, laundry, industrial security, firefighting services, organisation of health care and protection of oil installations—are reserved to Congolese nationals (Decree No. 16/010 of April 19, 2016: Article 12).

b) Analysis of Local Content in the Hydrocarbon Legislation

The hydrocarbon legislation is more detailed on local content than the mining legislation. Nevertheless, the implementation of these provisions may be hampered by underdeveloped infrastructure in the oil sector in the DRC. Despite its enormous potential, only one company is in production in the coastal basin (Pilipili, 2010). Since its enactment in 2015, the implementation of the hydrocarbon legislation has not been effective due to the lack of enforcement actions. The Minister of Hydrocarbons has about 160 regulatory texts on the table. At the same time, there seems to be some organisational deficit at this ministry, particularly because of the centralisation of all competences at the national level.

CONCLUSION

The objectives of this study were to review the legal provisions on legal content in the DRC, identify weaknesses and propose solutions for their improvement. The analysis reveals the existence of legal content provisions in the Constitution of 18 February 2006, in the 2002 Mining Code as revised in 2018, and in the 2015 Law on the regulation of hydrocarbons, and their respective enforcement actions. In 2007, the parliament also adopted the Law on Subcontracting in the private sector, and the government put in place an institutional framework for the effective implementation of all local content provisions.

Nevertheless, besides the non-application of some provisions of the above-mentioned legal instruments, the study found gaps in the Congolese legislation on local content. It is incomplete and vague on issues such as the quotas to achieve after clear timeframes.

The Congolese legislation on local content does not address vulnerable groups, with a lack of provisions for women, the youth and low-income individuals. There should be a comprehensive law on local content that addresses the weaknesses identified in the sector-specific legislation.

Recommendations

- Adoption of a comprehensive law on local content in the DRC, similar to Senegal (Law No. 2019-04 on local content in the hydrocarbon sector);
- Overall of the 2007 Law on Subcontracting in the private sector, with the inclusion of clear obligations for companies to promote and train local service providers, clear purchasing quotas or percentages for companies, and provisions to facilitate access to subcontracts by women and youth;
- Establishment by the government of mechanisms to facilitate access to bank credit for Congolese entrepreneurs, notably through the creation of an investment bank or the granting of guarantees to private banks;
- Accelerating infrastructure upgrades to promote local processing of products;
- Publication of interdepartmental decrees to promote the application of the provisions in the Mining Code and the Hydrocarbons Law, particularly with regard to the participation of Congolese nationals in the capital of mining and oil companies, as well as the training of Congolese nationals and technology transfer.

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SARW Objectives

Monitor corporate and state conduct in the extraction and beneficiation of natural resources in Southern Africa, and assess to what extent these activities uplift the economic conditions of the region's communities.

- Generate and consolidate research and advocacy on natural resource extraction in Southern Africa.
- Create informed awareness of the specific dynamics of natural resources in Southern Africa, building a distinctive understanding of the regional geo-political dynamics of resource economics.
- Provide a platform of action, coordination and organisation for communities, activists, researchers, policy-makers, corporations, regional and global governing bodies in the watching and strengthening of corporate and state accountability in extractive industries.
- Engage with and support government on building accountable and transparent management of extractive resources.
- Build capacity for communities, civil society, parliaments, and media to hold governments and corporations to account, and to participate in decisions about resource management.
- Advocate and promote human rights and environmental protection in resource extraction activities.
- Support efforts to legislate mandatory public disclosure of and access to financial, social, environmental and regulatory compliance information in the extractives industry.
- Promote extractive industries that create wealth for local communities.

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