

July 2020

Reflections on the Regulation and Control of Strategic Minerals of Artisanal Exploitation in the Democratic Republic of Congo

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Gécamines
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Multiplicity of structures

INTRODUCTION

The Democratic Republic of Congo (DRC) is a major producer of three strategic minerals (cobalt, germanium and coltan) that contribute to both modernisation and the mitigation of climate change. These minerals are subject to the effects of speculation on the international market, and often the DRC does not profit from their exploitation and trading since it does not control this process. All the mines are managed by multinationals and foreign operators. The strategic position of these minerals (particularly cobalt and coltan) caused the DRC to classify these minerals (along with germanium) as strategic minerals through Decree No. 18/042 of 24 November 2018.

To ensure the regulation and control of these strategic minerals, the prime minister signed two decrees: Decree No. 19/15 of 5 November 2019 on measures to safeguard activities relating to strategic mineral substances from artisanal mining, and Decree No. 19/16 of 5 November 2019 creating the Regulatory and Market Control Authority for strategic mineral substances (ARECOMS).

This report focuses on the impact of these decrees on artisanal cobalt, its exploitation, and its trading.

Definition of a strategic mineral

Point 48c of article 1 of Law No. 007/2002 of 11 July 2002 on the Mining Code, as amended and complemented by Law No. 18/001 of 9 March 2018 defines a strategic mineral substance as:

Any mineral substance which, according to the international economic situation of the moment, to the appreciation of the Government, is of particular interest with regard to the critical nature and the geostrategic context.

The publication of Decree No. 18/042 of 24 November 2018 had raised concerns among civil society organizations (CSOs) involved in the governance of natural resources because of the

lack of consultation and transparency in the definition of strategic minerals.

During the 3rd Alternative Mining Indaba organized by SARW in Kinshasa (9-11 July 2019), participants expressed certain concerns about this question. One of the recommendations called on the Congolese government to organise a dialogue to define a clear vision for these minerals, giving them a clear definition. This vision should correspond to the vital interests of the DRC, beyond the cyclical situations of prices on the international market. Unfortunately, this recommendation has not been followed up by the government despite having been communicated to all government authorities.

1. The major challenges posed by the prime minister's decrees

Government's approach to this issue of strategic mineral substances poses a number of challenges in the management not only of cobalt, but also of any other artisanal mining ore. This paper highlights the structural problems that complicate the management of strategic minerals.

1.1 Multiplicity of structures

The question that needs to be asked is why create a new structure when the sector has other structures that can integrate this new orientation?

In execution of these three decrees, Gécamines created the Entreprise Générale du Cobalt (EGC) to collect and buy back all the artisanal production of cobalt in the DRC. The regulation and control of cobalt from artisanal mining is a good initiative, but it involves challenges that must be met.

The question that needs to be asked is why create a new structure when the sector has other structures that can integrate this new orientation?

Several structures already contribute to the administration of mining in the DRC: The Department of Assistance and Supervision of Small-Scale Mining (SAEMAPE), the Center of Expertise, Evaluation and Certification (CEEC), and the Agency for Regulation and Control of the Strategic Mineral Substance Markets (ARECOMS). In the meantime, Lualaba provincial government is in the process of erecting a Center for Trading in Artisanal Mining Products aimed at organising and controlling artisanal mining in this province, for which more than US\$18 million (as a loan) would have been already been invested. If it was private companies that loaned this money to the provincial government, what were the means of controlling the use of this funding and what transparency measures were put in place in this transaction?

The creation by the government of ARECOMS and EGC adds to a multiplicity of structures in the mining sector. Indeed, there is already a problem with the interaction between these institutions and the delimitation of their respective areas of action. The creation of two new structures (ARECOMS and EGC) further confuses the competencies of the existing mining public services.

1.2

Legal and jurisdictional problems related to the creation of ARECOMS

In light of this legal provision, the creation of ARECOMS seems to have compromised article 16 of the Mining Code.

The creation of ARECOMS poses legal problems and raises the risk of a conflict of jurisdiction. In accordance with article 16 of the mining code as modified and supplemented by article 1 of Law no. 18/001 of 9 March 2018, only the ministries in charge of Mines, Environment and Finance, provincial Governments, the public services which report to them and the state organs expressly referred to in the code or in the mining regulations are empowered to act in the mining sector. Apart from them, “no other service or public or state body is competent to participate in the administration of the mining code or act directly in the mining sector”.

In light of this legal provision, the creation of ARECOMS seems to have compromised article 16 of the Mining Code. It violates the principle of the restriction of powers imposed by this mining law to prevent disorder in the sector. Its existence and its effective functioning risks generating conflicts of jurisdiction with the public services specifically mentioned in the Mining Code.

With SAEMAPE, the conflict of jurisdiction may arise insofar as the two public services will intervene in the same sector of artisanal mining. If we can conceptually draw the line between the two services, this is not the case in practice. Indeed, SAEMAPE is responsible in particular for assisting and supervising the artisanal and small-scale exploitation of mineral substances by encouraging miners to join together in mining cooperatives – to bring all the activities of the artisanal or semi-industrial exploitation and the products from the quarries into the official circuit of production and marketing.

Although SAEMAPE experiences difficulties in properly fulfilling its mission, it remains competent with regard to the exploitation of products from artisanal mining, mining cooperatives and the supervision of artisanal miners. The two decrees did not rid it of these powers and should not have done so without a deep motivation in accordance with the Mining Code. The conflict arises between ARECOMS and SAEMAPE on the competencies concerning the so-called strategic minerals because the decree creating ARECOMS does not envisage provisions relating to the collaboration between these two structures. The government should reverse its decision to avoid these jurisdictional conflicts, or else we will witness a still-born in the mining sector.

1.3

Conflict of interest between ARECOMS and CEEC

With regard to these attributions, ARECOMS will be in conflict with CEEC concerning the certification of artisanal mining cobalt and its traceability

There will certainly be a risk of conflict of interest between ARECOMS and CEEC. The latter aims to appraise, analyse, evaluate and certify in the DRC the precious, semi-precious mineral substances and colored stones, precious and semi-precious metals and rare metals (associated or not with major ferrous and non-ferrous metals), and mineral substances of artisanal production, ensuring the traceability of precious and semi-precious mineral substances as well as mineral substances of artisanal origin from the purchase or deposit counter to export. It also aims to implement and monitor the international programme of the Kimberley process and the regional certification mechanism in the Great Lakes region, as well as other similar programmes such as the principles of responsible mineral supply laid down by the OECD, taken up by the Congolese regulatory framework, and in particular:

- Circular Note of 6 September 2011 imposing on all entities involved in the production and trading of tin, tantalum, tungsten and gold to implement their duty of due diligence in accordance with the recommendations of the OECD guide;
- Ministerial decree no. 0057 / CAB.MIN / MINES / 01/2012 of 29 February 2012 implementing the regional certification mechanism of the International Conference on the Great Lakes Region (CIRGL) in the DRC;
- Ministerial Decree No. 0058 / CAB.MIN / MINES / 01/2012 of 29 February 2012 setting out the qualification and validation procedures for mining sites (OECD, 2016).

With regard to these attributions, ARECOMS will be in conflict with CEEC concerning the certification of artisanal mining cobalt and its traceability. Concretely, what will be the scope of the certificate issued by ARECOMS while CEEC already issues certificates in the artisanal mining sector in the DRC, and it is these certificates that are recognised internationally? Why create one more mechanism when the CEEC exists and already has the expertise and experience in the matter? In doing so, it seems that we have fallen into a certain institutional inflation.

1.4

Difficulties related to ARECOMS funding

Article 9 of Decree No. 19/16 of 5 November 2019 determines the sources of funding for ARECOMS. These are budget allocations, government grants,

The government must avoid creating structures it cannot sustain.

loans, donations from national, foreign and international organisations, assistance from development partners and any revenue authorised by the laws and regulations in force. As can be seen, ARECOMS could depend mainly on funds from the state budget. Is it possible under the current conditions for the state to finance a new structure when it is unable to finance existing structures?

All the other mining public services justify their ineffectiveness and inefficacy on the grounds of lack of financial resources; will ARECOMS be an exception? The government must avoid creating structures it cannot sustain. It is better to build on existing structures and extend their mandate to include ARECOMS.

2. Problematic of the creation of the *Entreprise Générale du Cobalt*

The creation of the *Entreprise Générale du Cobalt (EGC)* by Gécamines poses two major problems – its management and its financing.

2.1 EGC Management

There is another problem related to the capacity of the state. Despite the existence of the law and accompanying institutions, the DRC has never managed to organise artisanal mining.

During the 3rd Alternative Mining Indaba, participants believed that Gécamines might hold the monopoly for the purchase of all artisanal minerals, especially since most of these minerals are extracted in its concessions. Opinions differed in connection with the creation by Gécamines of the EGC with almost all of the equity interests in this new company, because of the difficulties that Gécamines itself is facing.

Gécamines' capacity and its management risk compromising the functioning of the EGC. EGC is owned by two shareholders, Gécamines and the Congolese government. Actually and ultimately, the Congolese state is the only shareholder. Gécamines is one of the state's portfolio companies experiencing many operating difficulties and on which a series of scandals of suspected embezzlement or mismanagement have been reported, rightly or wrongly. The weight of the state as the sole shareholder of this company is the basis of certain difficulties, including political interference, a source of bad governance, corruption and embezzlement. Given that the same causes produce the same effects, it is likely that the difficulties faced by Gécamines will affect the EGC and make it impossible for it to achieve its goal.

For some informed observers, it was desirable that this company be created by private shareholders in partnership with Gécamines, and that its management be of the private type and not 100 per cent state-owned. In this case, the two partners would provide capital to finance the work to identify viable artisanal areas, accessibility, and the discovery of these artisanal mining areas in favour of mining cooperatives. This arrangement would then be an opportunity for artisanal miners and the Congolese state to formalise artisanal mining. The presence of private investors would guarantee profitability and sustainability.

There is another problem related to the capacity of the state. Despite the existence of the law and accompanying institutions, the DRC has never managed to organise artisanal mining. Can we believe that the state has suddenly regained its control and organisational capacities simply because it now wants to buy cobalt?

Buying is one thing but organizing a clean supply chain is another. If it is true that the Congolese government would like to control this sector, it will have to find the means to make discoveries, to respect human rights, to ensure the protection of the environment, and to eradicate the presence of children in mines and on mining sites. It would be important here for the government to be able to explore forms of cooperation between private operators and the artisanal mining industry, where the mining operator guarantees the formalisation and supervision of artisanal miners in cooperation with the state services concerned, and waives their mineral rights to create an artisanal exploitation zone (ZEA). Examples (showing varying degrees of success) include the Mutoshi, Karajipopo, Kasulo, and Kamilombe cases. An OECD report has been mentioned here.

2.2

Qui financera les opérations de l'EGC ?

The government must avoid creating structures it cannot sustain.

Gécamines, owner of 95 per cent of the share capital of the EGC, is experiencing particularly difficult cash flow challenges to develop its own mineral deposits. It appealed to Fleurette or Ventora for a loan in 2017, and it is not believed that Gécamines can have equity to buy all the production of cobalt from Lualaba and Haut-Katanga produced by craftsmen. Is there already a lessor and under what conditions will Gécamines commit to a new loan? The Resource Matters report, titled *Neither Seen nor Known*, documents how large companies buying cobalt in the DRC are not doing enough to mitigate potential corruption risks in their supply chains. Companies buying products in high-risk areas like the DRC should show that they have taken steps to ensure that their suppliers do not engage in potentially corrupt activities.¹

¹ Resource Matters, <https://resourcematters.org/wpcontent/uploads/2019/04/ResourceMatters-NiVusNiConnus-RisquesCobaltCorruption-Avr-2019>

Our fear concerns the problem of borrowing funds from companies linked to individuals under international sanctions, and the implications for the credibility of Gécamine

Chinese traders and counters were blamed for, among other things, the manipulation of tonnage, mineral content, and the cheap purchase of artisanal products. The monopoly that the EGC is going to have could lead to the same behaviour exhibited by the expelled foreign operators.

Multinational Trafigura is said to want to fund the EGC to secure its supply of cobalt. It is not clear why Gécamines did not associate this company in the share capital of the EGC so that the latter brings fresh capital to this project of Gécamines and the Congolese government. It is important to determine the conditions for funding the operations of the EGC and to ensure due diligence on this funding, which would be obtained from any donor.

It is true that Gécamines seeks to wake up and organise itself, but new trials must be avoided along with failure to respect the commitments made. It may happen that the EGC is unable to meet expectations, to deliver the quantities promised to its donors or lenders, and in particular to allow repayment of financing. We risk seeing a new dispute which will directly bind Gécamines. It is also clear that EGC could face a decline in artisanal mining products if rigorous protection of concessions from private companies is ensured. While this article is being written, we learn that two companies (American and Chinese) plan to take cobalt from other minerals for the production of electric cars. This project must draw the attention of the Congolese government, which will have to consider suitable solutions.

3. Why cobalt and not gold?

Gold has not been classified as a strategic mineral, but the importance of its production and its fraudulent trade should attract the attention of the Congolese authorities.

Gold has not been classified as a strategic mineral, but the importance of its production and its fraudulent trade should attract the attention of the Congolese authorities. The eastern and Kivu provinces have enormous potential for gold ores, and artisanal mining is almost fraudulent. The areas of exploitation are scattered but the border countries of destination are known to government authorities. If the concern of the Congolese state was to maximise revenues and control artisanal production, it would be more in the area of gold because its illicit exploitation and its fraudulent export causes a lot of revenue evasion and creates difficulties in controlling artisanal production.

Estimates from organisations working in the gold sector show that between 10 and 15 tonnes of gold fraudulently leaves the DRC each year, without the state taking control measures such as those now introduced for cobalt. The supervision of artisanal gold mining, the installation of foundries and refineries (particularly in the east), and the creation of entities for the purchase and trading of gold (necessary for the reduction of armed groups and to avoid the illicit export of gold to neighbouring countries) have not been addressed by government authorities.

Foundries would allow the state to accumulate gold reserves, which would serve as monetary reserves for the stability of the national economy as they do in many countries. How can we justify this rush for only one ore, in the case cobalt? It is crucial to take into account the volatility of cobalt prices on the international market, which was high for a relatively short period before returning to its original price. The control and regulation of cobalt should not be based on the price of this metal on the international market, but must address strategic concerns of the DRC. This will require a serious commitment and rigorous means of control.

4. Why limit the scope of the EGC to cobalt only?

The government should be encouraged to regulate and control the gold from artisanal mining, which is regularly and fraudulently smuggled through the Congolese borders due to lack of effective policies.

There is a problem in the separability of copper and cobalt. Geologists and miners claim that there are no clean cobalt mines separate from copper mines in the DRC. Cobalt ore is associated with copper, and diggers exploit high-grade deposits particularly rich in either cobalt or copper. Questions still arise concerning artisanal copper.

The EGC has jurisdiction over only one strategic mineral, cobalt. What about other minerals (copper, coltan and germanium)? Perhaps there is reason to believe that it was created on an experimental basis. If it succeeds, the experience can be duplicated in other sectors.

The question that arises, perhaps, is EGC's geographic location to facilitate its accessibility to all artisanal diggers. What is possible is the installation of branches in artisanal mining areas, and hence the issue of the relationship between the EGC and the cooperatives on the one hand, and between it and the Musompa Artisanal Mining Trading Center on the other. Lualaba provincial government is said to have invested more than US\$18 million in a loan for the construction of a trading centre. Information in our possession indicates that EGC has taken over the province-built Musompo Trading Center, at what cost, no one knows. Who will repay the funds borrowed or disbursed by Lualaba Province? What is the mechanism of collaboration between the province and the EGC? Have there been consultations

between Gécamines and the Lualaba officials?

Several observers have already wondered about the supply of the trading centre in the absence of mechanisms to support cooperatives in the viability of their artisanal exploitation zones (ZEAs). How do the EGC and Gécamines plan to solve the problem of making ZEAs sustainable.

Many Congolese believe that the increase in artisanal production of cobalt, which is the primary motivation for the government's initiative, was mainly due to the swarming of the mining perimeters of the private companies by artisanal miners. If these perimeters are secure, it is understood that this production will be reduced. This would be the ideal time to create viable ZEAs, in particular by funding accessibility and stripping work in order to receive sufficient quantities of cobalt both in the trading centre and in the EGC facilities, or to explore possibilities for cooperation between mining operators and artisanal miners. Doing things the other way round will lead to failure after investing money, for which the country, the province or Gécamines could be sued.

Another issue is the selection of cooperatives that should work with the EGC. How should the selection of these mining cooperatives be done in a context where the creation of cooperatives has been politicised? Will it be done transparently? This matter deserves government's attention.

The government should be encouraged to regulate and control the gold from artisanal mining, which is regularly and fraudulently smuggled through the Congolese borders due to lack of effective policies. Our reflection does not reject the initiatives taken by the government, but would like to draw its attention to the objectives to be achieved and encourage it to adopt the right approach.

5.

Ambiguity between ARECOMS and industrial operators

ARECOMS is responsible for regulating and controlling all the markets for strategic mineral substances.

ARECOMS is responsible for regulating and controlling all the markets for strategic mineral substances. The main cobalt mines are owned by mining companies, and it is on the basis of their titles that they hold the cobalt ores extracted from their concessions. According to the Mining Code and being owners of market products, these companies are not subject to any formality which is not provided for by the Mining Code. By imposing this control on them, is there not an additional formality

that would create a heavy procedure detrimental to the business climate? What is the nature of this control and its legal effects? The list of questions raised could go on.

If the regulation and control of strategic mineral substances from artisanal mining is a necessity, it is imperative to spare industrial operators from ARECOMS' control in accordance with the objective of improving the business climate and the economic attractiveness of the sector, as provided for in paragraph 2 of article 1 of the decree establishing ARECOMS.

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CONCLUSION



The government's initiative to regulate and control artisanal cobalt mining is welcome and should be encouraged. However, it poses problems that could have been avoided if the Ministry of Mines had involved actors in the mining sector in the preparation of these decrees. The questions raised by this paper will help the government to ensure that the regulation is general and effective and complies with the prescriptions of the Mining Code.

The mining sector has recently experienced a tripartite principle of consultation, and sometimes wide consultation with the three stakeholders. The current trend of new government authorities for the mining sector goes in the opposite direction of lack of consultation and transparency in improving the governance of the mining sector. In no case will this trend bring about desirable changes in this sector, the engine of the Congolese economy.

Recommendations

- ▶ Ensure that the two decrees are discussed with experts and other stakeholders to avoid conflicts of jurisdiction between the different mining public services ;
- ▶ comply with the requirements of article 16 of the 2018 mining code by avoiding the creation of new institutions in the sector, but rather strengthening existing ones;
- ▶ regulate and control the artisanal gold ore that fraudulently leaves Congolese territory by the creation of a company based on the EGC model and by the installation of refineries in the east of the DRC;
- ▶ implement the OECD Guide on Due Diligence for Responsible Mineral Supply Chains, and in particular its Appendix on Suggested Measures for the Creation of Economic and Development Opportunities for Artisanal and Mining Operators, and on a small scale;
- ▶ review the capital structure of the EGC by transparently bringing together private economic operators to bring in fresh capital, instead of exposing Gécamines to the risk of debt, and

create an ad hoc mixed technical commission made up of experts from existing mining public services (CEEC, SAEMAPE, OCC, GCM, DGM, etc.) which can meet quarterly to discuss and evaluate the regulation and control of strategic mineral substances, in lieu and in place of ARECOMS.

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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