

The Extractive Industries Transparency Initiative (EITI) & Artisanal and Small-Scale Mining (ASM)

PRELIMINARY OBSERVATIONS FROM THE DEMOCRATIC REPUBLIC OF THE
CONGO (DRC)



NICHOLAS GARRETT

Report following a mission to North Kivu - DRAFT



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Front cover: Artisanal cassiterite mining in North Kivu/DRC © Nicholas Garrett, 2007

Info: Nicholas Garrett produced this report. Mr. Garrett works as a Minerals Consultant and currently drafts his PhD on minerals, conflict and development in the DR Congo. The report is partly based on primary data he collected in Goma, Bukavu and the Mpama/Bisiye cassiterite mine in North Kivu, DRC between April and July 2007. Email to: nicholas.garrett@agency-global.com.

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Acronyms

| | |
|-----------|----------------------------------------------------------------------------------------------------------|
| ASM | Artisanal and Small-Scale Mining |
| BGR | Bundesanstalt für Geowissenschaften und Rohstoffe |
| CASM | Communities and Small-Scale Mining Secretariat (World Bank) |
| CEEC | Centre d'évaluation, d'expertise et certification des substances minérales précieuses et semi-précieuses |
| CMMK | Coopérative Minière Madini Kwa Kilimo |
| COMESA | Common Market for Eastern and Southern Africa |
| COMIMPA | Coopérative Minière Mpama/Bisiye |
| CSO | Civil Society Organization |
| CTC | Certified Trading Chain |
| DFID | UK Department for International Development |
| DRC | Democratic Republic of the Congo |
| EITI | Extractive Industries Transparency Initiative |
| EMAK | Exploitants Mineurs Artisanaux du Katanga |
| FARDC | Forces Armées de la République Démocratique du Congo |
| FDLR | Forces Démocratiques de Libération du Rwanda |
| GECAMINES | Générale des Carrières et des Mines |
| IAG | International Advisory Group |
| IDP | Internally Displaced Person |

| | |
|----------|-------------------------------------------------------------|
| INICA | Initiative for Central Africa |
| LSM | Large-Scale Industrial Mining |
| NGO | Non-governmental organization |
| OCC | Office Congolais de Contrôle |
| OFIDA | L'Office des Douanes et Accises |
| PPP | Purchasing Power Parity |
| SAKIMA | Société Aurifère du Kivu et du Maniema |
| SAESSCAM | Service d'assistance et d'encadrement du small-scale mining |
| SOMINKI | Société Minière et Industrielle du Kivu |
| SME | Small and Medium sized Enterprise |
| USAID | United States Agency for International Development |
| WWF | World Wildlife Fund |

The Extractive Industries Transparency Initiative (EITI) has evolved into a globally recognized governance tool for greater revenue transparency in the extractive industries. Its clear focus has resulted in political support from the governments of a number of developed and developing countries, the G8, the private sector and civil society, as well as international organizations such as the World Bank. The EITI has until now predominantly focused on the oil and gas sectors; however, it has recently begun to place more emphasis on large-scale industrial mining (LSM), aiming to increase revenue transparency in the mining sector and in mining dependent countries.

This report summarizes observations made in the North Kivu province of the Democratic Republic of the Congo (DRC), with respect to a possible implementation of the EITI in employment-intensive artisanal and small-scale mining (ASM). Parts of the report are based on specific data from the ASM of cassiterite. As the DRC's overall ASM sector differs by geographical area and mineral, extrapolation to the general is not without risk. The author has accordingly tried to use specific data prudently, and largely for illustrative purposes.

From a development perspective ASM is one of the most complex economic sectors, but a clear and/or workable enabling policy for the country's ASM sector is missing, both on the national and on the international level. Box 2 on page 11 provides an overview of the characteristics of the sector in the DRC, which highlights what significant challenges the sector is faced with.

However, ASM is also an important economic sector, with estimates of up to one fifth of the country's population, or 12.5 million people dependent on it in their livelihoods. It accounts for up to 100% of mineral production, depending on the mineral. Due to the continued legal, political and economic informality of the sector, its contribution to the country's formal economic accumulation is minimal.

Stakeholders in international development increasingly recognize the important macro-economic contribution the ASM sector can potentially provide, if reformed and well governed. With its focus on revenue transparency, the EITI has a particular interest in the sizeable revenue streams that pass through the sector. Revenues are largely lost in informal channels, bypassing the states' fiscal apparatus, which deprives the country of much required funds for development and leaves ASM communities impoverished. The rationale of an EITI implementation in ASM is not to support the imposition of taxes on individuals faced with abject poverty. It is imperative to take the level of capitalization, and the area of land under exploration/exploitation into consideration, for example.

Additionally, in a country, where formalization is an unattractive option for many in business, given the high cost of operating and levels of extortion, inappropriate taxation should not become a further deterrent to joining the formal economy. However, some cooperatives and particularly small-scale mining companies, which frequently have at least basic administrative structures in place, operate on revenue streams significant enough to merit EITI implementation.

There are three particular areas the EITI can help to increase transparency in the state's interaction with ASM. These are license fees, tax payments and export charges. The different actors in the mineral trading chain are liable to licenses payments and the payment of import taxes. The exporting companies, widely known as *comptoirs* and exporting small-scale mining companies are liable to export fees and taxes, which are collected on the provincial level. A successful implementation of the EITI in these realms would be a considerable achievement.

However, increased tax revenue alone will not contribute to a development process, as today taxes are widely used as a private source of income for elites, and functioning government structures are not yet in place to transparently channel state revenue into, for example, development programs. The EITI's contribution in this respect would be to provide information to the country's citizens over the state's revenues from the ASM sector. It is then in the hands of the Congolese people to hold their leaders to account for the use of those revenues.

The essential precondition for the EITI to achieve efficiency and effectiveness in implementation is a minimum enabling environment, which encompasses legal, institutional, structural and political dimensions. Examples are a legal basis conducive to ASM formalization, the political support of the government, a private sector committed to accountability, as well as knowledgeable and vibrant civil society organizations to guard the national EITI process on the national level and well-functioning state institutions.

The DRC has a vibrant, but under capacitated civil society, which in many instances has become part of the political establishment and is often driven more by personal ambitions than by the common good. Informal governance structures reign in most parts of the ASM sector and the state's institutions face significant technical and governance challenges. In addition, the high cost of doing business in the DRC currently prevents almost every company from operating accountably. Transparency is widely regarded as a luxury most companies say they can ill afford in the context of a corrupt economic system, where information can easily be deployed as a weapon against competitors.

In the analysis of the DRC's ASM sector and the search for potential avenues for EITI implementation it is also pivotal to look beyond the structures on the national level. Since the first "Kassem report" of the *UN Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth in the Democratic Republic of the Congo* in 2001, most Westerners have settled under the theory that the DRC's neighbors are stealing the resources of the Congo, often with the help of Congolese elites and companies. This over-simplified theory neglects the pivotal role of Western and Eastern companies and their complicity in the process. To date, Western and Eastern governments have not done enough to ensure their multinational companies conduct proper due diligence prior to purchasing and/or brokering these minerals. Companies, both within the DRC and within the neighboring countries, to which a large quantity of minerals continues to be smuggled, find Western and Eastern companies willing to purchase and/or broker ASM production smuggled from the DRC directly and/or the minerals smuggled to, and officially exported from its neighboring countries. This provides a direct disincentive for ASM reform.

The previous two paragraphs have highlighted barriers to EITI implementation that have to be recognized. A realistic chance of successful EITI implementation will therefore largely depend on the progress of the country's general reform process in the wake of the democratic elections of 2006 and on a more responsible conduct of Western and Eastern companies.

It will take a combined effort of government, the private sector, civil society and donors to establish a minimum enabling environment for effective EITI implementation in the DRC's ASM sector. Presently a clearly defined strategy for EITI implementation in the DRC's ASM sector or other countries' ASM sectors does not exist. The focus at this stage therefore has to be to progress a potential EITI implementation into the realms of the achievable by developing a strategy around ASM, without discarding visions for the future. This strategy development process may or may not be geared towards the DRC.

Recommendations

This report highlights key challenges and opportunities for EITI implementation in the DRC's ASM sector, which are briefly introduced in red and green boxes at the end of each headed section. The challenges and opportunities highlighted imply that an EITI implementation in the DRC's ASM sector is difficult, but not impossible to achieve under its present realities.

This report makes the following recommendations to the EITI Secretariat with a more general view to bringing EITI implementation in ASM into the realms of the achievable:

Box 1: Recommendations

1. Cooperate with the World Bank's Communities and Small-Scale Mining Secretariat with a view to establish an **expert group** comprising key representatives of civil society, government, private sector and academia commissioned to develop a strategy for EITI implementation in ASM.
2. Develop a **country-specific and sector-specific implementation strategy**. ASM sectors are heterogeneous in their structure, differing by mineral and geographical area. This renders a blueprint strategy development unfeasible. Particular emphasis should be placed on opportunities on the **sub-national level**.
3. If the implementation strategy is geared towards the DRC, it will be imperative to **address the current governance culture**, which partly reconfirms patrimonialism, yet at the same time includes different competing centers/networks. Implementing initiatives to promote good governance and transparency can only work if the Congolese elites themselves are willing to respect them.
4. Focus the initial strategy development **on the small-scale mining** part of ASM. Some small-scale mining cooperatives and companies have at least basic administrative structures and engage with the state, particularly in the realms of **export charges, tax payments and license fees**.
5. Select a country for **pilot implementation**, which has a **minimum enabling environment** for an EITI process to function. An opportunity that would leverage synergies is to choose a country for pilot implementation that already implements the EITI effectively in other sectors. At the current stage there are countries more ideally suited for implementation than the DRC.
6. Commission further **research** into the mechanics of how to implement the EITI in the ASM sector of that particular country. This should be undertaken with particular respect to potential avenues for **local participation and local ownership**, such as **identifying domestic partners** in civil society, private sector and government institutions

Continues below...

Box 1: Recommendations (continued)

7. In cooperation with donor governments and multi-lateral lending institutions ensure the chosen country provides **adequate political support** to the pilot implementation process.

8. Effective implementation of the EITI and improved governance standards will require **sustained and well-coordinated supporting efforts**. The export group should **continuously monitor** and, possibly through CASM, seek to **evaluate progress** and **develop a strategy for scaling-up** to a globally replicable, but domestically adaptable model.

The EITI – A Brief Introduction

Since its announcement at the World Summit on Sustainable Development in 2002, the EITI has evolved into a globally recognized good governance tool for greater revenue transparency in the extractive industries in resource-rich countries. The Initiative works to build multi-stakeholder partnerships in developing countries in order to increase the accountability of governments and companies through the verification and full publication of company payments and government revenues in the extractive sectors. When transparency and accountability are weak, the extractive industries may contribute to poverty, corruption, and conflict – a phenomenon some describe as the “resource curse”. Good governance is a key to converting large revenues from extractive industries into economic growth and poverty reduction. The EITI is therefore an important step in overcoming this phenomenon.

The DRC’s transitional government committed to the EITI in 2005 to improve the country’s international standing with investors and international financial institutions. The DRC’s national EITI process started its work in 2006, building a tri-sectoral steering committee, supported by a technical secretariat. The national EITI is focused on the industrial mining sector, with the promulgation of the Mining Code as a predictable legal framework and the establishment of the EITI process on the provincial level as its priorities. Progress has been made with the country currently in the process of completing the pre-validation phase of the EITI process, but reports suggest that political buy-in leaves room for improvement. This report suggests that if the country’s general reform process progresses and a minimum enabling environment can be established, the EITI may also have a role to play in the country’s largely informal, albeit employment-intensive ASM sector. As a result of the current governance structure and

governance practices ASM's present contribution to the DRC's formal economic accumulation is negligible. In this regard the EITI will be an important tool to ensure that more ASM revenue flows through official channels and that these revenues will be published, thus providing important information for the Congolese people to hold their government to account, which is a proactive contribution to the DRC's economic recovery.

Terms of Reference and Methodology

The EITI Secretariat has commissioned Nicholas Garrett to produce a report that highlights key challenges and opportunities for EITI implementation in the DRC's ASM sector. The report contributes both to ongoing deliberations on the need for clearer evidence of the benefits of EITI for broader governance reform and to discourses on how to further the implementation of EITI in the mining sector, particularly in mining-dependent countries. From a development perspective, ASM is a complex phenomenon with many pressing issues to consider. This report focuses exclusively on legal, political and economic issues of most pertinence to a potential EITI implementation. Its results are based exclusively on specific primary data collected while researching artisanal cassiterite exploitation in North Kivu province in the Democratic Republic of the Congo (DRC) in 2007. North Kivu is an extreme environment and ASM sectors differ by mineral, but where appropriate, data has been extrapolated to the general. A series of interviews were undertaken with ASM populations, Congolese military, civil society, government agencies, mining companies and representatives of multilateral organizations, to obtain a cross-section of local information on challenges and opportunities. The majority of interviewees agreed to discuss the sector only under condition of anonymity, which is a sensible precaution, given the volatile security situation in North Kivu and the sensitive nature of the subject. Their wish has been duly observed throughout the finalization of this report. **The following pages capture the lessons and suggestions provided by the interviewees.**

ASM in the DRC – Background and Context

The DRC is one of the richest countries in natural mineral resources, but its population subsists on an estimated GDP (PPP) of US\$ 700 per year. The country has reserves in bauxite, bismuth, cadmium, cassiterite (tin ore), coal, cobalt, columbite-tantalum (coltan), copper, diamonds, germanium, gold, iron ore, manganese, pyrochlore, silver, uranium, wolframite (tungsten) and zinc. While the true size of reserves is largely unknown, due to a lack of modern geological surveying, the DRC is estimated to possess, for example, around 35% of the world's cobalt reserves and 25-65% of the world's coltan reserves, stretching into Rwanda and Uganda (*BGR*). In light of these facts it is often disregarded that ASM accounts for 80% to 100% of domestic

mineral production, depending on the mineral. But since ASM is largely part of the DRC's informal economy, its contribution to formal economic accumulation is minimal.

Large-scale industrial mining's (LSM) contribution to the DRC's GDP was only 10% in 2006. In comparison, the state-owned copper producer *Générale des Carrières et des Mines* (Gécamines) alone, accounted for 69% of GDP in 1974. Statistically this equates to an output reduction of around 90% over the period, but in reality, revenues from LSM are also comparatively small, as a result of a significant tax gap. A large statistical anomaly suggests a gap in the amounts of taxes actually received and the amounts, which should have been received. The actual output reduction is therefore less severe, but significant enough to have led to a transition from LSM to ASM over the past three decades.

The ASM to LSM transition and the increasing "tax gap" have their roots in a lack of investment, political interference and mismanagement in the running of the Congolese (then Zaïroise) parastatal companies in the latter decades of the reign of former president Mobutu Sese Seko, as well as widespread corruption. When faced with economic collapse and social instability Mobutu's response was blunt. "This is your home, so fend for yourselves", he advised the country's citizens. The subsequent liberalization of the mining laws in 1982 (Law No. 82/039, November 5 1982), which allowed for minerals to be carried in public, saw a proliferation of ASM throughout the country's mineral rich areas.

The end of the cold war and the subsequent end of the Mobutu era saw the DRC plunge into two successive wars (1996-2003), which rank among the world's deadliest, with up to 4 million deaths of conflict-related causes. The war, fuelled by natural resource exploitation, saw the DRC's ASM sector move into the international spotlight. The *UN Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth in the Democratic Republic of the Congo* uncovered and condemned exploitative systems of natural resource extraction and trafficking in the DRC, operated by foreign armies and private actors, often with the help of the private sector. Numerous studies have since confirmed this interrelation of natural resource extraction and conflict.

During the transitional phase that followed the second Congo war, President Joseph Kabila KABANGE led a transitional government made up of former government and rebel group representatives. The transitional government undertook various initiatives related to the mining sector, which remain of relevance to the ASM sector today. In 2002 the legal basis for the sector was established in the form of the *Mining Code*, written with the help of the World Bank. The *Mining Regulations* followed in 2003 and a *Mining Plan* in 2006. While the feasibility of these

legal instruments remains to be tested, the initiative is laudable.

The transitional period has officially come to an end with the democratic elections of 2006 that saw Joseph Kabila KABANGE confirmed as President. Ever since a profound institutional and organizational change has been underway, both at the national and the provincial level, and most areas of the country have witnessed the advent of peace. In the Kivu provinces the peace process is incomplete and its achievements remain to be consolidated. Here, the fledgling democratic institutions and their newly elected representatives remain in a weak position vis-à-vis entrenched interest groups in statutory and customary spheres. Fighting and insecurity persist in these areas and significant parts of the ASM sector continue to be militarized. Either the Congolese army (e.g. the FARDC's 85th brigade in Mpama/Bisiye in Walikale territory) or different rebel groups (e.g. FDLR in Walikale/Massisi and in South Kivu) are in control. Sporadic fighting over deposits and human rights violations are not uncommon.

Today, no one knows the true extent of the DRC's ASM sector, as global census data is non-existent. Estimates of people working in the sector range between 500.000 and two million. This high number is due to a variety of factors, such as rising global mineral demand and related higher commodity prices; an only slowly progressing domestic economic recovery process and therefore limited income opportunities in the formal sector; both domestic and external migration into a sector that provides an income opportunity of last resort; the end of the conflict in some areas, which has seen many marginal social groups, such as ex-combatants, war-related orphans and IDPs (Internally Displaced People) to seek their luck in the mines; and the continued instability in some areas, which has led many to give up their traditional source of income, such as farming. The list is not exhaustive.

In North Kivu, educated migrants can also be found in the mines, a result of a lack of other economic opportunities and the lure of quick money, sparked by the record Coltan prices of 2000 / 2001. In one mine in North Kivu, 35% of the workers were educated, 10% of which to university degree level. Allowing for five dependents per worker, up to 20% of the DRC's population could be dependent on ASM in their livelihoods. While secondary economies remain underdeveloped, counting in those involved in current supply, trade, control and policing, ASM is clearly a very important part of the DRC's economy. But despite this economic importance, the sector is marred by significant challenges, which are briefly introduced in Box 2 below.

Box 2: Overview: Key Features of ASM in the DRC

1. **Diversity** – ASM in the DRC differs considerably by mineral and province, both with respect to governance, economic, social and livelihood structure as well as degree of vulnerability of the mining populations. The latter is dependent on a host of issues, but most importantly on whether the miners operate in stable, conflict or post-conflict environments within the country and their access to medical services and food markets.
2. **Dynamism** – The sector is dynamic in its proliferation. Frequently shifting alliances, particularly in the mineral exploitation stage, are common.

In its diversity and dynamism, the sector shares a number of common attributes:

3. **Employment** - The sector provides employment opportunities of last resort for both the educated and unskilled, as well as for marginal social groups in an otherwise adverse economic environment. Since the end of the war the number of people involved has further increased largely owing to an influx of, for example, ex-combatants and IDPs.
4. **Economic Informality** – The ASM sector is largely informal and, while significant revenues pass through the sector, they often bypass the state's fiscal apparatus. The sector's contribution to GDP is negligible.
5. **Inefficiency** – Mineral recovery in ASM is comparatively small, but effective enough to deplete good deposits. This is partly due to a lack of knowledge, access to finance, and appropriate mining technology.
6. **Poverty** – The majority of miners subsist on US\$ 1-5 per day. They are often locked in dependency and indebtedness to local traders and strongmen. Some mines operate on a barter economy, which has further detrimental effects on saving and investment, meaning some miners actually lose money. Nevertheless, in many parts of the DRC ASM remains the sole income opportunity and survival strategy.
7. **Exploitation/Corruption** – The sector is being exploited by a corrupt system, transcending modern and customary structures. The miners are subject to illegal taxation, theft and other forms of rent seeking by both civilian and military entities. The amount of collected taxes has further increased since the "official" end of the Second Congolese war, as a result of, for example increased road transport.
8. **Lack of Statutory Law Awareness, Application and Enforcement** – While the sector is meticulously organized on the micro level, the governance is informal, often based on customary rules. There is a lack of awareness and enforcement of statutory law. Provisions made for the sector in the DRC Mining Code, are unrealistic and a hindrance to developmental engagement.
9. **Limited Institutional Capacity** – The Congolese institutions involved in the governance of the ASM sector suffer from limited institutional capacities, which compromises their organizational efficiency and leaves them vulnerable to corruption.

Continues below...

Box 2: Overview: Key Features of ASM in the DRC (continued)

10. **No Accountable Representation** - There is currently no accountable representative body that truly advocates and furthers the rights of the miners on the local level that would also be a credible partner for developmental engagement. Existing bodies, such as cooperatives, are often part of exploitative structures. The state service SAESSCAM is supposed to take on this role, but there are considerable doubts with respect to its operational capacity (see box 6).
11. **Child Labor** – Traditional reasons for child labor in mining, such as their ability to navigate narrow tunnels and cheaper operating costs for the bosses (e.g. lower food consumption than adults) are still cited in the DRC. Many children arrive in the mines as orphans (often HIV/Aids or war-related) or former child-soldiers and/or because they lack other opportunities. Their lack of a formal education means many will find alternative future income opportunities hard to come by.
12. **Social Problems** - ASM is associated with a multitude of social problems, many rooted in the forced migration of ASM populations. They include conflicts with local populations, localized inflation, increased demand on infrastructure and public services (if these exist), pressure on food prices and availability. Others include a lack of gender awareness and violence.
13. **Safety Hazards** – The working conditions in most mines are generally in breach of commonly acceptable labor standards and many, sometimes fatal, injuries and accidents occur regularly.
14. **Health Hazards** – Health hazards result from occupational hazards, poverty, poor sanitation and a lack of access to protection and health support. Examples are a high HIV/Aids prevalence, TB, malaria, cholera, verminosis, dysentery, diarrhea et cetera.
15. **Environmental degradation** – For the ASM sector, subsistence takes precedence over environmental protection. Environmental degradation includes pollution, erosion, deforestation, poaching et cetera.

In light of these realities, many western ASM experts describe the sector as “chaotic”. It is widely accepted that good governance is a precondition for converting mineral resources into economic growth and poverty reduction. However, for natural resource governance approaches to work, any analysis of the current governance structure has to see beyond the seeming chaos. In reality the ASM sector is often meticulously organized on the micro-level, governed by multiple-rule systems transcending statutory and customary spheres. Once the current governance structure of the DRC’s ASM sector is acknowledged and understood, which will no doubt require further intensive research, opportunities for developmental engagement and reform of the sector will open up, including for the EITI.

The following sections introduce key legal, economic and political aspects of the DRC’s ASM sector. Boxes at the end of each section highlight challenges and opportunities for EITI

implementation in the sector.

ASM in the DRC – The Legal Aspects

The DRC's *Mining Code*, adopted in July 2002 and its accompanying *Mining Regulations*, including the *Code de Conduite de l'Exploitant Artisanal* adopted in 2003, provide today's legal basis for both ASM and LSM. Written with the help of the World Bank by the then DRC Ministry of Mines and Hydrocarbons, the *Mining Code* aims to ensure the development of the DRC's mineral resources, largely through the private sector.

While the role of the state in the *Mining Code* is reduced to the promotion and regulation of private mineral exploitation, the *Mining Code* provides a liberal legal basis of industry standard for a concessions system that predominantly seeks to provide a level playing field for industrial mining. Instead of a vigorous market place in mineral rights with low barriers to entry as would be provided, for example, by a claims system, the concession system advantages investors with significant monetary resources over small- and medium-sized operators.

In simple terms, a concession is granted on the basis of an application testing eligibility and concepts, whereas a claim is attributed to the one who claims it in case it is free, with no eligibility check on financial and institutional capacity. In reality both systems should be in place, as for known mineralization it is clear that the state wants to tender it. However, if artisanal miners discover a gold vein in the forest, for example, they are currently unable to claim it. In the interest of the economic development of the DRC they should be able to.

In combination with comparatively little investment into ASM, the concession system impedes the upgrading of artisanal mining activities to small-scale and medium-scale mining. In other words, the DRC's *Mining Code* currently prevents a macro-economically more balanced and productive continuum of mining activities from artisanal to industrial mining.

The *Mining Code* does make provisions for ASM, but these do not signify an intentional departure from previous Congolese legislation, which largely ignored artisanal mining, and they are ignorant of the realities of the ASM sector. The *Mining Code* distinguishes between artisanal mining and small-scale mining, which are also subject to separate fiscal regimes (see *Payments* section).

Small-scale Mining Exploitation is defined as: "Any activity by means of which a person carries

out permanent small-scale exploitation, requiring a minimum amount of fixed installations, by using semi-industrial or industrial processes, after a deposit has been found.”

Artisanal Exploitation is defined as: “Any activity by means of which a person of Congolese nationality carries out extraction and concentration of mineral substances using artisanal tools, methods and processes, within an artisanal exploitation area limited in terms of surface area and depth up to a maximum of thirty meters.”

The code makes provisions for *artisanal mining zones*, permitted where industrial or semi-industrial mining is not feasible. Artisanal miners have the right to exploit these specially designated areas on a renewable one-year basis, if they are listed in their *Artisanal Exploitation Card* (see below). The creation, authorization and closure of artisanal mining zones are subject to an order from the *Ministry of Mines*, based on the recommendation of the *Directorate of Mines* and the *Governor* of the province. Upon the creation of an artisanal mining zone, no commercial mining title can be issued legally over the enclosure. If recommended by the *Direction de Géologie*, artisanal exploitation zones can be closed, so long as the factors on which their creation were originally based have ceased to exist. The artisanal miners are then obliged to vacate the zone within sixty days of notification. In case artisanal miners intend to upgrade to small-scale mining, priority in title allocation is granted to resident mining communities. They are given a thirty-day period to apply for a title after the closure of the artisanal mining zone.

Official *artisanal mining zones* rarely exist in reality, which means artisanal mining is predominantly an illegal activity (see box 7). Even if these zones existed, the simple mechanism to close the zones, illustrated above, and the license duration restriction to one year, imply the *Mining Code* does not provide an adequate legal basis for security of tenure, which undermines investment into ASM. Importantly, it also compounds the empowerment of mining communities by erecting insurmountable barriers to entry into the formal economy. Expecting an artisanal mining community to apply for a mining title within 30 days of closure of an artisanal mining zone is nonsensical, bearing in mind that applications include proof of financial capacities, a feasibility study and an environmental impact assessment.

Many ASM communities and operators have no conception of the *Mining Code* as statutory law and it is rarely enforced. The minority of miners has a mandatory *Carte d'exploitant artisanal* valid for their mining area. The cards are issued against an annual fee (see *Payments*) by the provincial *Division of Mines*. Both the remoteness of many mining areas and the fee impede a proliferation of the cards, which also require compliance with health and safety regulations and

environmental provisions, which are largely unrealistic. Only Congolese nationals “of age” may obtain *artisanal miners’ cards*, which exclude the significant immigrant and youth populations active in artisanal mining.

Minerals can only be transported by individuals with a miners’ or a traders’ card. In North Kivu, the *petits négociants*, who buy cassiterite at the mining sites and sell to *négociants* in larger villages, are often as informal as the miners, as they too lack the required trading license. They tend to escape regulation and often contribute to the exploitation of the miners by paying the miners prices, which do not correspond to the real value of their minerals.

The situation differs where statutory law is enforced, which affects predominantly the *comptoirs*, who work on the important intersection of the formal economy and statutory law on the one side, and the informal ASM exploitation and customary law on the other. Some of these operators comply with all or the majority of requirements in the *Mining Code* and have recently acquired concessions with the help of foreign investment. Instead of imposing the heavier burden of compliance upon the most powerful components in the trading chain (i.e. the *comptoirs*, the international purchasers and the trading companies that supply them, the transport companies, the trading companies and the processors of the ore) and working backwards towards the weakest one (i.e. the artisanal miners), the mining code predominantly creates obligations for the weakest component¹.

In summary, the *Mining Code* is not conducive to the realities of the mining sector. It is therefore merely a parallel rule system, largely ignored by the majority of operators in the ASM sector. The “legal basis” for most ASM communities and operators in North Kivu remains customary law, of which Western experts do not have sufficient knowledge and/or understanding. This has proliferated the notion of a “chaotic” sector, a label, which unhelpfully promotes disengagement with the deeper, customary organizational and institutional structures, which rule the sector in many parts of the DRC and in particular in the Kivus. It also compounds a deeper understanding of how these entities interact with elements of modern organizational and institutional structures of the formal economy. This interaction may, after all, hold the key to a better understanding of, and therefore more efficient engagement with the sector.

¹ Eklund, M. (2007), “The Impact of the Mining Code on Artisanal Mining in the DRC”, *Annex IV of the Phase 1 Report Natural Resources and Trade Flows in the Great Lakes Region*, INICA.

ASM Legal Aspects – Key Challenges for the EITI:

1. The Mining Code is presently a parallel rule system, largely ignored by the majority of operators in the ASM sector. In most locations there is therefore no statutory legal basis for EITI implementation.
2. ASM is ruled by a system of customary rules that differ across contexts and of which Western experts have not sufficient knowledge and/or understanding.
3. The promulgation of the *Mining Code* is a government priority, but the *Mining Code* is not conducive to ASM formalization and investment into the ASM sector.
4. The *Mining Code*'s provisions render almost the entire ASM sector illegal, whilst erecting insurmountable barriers to entry into the formal economy. A formalized sector would aid the EITI's implementation in the realms of payments of license fees, tax payments and export charges. (See *Payments*.)
5. The Mining Code's concession system does not facilitate ASM friendly formalization through upgrading to small- and medium-scale mining. A proliferation of SMEs would, however, facilitate the sector-wide implementation of EITI given their at least minimal, administrative capacity and their base in statutory law.
6. Planning reliability, as provided by applicable statutory law is important to investment decisions. Investment into ASM can aid the upgrading to small-and medium-scale mining and the adherence to statutory law, which would help EITI implementation. In the ASM sector, planning reliability is currently not provided by the *Mining Code*, as it does not guarantee security of tenure.

ASM Legal Aspects – Key Opportunities for the EITI:

1. A realistic modification of the *Mining Code* would provide a clearer legal framework and opportunities for EITI implementation, specifically in the realms of license fees, tax payments and export charges. (See *payments*) This would encourage ASM formalization and investment.
2. Statutory law - and therefore also the *Mining Code* - often applies in larger trading centers, where small-scale mining companies and *comptoirs* are based. The EITI could focus on this part of the sector, in particular with respect to taxes and export charges paid by these entities.

ASM in the DRC – The Economics

(This section is largely based on data of ASM of cassiterite in North Kivu. Please also refer to the separate section on *Payments* further below.)

ASM mineral exploitation and trade vary considerably by mineral and geographical area. Some minerals are of higher macro-economic importance to the country and different potential for formalization of ASM activities is associated with each mineral. Diamonds, Copper and Cobalt have an estimated potential production value of 700 to 900 million US\$ per year. Their industrial exploitation already contributes the largest share to GDP; the ASM share in production is around 80%. In comparison, cassiterite exploitation in North Kivu is 100% artisanal, with exports from Goma valued at around US\$ 115 million on the world market (see box 4).

There is a difference between the economics of exploitation and the economics of trade. Most research has thus far focused on the economics of trade, which largely neglects the economic importance of the exploitation stage. Box 3 on page 23 shows the example of a cassiterite trading chain in North Kivu, which demonstrates that over 30% of the total export value is added in the mine. At the same time, the majority of miners, for example in North Kivu, persist on US\$ 1-5 per day and production costs for the mining site owners are very low at no more than US\$ 1 per miner per day, covering some food expenses only. This hints at an exploitative pattern of mineral exploitation with extreme forms of rent seeking, prior to the mineral entering the official trading chain. These patterns remain under-researched, but, given the significant sums involved, they may go beyond the mere standard pattern of, for example, local military extortion. In many mines it is improbable, but as yet not provable that the significant returns exclusively accrue to whomever is in charge on the ground and their immediate marketing partners. The feedback from most actors suggests that up to 70% of value added in the mine accrues to “big men” in military, business and politics.

The miners are in most cases the victims of exploitative practices, which often take on the form of outright theft of their production, bonded labor or illegal taxes. Many miners and small traders do no longer know, which taxes are legal, and which are not. In addition, the miners are often locked into dependency, indebted to local strongmen or their financiers higher up the trading chain. In the ASM development stage this structure is generally accepted, as it is commonly associated with risk capital. The financiers sustains the ASM during development, without guarantee of future productivity, with expert estimate of costs reaching, for example, up to 15.000 USD over 4 weeks, depending on the mineral. In that respect it is normal that the financiers seek preferential exploitation agreements upon successful discovery of minerals.

However, in mature ASM deposits, dependency, as described above, is just as much a symptom of irregular production volumes, barter economies in some mines, uncompetitive mineral markets in remote locations that translate into low bargaining power for the miners, as well as artificially inflated prices. In summary, the miners are the weakest link, both within the mineral exploitation stage and within the mineral trading chain.

Their vulnerability to exploitation is further increased by the miner's mostly illegal status. Only a very small minority is in possession of a *Carte d'exploitant artisanal* and designated ASM zones do not seem to exist in North Kivu. In some mines, miners have organized into cooperatives, which are, in theory, a means to negotiate more favorable mineral marketing agreements and mine site issues, such as working conditions and security. The cooperatives would, again in theory, also be an opportunity for developmental engagement of the ASM sector. But many cooperatives throughout the DRC, which claim to represent the artisanal miners, are instead known to be part of the exploitative structures of the ASM sector. Some represent vested interests in the economic and/or political spheres and many merely charge the miners illegal taxes without providing a service in return. *CMMK* (Coopérative Minière Madini Kwa Kilimo) and *EMAK* (Exploitants Mineurs Artisanaux du Katanga) are well-known examples, the cooperative *COMIMPA* (Coopérative Minière Mpama Bisiye) is a new example from North Kivu that is introduced in box 7.

The economics of trade differs from the economics of exploitation. A standard pattern of the trade in ASM products in North Kivu is that middlemen (*petits négociants* and/or *négociants*) buy the product in the mines and organize transport to trading centers, where *comptoirs* buy the mineral, process it minimally and finally export it. The latter stage is crucial. Since the first "Kassem report" of the *UN Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth in the Democratic Republic of the Congo* in 2001, most Westerners have settled under the theory that the DRC's neighbors are stealing the resources of the Congo; a fact that will be introduced below. This over-simplified theory, however, neglects the pivotal role of Western and Eastern companies and their complicity in the process. To date, Western governments have not done enough to ensure their multinational companies conduct proper due diligence prior to purchasing and/or brokering these minerals.

The ownership structure in the trading chain can be diverse and it is often unclear, who owns the mineral at what stage. *Coopératives*, *petit négociants*, *négociants* and *petits comptoirs*, as well as *comptoirs* and small-scale mining companies all have a presence in the sector. The trading chain at times mirrors the exploitative structure of the exploitation stage. Literally all entities can

be debt-bonded or pre-financed by entities higher up in the trading chain. Liberalized and competitive mineral markets are non-existent outside the trading centers, which seriously compounds the developmental potential of ASM. There can be competition between the *comptoirs* in the trading centers, but given widespread pre-financing of *négoçiants* and therefore steady supply streams, this is rarely the case.

Most licensed *comptoirs* and *small-scale mining companies* continue to engage in fraudulent practices, such as under-declaring (i.e. declaring 10 tons, but exporting 20 tons) or wrongly declaring (i.e. declaring for example wolframite as cassiterite) their exports. However, this happens on a significantly lower scale than in recent history. As highlighted further below, fraudulent exports are at least as much a necessity for business survival, as it is a means to increase profits. A minority of unofficial *comptoirs* and other smaller operators continue to smuggle cassiterite across the countries' porous borders. The general feedback, both from the private sector and state officials, was that it is currently not possible to conduct an "honest" business within the institutional framework of North Kivu's mineral sector.

The Governor of North Kivu, Julien PALUKU, of the RCD K-ML, who has a formidable track record from his time as Mayor of Beni and Lubero, recently introduced technical measures to curb overt smuggling, which include an earlier, 6pm border closure, road blocs and physical slip-road closures. The measures have had a positive effect on official export statistics, but they do not affect the larger amount that leaves under- or wrongly declared. For the purpose of illustration, total official cassiterite exports through Goma from January 2007 until May 2007 were 3.023 tons. This implies within the first five months of 2007, total officially recorded exports of 2006, 2.904 tons, have already been surpassed (*Division de Mines*). The validity of official export statistics cannot be guaranteed, but there seems to be a positive trend.

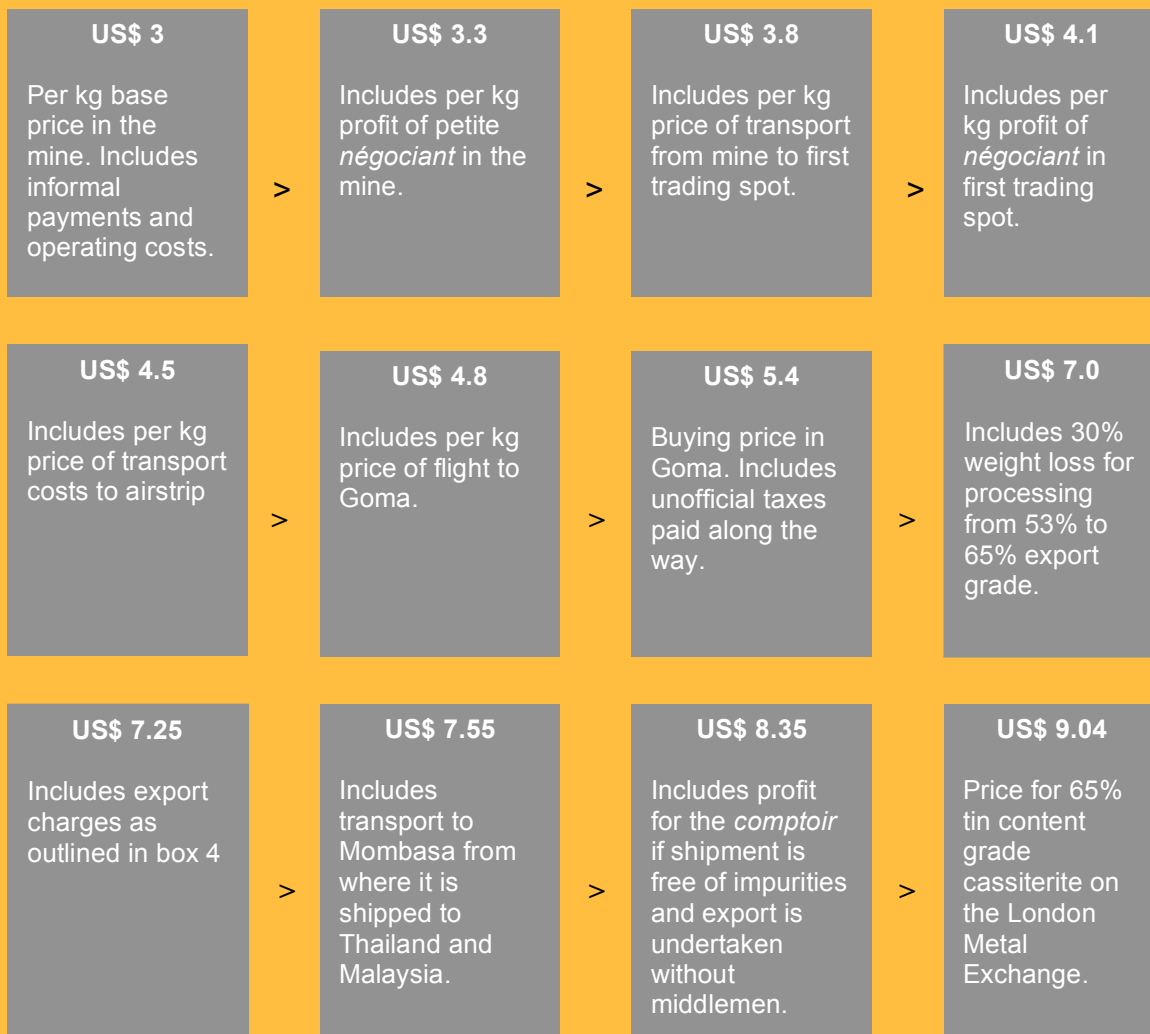
In the realms of exports, the insufficient capacity of the customs authority *OFIDA* (L'Office des Douanes et Accises) to control export shipments is notable and not helped by the fact that a large share of exports continues to leave the DRC in bags, which are harder to control than the internationally used drums. Estimates of the amount smuggled vary between 30% and 60% of total production, depending on the mineral, but exact figures are hard to come by. Please refer to box 4 for an example of production and export figures for cassiterite in North Kivu.

Until earlier this year much cassiterite used to be exported in unprocessed form, with no value being added on the territory of the DRC. This practice led to an export stop in April 2007 and a review of export practices by the *Ministry of Mines*. Export licenses were issued to selected

comptoirs, who could provide evidence of minimum processing capacities. Some interviewees allege the review of export practices was a politically motivated move by the government to reduce competition and simultaneously opening up opportunities to demand bribes and access to the profits of the selected *comptoirs*.

Box 3: Cassiterite Value Chain in North Kivu (June 2007):

The following diagram illustrates a sample calculation of the domestic value chain for 53% tin content “red” cassiterite extracted at the Mpama/Bisiye mine in North Kivu.



Profit margins are relatively evenly spread across the trading chain. Factoring volumes, significant profits are made at the export stage and internationally. Those, who control those, who often militarily control the mining activities, also reap high individual profits.

This could however not be verified and, despite temporary, detrimental economic and social effects, as the market was not given enough time to compensate, the author judges the review a positive development. In response to the export stop, financially potent *comptoirs* have undertaken investment in their minimum processing facilities and many smaller *comptoirs* have accelerated their search for foreign investment to upgrade their facilities. Those *comptoirs* not considered for an official export license have either closed down or continued to smuggle or, at times, struck arrangements with official *comptoirs* to sell their stocks through them.

Box 4: Production, Export Volumes and Export Values for Cassiterite in North Kivu

The provincial *Division of Mines* has officially recorded 3.023 tons of cassiterite exported from Goma in the first five months of 2007. Presuming official export quantities remain stable throughout the year, they will reach 7.250 tons at the end of the year.

The main cassiterite production area is Walikale, which is estimated to account for up to 70% of cassiterite exported from Goma. The most important contributor is the Mpama/Bisiye mine, where research for this report was undertaken. Minerals leave Walikale by plane and by truck for Goma (and some for Kisangani). The fluctuating amount transported by road is small. It is therefore excluded from the following calculation for the sake of simplicity.

On a normal day, six planes, transporting two tons of around 50% tin-content grade cassiterite each, fly four rotations. This means 48 tons arrive in Goma per day from Walikale, which is 17,520 tons per year. Factoring fluctuations in output it is prudent to deduct 20% of that sum, which leaves 14,016 tons per year with a world market value of 88.7 million if factoring 30% weight loss to obtain a 65% tin export grade. The UN estimates only US\$ 800.000 actually stays in the local economy of Walikale territory (UN Panel of Experts, 2007).

Factoring cassiterite arriving in Goma from other parts of Eastern DRC it is prudent to add another 30% on top of the 14,016 arriving from Walikale, which leaves 18,220.8. Official *comptoirs* process the cassiterite up to an export grade of 65% tin content. The *comptoirs* estimate 30% of weight is lost in the process. This leaves a net tonnage of 12,754.56 of export grade cassiterite going through Goma by plane only. The difference between officially recorded exports and this net tonnage of export grade cassiterite available is 5,504.56 tons or 43%. This suggests a world market value of export grade cassiterite going through Goma of US\$ 115.3 million.

The *comptoirs* explain continued fraudulent exports with unfavorable export charges in the DRC that are – depending on the mineral - significantly higher than in, for example, neighboring Rwanda. Another reason cited is the significant amounts in bribes the Congolese authorities demand for official exports to pass the Congolese border points. As one *comptoir* put it, “even when all documents are in order, you still have to pay bribes for the shipment to pass”.

State officials remain irregularly and lowly paid and many therefore rely on additional income from bribes to subsist. In the DRC, patronage networks continue to provide social cohesion and economic opportunity, but they also create difficulties for those in official employment, who have to take care of their extended circle of relatives. One *OFIDA* employee, said, “my income is high enough for myself, but because my relatives know that I have an income, they demand that I take care of them too. So I have to generate more”. Many interviewees acknowledged that their meager or non-existent wages are a result of a lack of a fiscal base owing to widespread economic informality and/or corruption in the first place.

Over the past year, many smaller high-risk companies have acquired mining concessions, some of which presently contain artisanal mining communities. This is possible because there are presently no earmarked artisanal mining zones (*zone d'exploitation artisanal*) as stipulated in the *Mining Code*, which would prevent the titles from being granted to commercial operators, unless the *Division of Mines*, pending approval from the Provincial Governor, closes the *zone d'exploitation artisanal* beforehand. There are two types of high-risk players, the *comptoirs* and smaller international mining companies. These companies are influential politically as they are important economic operators. Some, but not all, are linked with political and/or military interests. Please refer to box 7.

Most of the *comptoirs*, who have acquired concessions, have done so with foreign financial backing, predominantly from Europe, Canada, China, South Africa and Rwanda. The need for foreign investment is partly a symptom of the concession system, as stipulated in the *Mining Code*, which advantages investors with significant monetary resources over small- and medium-sized companies. Some of these companies state their aim as to scale up to small- or medium-scale mining in the medium term, pending satisfactory geological surveys, stabilization of the political situation and improvements in physical infrastructure, such as the erratic electricity grid. With increasing foreign financial backing and general foreign interest in the sector, some small-scale mining companies and *comptoirs* have expressed an interest in engaging with the idea of improving corporate governance.

The potential macro-economic contribution of these small-scale mining companies could be substantial, as they would help to establish an economically healthy continuum of company sizes from ASM to LSM. This is particularly true as LSM mainly contributes to foreign exchange earnings, while its proceeds transferred abroad are lost to domestic development efforts. In light of forthcoming investment into LSM and some foreign investment into ASM, mineral production levels are set to increase in the future. With an increase in LSM production levels, the percentage share of ASM in overall production value will decrease, but artisanal production volumes will remain stable or increase. In other words, ASM is there to stay.

ASM Economics – Key Challenges for the EITI

1. Those who control the mines often make large profits before the minerals enter the official trading chain, in environments where statutory law seldom applies. This means a large share of revenue will elude the EITI, which can engage the sector in the realms of license fees, tax payments and export charges, where they are paid through official channels.
2. The EITI has not yet developed an international benchmark for what sized entities have to report. This is required to build a consistent policy around how to engage with cooperatives and small-scale mining companies.
3. EITI engagement with small-scale mining companies and *comptoirs* seems most plausible, but their knowledge of – and will to implement - revenue transparency is low. See *payments*.
4. Widespread corruption implies there is a lack of political will within the state apparatus to implement revenue transparency.
5. Foreign companies disincentivize national operators to support ASM reform in continuing to buy minerals without conducting proper due diligence

ASM Economics – Key Opportunities for the EITI

1. It is likely that improved transparency has knock-on effects leading in this case also to the possible improvement at the mining level.

Continues below...

ASM Economics – Key Opportunities for the EITI (continued)

2. Small-scale mining companies and *comptoirs* provide the EITI with a comparatively easier engagement platform than the largely irregular artisanal miners and/or cooperatives. With ASM formalization attempts and more foreign investment into ASM, their numbers are expected to increase in the future. There is a level of business administration present in small-scale mining companies and they tend to pay export charges and taxes.
3. With foreign financial backing, some small-scale mining companies and *comptoirs* have expressed an interest in engaging with the idea of improving corporate governance, which implies the EITI may find a receptive audience, if its merits are deemed appropriate by the sector.
4. Given mineral-specific ASM structures and buying networks with varying degrees of informality, a mineral-specific EITI implementation is highly desirable and a possibility that requires further research.

ASM in the DRC – Payments

The *Mining Code* and the accompanying *Mining Regulations* define what the ASM sector is obliged to pay the government in license fees, tax payments and export charges. The *Mining Code* sets out separate payment regimes for artisanal mining and for small-scale mining. Small-scale mining is subject to a flat rate tax of 10% of turnover. The flat rate exempts small-scale mining operations from the payment of mining royalties, taxes on movables, taxes on profits, the exceptional tax on expatriates' remuneration and domestic turnover tax. It is due at the first point of sale.

Artisanal mining is subject to a separate fiscal and customs regime, separating payments by the *creuseurs* / miners (remuneration tax on the artisanal miner's card / entrance fees / import charges); the *négoçiants* / middlemen (remuneration tax on the middlemen's card); the *comptoirs* / exporters (license payments / export charges / intermediary services / social benefit tax). The minority of miners carries a *carte d'exploitant artisanal*, charged at different prices depending on location. Given the meager income of the artisanal miners it is highly questionable to tax individual miners, never mind to collect fines of between US\$ 2.000 and US\$ 250.000 for

the illegality of their activity. Please also refer to the section *ASM in the DRC – The Legal Framework*. The principal objection the miners voiced to tax payments is that there would not be any revenue streams flowing back to their mining community. The miners seemed disillusioned about the prospect of investment into their activity or the dilapidated infrastructure used for mineral exploitation and trade (see *opportunities* below).

The *comptoirs* are liable to pay charges for official exports, which currently differ by mineral and province. North Kivu, for example, works on a per kilogram cassiterite base price of US\$ 2.9 to calculate export charges, whereas conflicting reports of a base price rise above US\$ 4 were coming from South Kivu at the time of research. Please refer to box 5 for a calculation of export charges that accrue to: OFIDA (*L'Office des Douanes et Accises*); CEEC (*Centre d'évaluation, d'expertise et certification des substances minérales précieuses et semi-précieuses*); OCC (*Office Congolais de Contrôle*); CTCPM (*Cellule Technique de Coordination et de Planification Minière*) and DGRAD (*Direction Générale des Recettes Administratives*).

Several agencies are responsible for assessing and collecting some portion of the taxes generated by the mining sector.

- Central Bank (*BCC*), is the central repository of all payments to the government treasury;
- *OFIDA* collects customs taxes, duties, export taxes, and service rendered fees on exports
- *DGRAD* collects essentially the mining royalties, fees assessed by *the Ministry of Mines* for various licenses and authorizations, and the surface rents assessed by the *Mining Cadastre* (*CAMI*) for issuance and renewal of mineral rights
- *Direction Générale des Impôts (DGI)*, is responsible for assessment and administration of taxes on profits, dividends, value added, and other taxes.

The revenue collection capacities of the provincial authorities remain low. It therefore remains to be seen, whether political decentralization, as stipulated in the DRC's new constitution will be a success. Political decentralization will entail fiscal decentralization, with 40% of all collected revenue earmarked to flow back to the provincial administrations (*recettes a caractere national*). This means the different provinces will be confronted with a sudden increase in fiscal revenue. Presently the provincial institutions do not seem to have the capacities to accommodate this revenue stream, which leaves them vulnerable to corruption. Fiscal decentralization could also generate social fault lines if islands of prosperity and social investment are created that attract others, who too intend to benefit.

Box 5: Export Charges for Cassiterite in North Kivu:

North Kivu's authorities work with a base price of US\$ 2.9/kg to calculate export charges. For a typical 20 tons shipment of 65% tin content grade, valued at US\$ 58,000, the following charges apply:

Tax to be paid to OFIDA: 5% = US\$ 2,900

Tax to be paid to OCC: 0.8% = US\$ 464 + US\$ 140 laboratory charges = US\$ 604

Tax to be paid to CEEC: US\$ 58,000 x 1% x 65% + US\$ 100 = US\$ 477

CTPCM Tax: 0.2% = US\$ 116

Provincial Tax: 1% = US\$ 580

DGRAD Tax: US\$ 58,000 x 7% x 10% = US\$ 406

Total: US\$ 5083

At a projected official export level of 7,250 tons for 2007 (See box 4) and a constant base price of US\$ 2.9/kg, the yearly revenue in export charges amount to US\$ 1.843 million.

The largely dysfunctional banking system adds a further challenge for security and economic recovery and regularization of the sector. Many people keep cash in their homes, which is an incentive for theft and ransoming. The reestablishment of the domestic banking sector and the restoration of confidence in the sector is likely to be a gradual process. Traders tend to rely on parallel and informal sector structures and the larger ones tend to bank outside the country. Nonetheless the lack of access to credit to purchase minerals and other products means that neighboring and foreign traders have a definite advantage and are often sought as partners. There are some private banks, such as *BANCOR*, who provide their services to business from comptoirs and small-scale mining companies. Investors are reluctant to use the banking system as the "Tiers payant" legislation allows people who claim you owe money to seize funds, so long as they have the approval of an administrative official; court proceedings are unnecessary. This is a huge vulnerability and disincentive for using the banking system. It also means that banks are extremely cautious about who they choose as clients².

The trade in ASM production generates large revenue streams, with cassiterite exports from

² Initiative for Central Africa (INICA) (2007), "*Natural Resources and Trade Flows in the Great Lakes Region*", forthcoming

North Kivu worth around US\$ 115 million on the world market. Yet the fiscal contribution of these revenue streams to GDP is negligible. Many ascribe this fact to economic informality, institutional incapacity, fraudulent exports, extortion and corruption. This is particularly true for export charges. On the local level, however, the largest part of taxes and licenses outlined in the *Mining Code* is not collected because the *Mining Code*, as statutory law, is currently not enforced. The majority of miners and many *négoçiants* are not aware of it and, at least for the miners, the provisions of the *Mining Code* are outright inappropriate in light of their meager income and the remoteness of their workplaces. Instead, taxes and profits continue to be collected by customary and traditional authorities, such as landowners and traditional chiefs, as well as unsavory, exploitative elements, such as mafia networks and armed groups and those who control the mafia networks and armed groups.

The Mpama/Bisiye cassiterite mine serves as an example. In Mpama/Bisiye the FARDC's non-integrated 85th brigade has a firm grip on the mine and the trade of goods and minerals coming in and out. Outside the tunnels the Congolese Army's 85th brigade preys on the miners, frequently employing its "Salongo" system of bonded labor, forcing the miners to surrender their production. While a small number of soldiers have a permanent presence at the mine, during "Salongo" many more appear in groups under orders of their commanders to confiscate a portion of the mine's production. If the miners are caught trying to hide their production, they are often arbitrarily arrested.

The FARDC's 85th brigade has until very recently been cooperating in the marketing of cassiterite with the *Bangandula Mining Group* (G.M.B.) based in Goma (see box 7). Their partnership has generated large sums in export sales, further supplemented by illegal cash and mineral taxes extorted from the population at impromptu checkpoints on the routes in and out of Mpama/Bisiye, as well as on the Walikale – Goma road and the local airstrip, Kilambo. An unpublished provincial level police intelligence report, seen by the author, values this "tax collection" at around CFR 175.000.000 or US\$ 350.000 per month. *G.M.B.* denies the allegations.

ASM Payments – Key Challenges for the EITI

1. Elites are profiting substantially from the current payment structure. EITI implementation would run counter to their profit interests.

Continues below...

ASM Payments – Key Challenges for the EITI (continued)

2. The sheer number of individual operators makes it impractical to implement the EITI with regard to individual's payments.
3. Small-scale mining companies and *comptoirs* do not yet have the capacities to adhere to the EITI process, for example, the knowledge of how to fill in templates.
4. High-risk players have mentioned that it would be important that disclosure of their company data would be aggregated to safeguard company secrets vis-à-vis their competitors. The EITI Draft Source Book allows for this decision to be made nationally. Aggregation would aid a broader acceptance of EITI among high-risk players, but disaggregated data is required if discrepancies and inconsistencies shall be dealt with, which only works at the disaggregated level.
5. There are currently no incentives for mining communities, companies and civil society to put its resources towards EITI implementation without a link to end-usage of revenue generated.
6. Fiscal decentralization means less capacitated, provincial-level institutions have to receive, manage and expend revenues. This is a challenge for a provincial level EITI approach. See *opportunities* below.
7. Fiscal decentralization could generate social fault lines if islands of prosperity and social investment are created that attract others, who also intend to benefit.

ASM Payments – Key Opportunities for the EITI

1. Small-scale mining companies and *comptoirs* have at list minimum administrative capacities. For EITI implementation these require expansion.

Continues below...

ASM Payments – Key Opportunities for the EITI (continued)

2. Small-scale mining companies and *comptoirs* pay export charges, when officially exporting. Currently this provides a more realistic chance for engagement than tax payments and license fees.
3. With fiscal decentralization, provincial level revenue transparency is an opportunity. This is where social conflict is most likely to be generated and where EITI's contribution to broader governance reform would bring about the greatest tangible benefit.
4. Small-scale mining companies and *comptoirs* have at list minimum administrative capacities. For EITI implementation these require expansion.
5. Social investment funds, sourced by mining revenue could be integrated into an EITI implementation strategy, which would link revenue generated to specific end usage, directly benefiting ASM communities. This would incentivize ASM communities, cooperatives, small-scale mining companies and domestic civil society to support the process.
6. To integrate a possible future EITI implementation strategy in early stage capacity building initiatives for provincial / national state institutions involved in the collection of taxes, licenses and export revenue, such as *SAESSCAM, CEEC and OFIDA*.

ASM in the DRC – Governance

Since King Leopold of Belgium's time, the DRC's natural resource exploitation structure has always been an exploitative one. In recent years and particularly during the two civil wars, the "resource curse" hypothesis has almost automatically become associated with the country's natural resource sector. To speak of a "resource curse" in this context is debatable, but there were visible links between natural resource exploitation and plundering and looting, criminal cartels, racketeering, insecurity, violence and human rights abuses. As mentioned in the introduction to this report, during the war foreign armies and private actors operated exploitative

systems of natural resource exploitation and trafficking in the DRC, often with the help of the private sector. These are well documented by numerous academic studies, the reports of the *UN Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth in the Democratic Republic of the Congo* and NGO reports. However, a negative side effect of some of these reports and particularly of the first “Kassem report” of the *UN Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth in the Democratic Republic of the Congo* in 2001, is that most Westerners have settled under the theory that the DRC’s neighbors are stealing the resources of the Congo, often with the help of Congolese elites and companies. This over-simplified theory neglects the pivotal role of Western and Eastern companies and their complicity in the process. To date, Western and Eastern governments have not done enough to ensure their multinational companies conduct proper due diligence prior to purchasing and/or brokering these minerals. Companies, both within the DRC and within the neighboring countries, to which a large quantity of minerals continues to be smuggled, find Western and Eastern companies willing to purchase and/or broker ASM production smuggled from the DRC directly and/or the minerals smuggled to, and officially exported from its neighboring countries.

The democratic elections of 2006 saw Joseph Kabila KABANGE confirmed as President. The progress the central government has made to date in its sporadic attempts to formalize the ASM sector is commonly described as slow and facing significant technical, financial, social, structural and policy challenges. On the one hand, this notion raises valid points and hints at how difficult a task ASM formalization is. On the other hand it often neglects that there are many other urgent issues for the government to deal with, such as humanitarian crises, military integration and continued fighting, as well as issues related to the LSM sector, such as the review of mining contracts entered into during the war, as urged by the Lutundula commission.

Today, the institutional infrastructure responsible for the governance of the ASM sector comprises of a number of agencies and departments, such as:

- The **Ministry of Planning**, which has drafted the Mining Plan of 2006.
- The **Ministry of Mines** (*Ministère des Mines*) is the principal central government institution. Minister of Mines, Martin Kabwelulu LABILO and Vice-Minister of Mines, Victor Kasongo SHOMARY currently head it. On the provincial level the Ministry of Mines is represented by the **Directorate of Mines** (*Division de Mines*), which works in cooperation with the **Geology Directorate**.
- The **Mining Cadastre** (*Cadastre Minier*) provides administrative and technical support to

the mining sector. It deals with matters such as the record of prospecting certificates, miners' rights, and concession requests.

- The **CEEC** (*Centre d'Evaluation, d'Expertise et de Certification*) evaluates and appraises precious/semi-precious minerals prior to export.
- The **OCC** (*Office Congolais de Contrôle*) controls the quality and quantity of products imported to and exported from the DRC.
- **SAESSCAM** (*Service d'Assistance et d'Encadrement du Small Scale Mining*) – please refer to box 6.

There have recently been reports of formalization attempts that saw successful coordination between the Ministry of Mines, mining companies, ASM communities and SAESSCAM. Please also refer to Box 6. This is a positive trend that demands international recognition and it shows that the government can act when incentivized. In North Kivu, SAESSCAM is a key institution behind the ongoing attempt to formalize mining activities in the province's principal cassiterite mine, Mpama/Bisiye, which today remains fully controlled by the FARDC's non-integrated 85th Maï-Maï brigade. See box 7.

Despite the positive news, there are significant drawbacks to formalization in its current guise. The capacities of the state's institutions to fulfill their tasks of assisting, monitoring, regulating and policing remains low, which results in erratic formalization attempts that open up avenues for entrenched interests and elites, such as mining companies, politicians, or military personnel to hijack the process for personal advantage. It is not uncommon for these individuals and/or entities to deliberately misinform, double-cross, or co-opt the authorities with the aim to attain a profitable position during and after the formalization process.

This process is not only related to a lack of expertise, as some experts suggest, but also a lack of resources, both human and financial, as well as a lack of knowledge of the local micro dynamics, both in the mines and the provincial capitals, where many decisions are taken. In North Kivu in particular, the fledgling democratic institutions and their newly elected representatives remain in a weak position vis-à-vis entrenched interest groups. Some are aligned with the RCD-Goma rebel group and subsequent political party, which used to rule over North Kivu until 2006, having had a parallel administrative structure built up during the war that was subsequently dismantled.

Another complicating factor is that many mining sites feature complex authority structures in traditional and customary spheres, resulting in a proliferation of actors in political, legal, security and administrative structures, claiming legitimacy to govern the mining sites. It is not always

clear, who the relevant and legitimate representative bodies are, be it in statutory or customary spheres. This can compound an important participatory element in the formalization process, as the miners are seldom represented democratically. It follows that the formalization process in North Kivu does not only have to deal with customary law and its institutions, as in the other provinces; it also has to take into account the remnants of the parallel statutory law from RCD-Goma times. The latter is particularly pertinent when settling disputes over mining rights that were granted during the reign of the RCD-Goma. In essence and with respect to ASM formalization, the Congolese authorities are adopting the rhetoric of the international community, but positive results on the ground will be difficult to achieve with this complex web of rules, institutions, and interests that constitutes the current governance structure.

BOX 6: SAESSCAM

SAESSCAM (Service d'assistance et d'encadrement du small-scale mining) is the Congolese state's technical service for the formalization of the ASM sector. *SAESSCAM* also serves an extension service provider to the sector, providing assistance in law awareness, training in mining techniques, cooperative formation, health and safety advice, social services and numerous other tasks. *SAESSCAM* operates a number of antenna offices in mining regions and currently has 830 staff. In theory a *SAESSCAM* representative is to oversee the trading chain and record keeping at each ASM site. In reality this is not yet the case. There are reports of *SAESSCAM* undertaking work, such as organizing training sessions or generating census data. This hints at the fact that *SAESSCAM* is in the process of reaching minimal operational capacity in a number of strategic areas, which is a positive development. According to *Coordonnateur Général de SAESSCAM*, Itheta MUSOMBO, the service has been allocated a budget of US\$ 5 million in the 2007 budget. Whether this is sufficient to achieve countrywide operational efficiency remains to be seen. In most areas the institution is clearly overwhelmed by the sheer magnitude of its elaborate mandate. *SAESSCAM* requires expert support and managerial training to sensitize its staff to the realities, constraints and challenges of ASM. Capacity building and payment of its staff may also have a positive effect on the widespread accusations of corruption, leveled against the institution by artisanal mining communities. If *SAESSCAM* becomes more accountable and transparent in its operations and improves its capacity, it could become an important partnering institution for ASM assistance programs, particularly if it has functioning representations on the local level, which could facilitate the formation of, for example, cooperatives.

The situation is further exacerbated by the ongoing conflict in the province. Fighting and insecurity persist in North Kivu today and significant parts of the ASM sector continue to be militarized, controlled by the FARDC (e.g. 85th brigade in Mpama/Bisiye in Walikale territory), different rebel groups (e.g. FDLR / Mai-Mai in the Kahuzi Biega National Park in neighboring South Kivu province) or marauding ex-combatants.

BOX 7: Case: Formalization of Mpama/Bisiye:

The Mpama/Bisiye cassiterite mine in Walikale territory in North Kivu serves as an example for a recent ASM formalization attempt. The Mpama/Bisiye mine has been artisanally exploited since 2002. During *RCD-Goma* times, *G.M.B.* (Bangandula Mining Group) had signed a *contrat d'amodiation* over a number of cassiterite concessions with *SAKIMA*, the successor of former parastatal company *SOMINKI*. *G.M.B.* was under the impression that Mpama/Bisiye formed part of *SAKIMA* concession PE75. With the help of the FARDC non-integrated 85th brigade stationed in Walikale territory, *G.M.B.* took charge of the mine and subsequently proceeded to charge both the population and the miners in and around Mpama/Bisiye illegal taxes. In a contract signed on 28 August 2006 with Dieudonne Tshishiku MUTOKA, Administrator of the Walikale territory the Administrator commits to supporting and ensuring the security of *G.M.B.* In exchange for the security services provided by the Administrator, the company guaranteed Mr. Mutoka 10 per cent of the weekly production of the Bisiye mine, US\$ 0.05 per kilogram of all cassiterite extracted by the company in the mine and 50 % of the receipts generated at the intermediary cassiterite selling stations in the territory (UN Panel of Experts). The only possible provider of security in the area allied with the Administrator is the 85th Brigade. It was subsequently established that Mpama/Bisiye is in fact situated outside of *SAKIMA* concession PE75. With this knowledge the Goma based *comptoir Mining and Processing Congo* (*M.P.C.*) registered the Mpama/Bisiye mine with *CAMI*. In September 2006 a *Permit de Recherche* was awarded to *M.P.C.* *M.P.C.* is Mpama/Bisiye's legitimate concessionaire and it aspires to industrialize parts of Mpama/Bisiye, pending satisfactory results of a geological survey, a stabilized political situation and a solution to the lack of electricity in the mine and territory. *M.P.C.* has also made an approach to *SAESSCAM* to fund a social investment plan through the institution for the resident artisanal mining population. *M.P.C.* subsequently found itself embroiled in conflict with *G.M.B.* over the concession, culminating in an assassination attempt on *M.P.C.* on their first visit to Bisiye in October 2006, during which one employee was wounded. In February 2007 the mine was declared unsuitable for artisanal exploitation, by the provincial *Division de Mines*, as it breaches health and safety regulations stipulated in the *Mining Code*. With no resort to statutory legal means to win the Mpama/Bisiye concession, *G.M.B.* proceeded with the establishment of the cooperative *COMIMPA* (Cooperative Minière de Mpama/Bisiye), which is supposed to represent the resident artisanal miners.

Continues below...

BOX 7: Case: Formalization of Mpama/Bisiye Mine (continued):

A review of the 22 names listed as founders of *COMIMPA*, however, reveals that 11 are also shareholders of *G.M.B.* The dominance of *G.M.B.* is further revealed given that 10 GMB shareholders signed the statutes of *COMIMPA* compared to only 5 non-shareholders. In a twist of events and under pressure from the *Ministry of Mines, M.P.C.* subsequently gave in to a compromise that allowed for the establishment of *COMIMPA* in Mpama/Bisiye for the duration of *M.P.C.*'s *Permit de Recherche*. *SAESSCAM* was part of these negotiations and was supposed to oversee the installation of *COMIMPA* in Mpama/Bisiye. In the mine, the mining population was vigorously opposed to *COMIMPA*, as it was aware of the fact that *COMIMPA* in effect represented *G.M.B.* and had close ties to the resident 85th brigade. The author witnessed this during the installation ceremony in the mine. The result of the deal would have been that the legitimate concessionaire is undermined, while the owners and financial backers of *COMIMPA*, who have exploited the miners of Mpama/Bisiye for months, have attained a legal revenue stream. Today the formalization has stalled with the 85th brigade cementing its illegal, but firm grip on the mine.

The DRC's provinces differ by quality of governance, structure of their ASM sectors and institutional capacities. Many of the issues introduced above merely apply to North Kivu, or occur in a less severe or different format in other provinces. A research project across provinces, exclusively focused on the governance of ASM exploitation would be helpful in gaining a deeper understanding of governance patterns on the local level and open up further opportunities for engagement. This could have a similar format to what the multi-donor research project *Natural Resources Trade Flow Patterns in the Great Lakes region* is currently attempting in the realms of trade. Results would be particularly pertinent, as the DRC's new constitution stipulates a federal structure, as opposed to the traditional centralistic system. Democratically elected provincial parliaments have elected provincial Governors since the democratic elections in 2006. The decentralization law, which has yet to pass congress, will increase the responsibility of the provincial administrations, particularly with respect to the mining sector. See *Payments* section. Today, the provincial level institutions face the same or worse capacity constraints as the central government's institutions above.

But there are also positive aspects in the current governance regime. National civil society is very active and could be well positioned to contribute to the governance of the mining sector. For the moment, however, it remains under capacitated, in many instances captured by elites and is often driven more by personal ambitions than by the common good. See also, *ASM &*

Development Assistance. Presently there is not a lack of interest, but a lack of knowledge, freedom, capacity and information for civil society to participate meaningfully in natural resource governance.

ASM Governance – Key Challenges for the EITI

1. Truly democratic bodies, such as cooperatives or associations, representing the miners could not be identified on the local level. Cooperatives identified were largely part of ASM's exploitative structure. For the EITI it would be easier to engage with a (non-exploitative) cooperative or association than with individual miners, while such a body would also provide a participatory element.
2. ASM's largely irregular ownership structure makes EITI implementation challenging from a trust-building perspective. Actors are deeply suspicious of each other and in the present business environment the general feedback was that they prefer their competitors not to know what they pay the government.
3. The capacity of state institutions to take an effective and accountable part in the EITI process is low, particularly on the provincial level. The coordination aspect of an EITI process involves building trust among companies, cooperatives and civil society representatives, but also mediating the political interests of the Central Bank, the Ministry of Finance, the Ministry of Mines, the Ministry of Planning, and the provincial level institutions. It is a challenging political task to balance all of these interests, not to mention the technical aspects involved in gathering and reporting on the data.
4. There are "spoilers", in modern, traditional and customary spheres, capable of, or able to manipulate the derailing of EITI implementation. EITI implementation would run contrary to the interests of elements that profit illegally in the current governance structure. In interviews, such "spoilers" have, for example, made clear that they regard the EITI as a Northern imposition and are therefore reluctant to cooperate or contribute.
5. Entrenched political interests currently competing for stakes in the new democratic institutional environment translate into a scarcity of unbiased information in the public domain, which can have adverse effects on information gathering and political support for EITI implementation.

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ASM Governance – Key Challenges for the EITI (continued)

6. CSO participation is paramount for an EITI strategy towards ASM. National CSOs emphasized the need for greater levels of political, technical and financial support as crucial for them to understand the issues related to revenue flows better and to participate in EITI implementation.
7. The central government's political support for EITI implementation is critical, just as its role in the EITI process is important. Presently there seem to be a lack of incentives and rewards to get the attention and political will of top government officials to rally behind EITI.
8. Western and Eastern governments are not doing enough to ensure their companies are conducting proper due diligence prior to engaging in business transactions in the DRC, which creates a direct disincentive for sector reform on the ground.

ASM Governance – Key Opportunities for the EITI

1. If SAESSCAM attains accountable and transparent operational capacity, it could become an important partnering institution for the EITI, particularly if it has functioning representations on the local level, who could facilitate the EITI implementation of, for example, cooperatives. Increased donor attention on capacity building of state institutions and civil society will have positive effects on the coordination and participation aspects of an EITI implementation in ASM.
2. With increasing capacities on the provincial level, focus a potential EITI implementation strategy on the sub-national level, either by region or mineral. This would mirror fiscal decentralization and reflect the sub-national focus as well as sub-national diversity of the ASM sector.
3. If EITI implementation entailed a formal accompaniment process, the political and technical barriers CSOs face may be reduced and political will could be increased.
4. If CSO capacities strengthen, CSOs will be able to fulfill their important role as information provider, watchdog and active contributor to the EITI process.

Today, in North Kivu and many other parts of the DRC, LSM does not exist and a lack of physical infrastructure and the ongoing conflict do not provide a basis particularly conducive to LSM investment in the short- to medium-term. The choice is therefore often not whether to mine industrially or to mine artisanally, but whether to mine at all. The relationship between ASM and LSM could not be directly observed in the research for this report, but it is said that where ASM and LSM coexist, their relationship is often characterized by mistrust, tensions and violence.

Over 2,000 mining (and quarrying) concessions have been registered in the DRC, which implies most mining locations face an imbalance between the presence of ASM activities and the priorities of LSM. Where companies speak of a violation of their property rights, ASM communities speak of theft of their 'traditional' land and the government giving in to foreign economic occupation. With further foreign investment in LSM is forthcoming in some parts of the DRC, such as Katanga province, the issue is widely regarded as a critical one to resolve. Congolese law stipulates that underground resources belong to the state. With hardly any official ASM zones established, this has led to the phenomenon of some areas with vibrant ASM activity being formally awarded as mining concessions to mining companies. In other words, the companies have used and continue to use the ASM sector as free prospectors. This has aggravated mining communities, where promised investment has not materialized and it has angered entrenched interests, who saw their profit interests in the previous ASM activities evaporate. The latter have repeatedly alleged that certain concessions were awarded in return for kickbacks, which could not be verified. ASM communities, in turn, have occupied newly developed, rehabilitated or expanding LSM sites, taking advantage of the better access, sometimes re-mining some of the company's tailings, waste or marginal ground.

The Mining Code allows the *cessionnaires* to prohibit ASM on their concessions, which some companies try to achieve by strong-handling ASM communities. Part of their explanation is illegal competition for resources, with the ASM sector mostly exploiting high grade surface deposits and LSM bulk mining lower grade deposits, of which the high-grade areas are an essential component. According to the Mining Code, the ASM communities are illegal, which complicates constructive, peaceful engagement with ASM communities by the large mining companies. Some companies have nevertheless tried to find constructive and peaceful ways of engagement, particularly in Katanga, but it is too early to judge the real progress of their initiatives. Other companies, for example in South Kivu and Ituri simply tolerate the presence of illegal ASM activity, providing it does not impact negatively on their operations. Yet again, others fail to recognize the corporate risk and/or the complexity of the ASM issue. The issue continues to be a serious challenge.

ASM & LSM – Key Challenges for the EITI

1. According to the Mining Code, ASM communities residing on LSM concessions are illegal. This puts the communities in an adverse bargaining position vis-à-vis the mining companies. It also prevents more proactive engagement of ASM by LSM. Instead of developing productive partnerships, ASM & LSM often find themselves in conflict, which has negative implications on trust building required for EITI implementation. It also hinders a more prominent role for LSM companies in ASM formalization, such as aiding the formalization of cooperatives.

ASM & LSM – Key Opportunities for the EITI

1. LSM has a real interest and an urgent need for a solution to the ASM issues described above, which means LSM representatives are also potential partners for a potential EITI implementation in ASM.
2. Despite evident corporate risk, LSM can have an important role to play in the formalization of ASM, if ASM communities were legal. Examples are aiding the formation of cooperatives under legally enforceable resource sharing agreements and the enhancement of their administrative capacities, which would aid EITI implementation. From a business perspective it makes more sense to, for example, engage with regular cooperatives than to risk operational efficiency through small-scale conflicts with entire resident ASM populations.

ASM in the DRC – External Stakeholders and Development Assistance

Presently, a workable, clearly formulated enabling policy for the transformation of the DRC's informal ASM sector is missing. Coordinated efforts on the domestic level are absent and donors seem to be shying away from high-impact changes, such as an SME – and therefore ASM - friendly modification of the *Mining Code* or the implementation of credit schemes. This is related to a noticeable switch from multilateral to bilateral development approaches following the end of the transition period, mirroring a return to the prioritization of donors' national strategic aims over the development of the recipient country.

The previous paragraphs have highlighted the significant development challenges the DRC's ASM sector is faced with. In light of these challenges, the impact of previous assistance programs has been suboptimal. Part of the reason is that many interventions have attempted to tackle the different challenges facing the sector in isolation of each other, not taking into account the systemic nature of the sector and mutual perpetuation of challenges. Instead of a holistic, multi-layered development approach, with an emphasis on local ownership, based on solid, output-orientated research data, approaches have too often mirrored the interests of the executing body, not taking into account the reality of the sector on the micro-level and the real needs of the miners. With any new policy attempt, the capacity constraints on the Congolese side have to be taken into consideration, but local ownership has to be encouraged, incentivizing the thorough implementation and continuation of any schemes implemented. The dialogue on such a strategy is ongoing, with tremendous interest on the side of civil society, donors and multilateral agencies. Areas of discussion are the possible implementation of the EITI, technical support to the various government levels, including down to provincial levels; education and capacitating civil society; provision of technical support to civil society; assistance and reform of the security sector, customs and border control; exploring options for grassroots beneficiation, et cetera.

A further area of discussion is the encouragement of responsible business behavior in line with OECD guidelines. Taking into account increasing investment and potential future investment in the DRC's mineral sector, this is an absolutely crucial point. Home governments are not doing enough to reign in their multinational enterprises, which continue to disregard the OECD guidelines. Since the first "Kassem report" of the *UN Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth in the Democratic Republic of the Congo* in 2001, is that most Westerners have settled under the theory that the DRC's neighbors are stealing the resources of the Congo, often with the help of Congolese elites and companies. This over-simplified theory neglects the pivotal role of Western and Eastern companies and their complicity in the process. To date, Western and Eastern governments have not done enough to ensure their multinational companies conduct proper due diligence prior to purchasing and/or brokering these minerals. Companies, both within the DRC and within the neighboring countries, to which a large quantity of minerals continues to be smuggled, find Western and Eastern companies willing to purchase and/or broker ASM production smuggled from the DRC directly and/or the minerals smuggled to, and officially exported from its neighboring countries.

The present reality on the ground is that only a small number of both domestic and international civil society organizations (CSOs) engage ASM. Domestic CSOs in North Kivu engaging ASM are small in number and more focused on the environmental and/or social impacts of ASM. In

North Kivu no large international CSO could be identified that actively engages the ASM sector over and above those interested in wildlife conservation. The large international CSOs in the Kivus explained they were lacking the donor mandate to engage with the ASM sector and they were cautious about an engagement because of the conflict link fearing a direct engagement will “do more harm than good”. The conservation CSOs, such as the Gorilla Organization and the WWF have shown that it is possible to engage with the ASM sector (in this case through the Durban Process), despite the conflict link. In other provinces with different governance challenges and opportunities, such as Katanga, some international CSOs, for example the American NGO, *PACT*, have begun to engage the sector effectively.

In light of the governance challenges North Kivu is currently facing and the economically important mineral deposits the province harbors, some donors (most notably Germany and Belgium) and the UN advocate Certified Trading Chains (CTCs). The implementation of a CTC is driven both by industry and consumer demand for materials and goods produced in an ethical manner. As a joint effort of industry, civil society and government they may compensate for imperfect governance, resulting in increased state revenues as well as producer benefits such as direct market access, fair returns and an enhanced environmental and social performance of the mining sector³. In that way they can help to build up “islands of integrity”, with positive spillover effects for other regions. In the context of the DRC a CTC would help to assess the true ownership of a natural resource consignment. It is always assumed that what is being traded is legally owned by the seller, yet, as highlighted above, if one actually investigates the entire supply chain one finds that ownership rights are frequently unclear, or disputed. In these respects CTCs would provide an excellent addition to the portfolio of tools to be employed in ASM formalization, but potential pitfalls of CTCs have to be taken into account. CTCs do not tackle structural governance challenges; they are geared towards short-term benefits; they are prone to bottleneck problems; they could generate social fault lines in the larger context of the poor population of the country; they can lack local ownership et cetera. For most policy interventions to work, there will have to be a minimum enabling environment in place, transcending access, political commitments, integrity and domestic political will. The sections above have shown that these are presently not necessarily given.

Next to civil society and donors, academia could contribute to the strategy finding process by producing information on the mineral-specific aspects of ASM in the DRC. The multi-donor *Natural Resources and Trade Flows in the Great Lakes Region* research project is a good example that will shed further light on the ASM sector in Eastern DRC, as well as some of the

³ Wagner, M., Franken, G., Martin, N., Melcher, F. and Vasters, J. (2007), “Certified Trading Chains in Mineral Production”, German Federal Institute for Geosciences and Natural resources (BGR)

structural issues related to it that will open up opportunities for engagement. Phase II of the research project, focusing on sustainability issues, is particularly important as it will engage local governance structures and possibly expose further avenues for effective engagement with the ASM sector, also on the community level, where change is most needed.

ASM & External Stakeholders & Development Assistance – Key Challenges for the EITI

1. ASM assistance strategies still seem uncoordinated, which is also due to a return to strategic bilateral thinking on the parts of donor governments. Coordinated assistance strategies, however, are critical to ASM formalization and reform, as well as implementation of EITI in ASM, particularly with respect to a possible inclusion of a future implementation of the EITI in the design of current assistance strategies.
2. An EITI implementation process in ASM will require greater long-term, on the ground engagement by the EITI and other stakeholders. On the ground engagement might include: hands-on, professional support for the political facilitation required to implement EITI effectively, including the implementation of a variety of trust-building activities; the provision of more consideration for the EITI in the design of assistance schemes et cetera. Neither the capacities nor the expertise sufficient to drive EITI implementation in the ASM sector are presently given in the EITI Secretariat and International Advisory Group (IAG).
3. An engagement strategy requires well-thought out coordination within the DRC. In North Kivu no CSO could be identified that is working towards revenue transparency and potential domestic partners presently do not seem to have sufficient capacities and knowledge to play a meaningful role in EITI implementation in ASM.
4. International civil society is good at advocating issues related to the EITI. The Publish What You Pay campaign, Global Witness and Save the Children, for example, have had great success in bringing the revenue transparency issue to the attention of policy makers. But ASM-specific technical expertise to help move ASM formalization and a potential EITI implementation forward is not widespread. Such expertise might be accessed through the CASM network.
5. Many home governments are not always actively engaged in punishing their companies' misconduct abroad, which does not provide incentives for foreign investors to conduct themselves according to commonly accepted guidelines, such as the OECD guidelines.

ASM & External Stakeholders & Development Assistance – Key Challenges for the EITI (continued)

6. The role of China and other new geographies countries as buyers of ASM minerals and investor in SSM companies is another challenge. China has not yet signed up to the EITI and continues to operate on a “we respect your sovereignty” basis, which means China is unlikely to support or participate in the implementation of the EITI in the DRC, unless it has no choice. Given the massive investment China has promised in DRC (\$5bn of infrastructure, for example) a major challenge to the EITI would be to work out how ensure the support of China, which is likely to become the country’s main investor and buyer of minerals in the near future.

ASM & External Stakeholders & Development Assistance – Key Opportunities for the EITI

1. The DRC is currently taking first steps towards ASM formalization and sector reform; and donor engagement is likely to increase in the near future. A start would therefore be for a potential EITI implementation in ASM to be included already in the design stage of ASM formalization and broader sector reform initiatives.
2. It may be possible to link the EITI implementation strategy to mineral certification schemes. Depending on the structure of the scheme different opportunities arise. In a certified trading chain, with selected, guaranteed buyers and selected, certified producers it will be possible to integrate the EITI into the structure of the chain, by, for example, making the publication of payments mandatory. This should be a research priority.
3. EITI implementation would be facilitated by a proliferation of SMEs instead of a mix of cooperatives and industrial mining companies. Donors could facilitate their establishment by supporting education, appropriate credit systems and an SME friendly modification of the Mining Code.
4. With foreign investment increasing in small-scale mining companies and *comptoirs*, home governments could play an important role in EITI implementation in ASM, ensuring their investors adhere to the OECD guidelines, for example.

ASM in the DRC – Conclusion

This report has provided a brief overview of legal, economic and governance issues related to the DRC's ASM sector. It has also highlighted challenges and opportunities for the EITI, with respect to possible implementation of the EITI in the DRC's ASM sector. Improved natural resource governance will be a key element in consolidating the DRC's peace process, attracting investors, and contributing to sustainable development, including economic growth, ecological protection, and poverty reduction in the DRC. The EITI, as an internationally recognized tool for good resource governance could have a role to play in the state's interaction with ASM on such matters as license fees, tax payments and export revenue. It is important not to assume that just because ASM does not yet contribute much to formal economic accumulation, the EITI is not relevant. However, it is paramount to keep potential EITI implementation in ASM in perspective.

ASM combines vested interests and complex interactions between artisanal miners, communities, middlemen, traders, small- and large-scale mining companies, Western companies and Western governments' strategic interests, state and private security forces, rebel groups and the Congolese government, while it is governed by multiple rule systems transcending statutory and customary spheres. The statutory governance system currently in place is largely under-capacitated and has failed to regulate and assist the ASM sector appropriately. In many instances it has become an exploitative revenue collection system, in which non-state and state officials collude for profit. In addition, home country companies continue to disincentivize ASM reform by continuously disregarding the OECD guidelines in their operations in, or dealings with the DRC's ASM sector.

It is these legal, economic and political challenges, as well as a very low level of formalization of ASM activities in the DRC that presently shadow the many opportunities for EITI implementation highlighted in this report. They are serious obstacles an EITI implementation strategy finding process will have to take into consideration, when assessing whether a sufficient enabling environment is in place in the DRC for the EITI to work efficiently and effectively.

Nevertheless, and more generally speaking, the development of an implementable consistent EITI strategy towards ASM would not only be a significant contribution to welfare generation, but it would also lend the EITI credibility, as it would engage one of the economically most important sectors of mining dependent countries.

As outlined in the recommendations, the EITI Secretariat should therefore establish an expert group comprising of key representatives of civil society, government, private sector and

academia commissioned to develop a country-specific and, if possible, mineral-specific strategy for pilot implementation of the EITI in ASM. This process may be undertaken with the help of the World Bank's Communities and Small-Scale Mining Secretariat (CASM), given its wealth of expertise in ASM.

There are many overt challenges, but also many opportunities for EITI implementation in the DRC's ASM sector. The expert group will have to decide whether to gear a strategy development process and a possible pilot implementation of the EITI towards the ASM sector of the DRC, or towards another country that may already have a more suitable enabling framework for the EITI to function in.

ASM in the DRC – Bibliography

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