Chapter 9

MINING IN THE DEMOCRATIC REPUBLIC OF CONGO
A Case Study

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Note: A shorter version, containing a less detailed historical overview and less maps and charts, was published in the Proceedings bound book of the 57th Rocky Mountain Mineral Law Foundation Annual Institute 2011.

9.01 Introduction

The Democratic Republic of Congo (hereafter “Congo” or “DRC”) is a land of paradoxes. It holds some of the largest deposits in the world in non-ferrous metals (with 10% of global copper reserves and 50% of global cobalt reserves), precious metals and some of the best diamond deposits (30% of global diamond reserves), and even some oilfields and coal. It has the capacity to produce the world’s largest white energy (electricity), and possesses in addition all the essential elements to be able to produce and export an incredible variety of agricultural and agro-industrial products. The Congo, however, remains a poor country and a difficult place to do business. Nevertheless, some businesses do succeed, among which are mining businesses.

A place of endemic wars since 1996 in its North-Eastern region, the Congo is relatively peaceful in its other regions and nevertheless remains an attractive place to invest for certain categories of investors.

9.02 Historical overview

It appears essential, in order to correctly understand Congo and the Congolese, to appreciate its history and to see how much the Congolese people have suffered, on a variety of levels – mainly due to a lack of political rights and a lack of high level education before independence, and due to civil wars, economic depression, lack of political, human and civil rights and mismanagement after independence. Understanding this allows one to understand how simple things such as food, water, electricity and peace are temporary and precarious in Congo and how planning for tomorrow is hard when today’s concerns prevail.
Dozens of books were written about Congo’s political and social history. Below is a selection of interesting recent publications:

In general:

- David Van Reybrouck, “Congo – Een geschiedenis”, 680 pp., 2010, De Bezige Bij, Amsterdam (an English version of this masterpiece is due to be published in 2012);
- Isidore Ndaywel è Nziem, “Histoire du Congo des origines à nos jours”, 266 pp., 2011, Le Cri/Afrique Editions, Brussels; this short book is a summary and an update of the important history of Congo written by the same author, cited below, and published in 1998
- Tony Busselen, “Une histoire populaire du Congo”, 184 pp., 2010, Ed. Aden, Brussels;

On the Mobutu era:


On the Kabila (father and son) era:


9.02 [1]  Before colonization

A white spot on the maps of Africa, qualified as “terra incognita”, Central Africa, which covers most of the Congo, was gradually and cautiously penetrated from its Western coast by the Portuguese as early as the 15th century, while from the East, the penetration from the outside world only occurred in the last quarter of the 19th century, with the “Arabized” slave and ivory traders.

9.02 [2]  Colonization


Pursuant to the first exploration of Central Africa by Henry Stanley, King Leopold II of Belgium saw there a unique opportunity to gain a colony for Belgium. Accordingly, under the guise of anti-slavery expeditionary actions, King Leopold II founded the basis for a Belgian colonization of Central Africa, mainly of the Congo Basin.

The Berlin Conference of 1885 allowed King Leopold II to found the Congo Free State and to become its King-Sovereign in 1886. After a period of thorough and brutal exploitation of primary natural resources, mainly ivory and rubber, and following an international campaign criticizing his governance, King Leopold II was induced to transfer the Congo Free State to Belgium in 1908.

Katanga, the non-ferrous metal “geological scandal” was won in a race against Cecil Rhodes and his British South African Company expeditions coming from the South. This, and the treaties concluded with the local kings, explains the strange form of the Katanga Province, as a sort of excrescence in the middle of what is now Zambia (and then Northern Rhodesia).
The map below shows the size of Congo compared to Belgium and Western Europe.

Figure 1 - Source: UROME (Royal Belgian Overseas Union)

9.02 [b] A Belgian colony

The Belgian government invested enormously but discreetly in the Congo in order to grant it a solid health infrastructure, transport infrastructure and a low and mid-level degree of education, and encouraged large Belgian companies to continue developing the colony’s mineral and other resources.

However, the Belgian government, contrary to e.g. the Portuguese government, did not encourage immigration from Belgium to the Congo. Accordingly, most Belgians active in the Congo were either hired by the government or by the large colonial companies such as the famous non-ferrous metal company Union Minière du Haut-Katanga. Self-employed settlers, merchants or other businessmen or intermediaries and even lawyers were supposed to pay a deposit before being able to enter the colony. This explains why, contrary to the former French, British or Portuguese colonies, so few Europeans and Belgians resided in the Congo when it became independent in 1960: approximately 80,000 Belgians out of no more than 110,000 Europeans, composed mainly of Belgian, Greek, Portuguese and Italian nationals for a total population of 15 million. As a comparison, Angola in 1960 had 5 million inhabitants, among whom were more than 200,000 Europeans.

9.02 [c] World War I and World War II

Contrary to Belgium, the Belgian Congo was not invaded during World War I and World War II. During World War I, the Germans tried to attack Congo on the side of the Tanganyika Lake, but they were beaten by the Belgian colonial army called the “Force Publique”. The Force Publique won many battles against the Germans during World War I, in Tanganyika, Rwanda, Burundi and Cameroon, and during World War II in Sudan and Ethiopia (Abyssinia), and fought even in Egypt.

9.02 [d] Colonial welfare

During colonization, the Congo did not suffer at all from World War II from an economic point of view; on the contrary, its wealth participated in the rapid reconstruction of Belgium, which had suffered enormously. The first Belgian supermarket was created in Elisabethville, now called Lubumbashi, the
capital city of the copper province of Katanga, just after the war. However, the population was forced to contribute to the “war effort”, and suffered greatly from this compulsory contribution.

The development policy of the Belgian colonial power aimed at a slow but steady mid-level development of Africans. A very narrow fringe of the African population managed to live more or less like Europeans. They were the so-called “évolués”, as they wanted to qualify themselves. To be admitted, they had to pass a sort of exam and to prove that they had a certain level of education, a steady source of income, an excellent professional track-record, that they were monogamists and that they lived like Europeans. They represented probably less than 20,000 persons in 1960 out of a population of approximately 15,000,000; this is 1.33/1000 of the population. In 1960 also, the number of Africans having a university degree did not exceed 20 individuals.

However, besides these strange figures, one must admit that the average level of literacy of the Congolese far exceed that of other African colonies, which, on the other hand, had many more holders of university degrees. Thus in 1959/1960, in the 25,000 schools of the colony:

• more than 1,680,000 children attended primary schools, this is the quasi entire number of children of school age;
• close to 60,000 students attended secondary or professional schools;
• but only 763 students attended universities.

In the same way, the health infrastructure, with free medical care, and the transport infrastructure were extremely well developed.

9.02 [2] [e] Growth of political consciousness

On the political side, political activities were only tolerated in the late 50’s, albeit in a limited way, even for Europeans. Nevertheless, political activities grew gradually in the civil society in small circles that formed underground. This is probably why the Congolese nowadays are so fond of politics and why the country has dozens of political parties.

After World War II, the pressure came from the United States, the USSR, the United Nations and recently independent countries such as India, to gradually bring the colonial powers in Africa to grant independence to their colonies. In 1955, a Belgian university professor published a plan, called “the thirty years plan”, to grant independence to the Congo. This plan created a certain shock in Belgium and in the Congo among the Europeans, while it created a fast growing awareness among the colonized population, that it had the chance to obtain independence sooner or later.

From then on, events moved rapidly. Political parties were created and political stars arose, Kasavubu with his ABAKO in the western part (Bas-Congo), Lumumba with his MNC (Mouvement National Congolais - one out of many branches of this party) in the whole country but mainly in the center (Stanleyville – now Kisangani), Tshombe in Katanga with his CONAKAT and some others. Demonstrations and sometimes lootings occurred. However, the Congo did not suffer from a colonial war like countries such as Algeria, Angola or Mozambique.

In 1958, Belgium organized a World Expo, in which some 300 Congolese nationals were invited to participate. They were stunned by what they discovered in Belgium: Europeans who were taxi drivers, waiters, and even beggars! Moreover there was no segregation and Africans were welcome in bars and cinemas. They also discovered that the French colonies or protectorates of Tunisia and Morocco had become independent, that a violent colonial war was raging in Algeria, etc. Some were invited by Belgian politicians – left or right – and union leaders who introduced them to politics, equality of rights and right to independence. When they came back to Congo, these guests spread the news and in a few months only, the majority of the population realized that independence was not just a dream.
Political options were – and still are today, but in a less marked manner – often dictated by ethnic identity (tribalism) or regional identity.

Four groups were dominant:

- the Bakongos (12% of the population), successors of the old Kongo kingdom, headed in 1960 by President Joseph Kasavubu. In Congo, they are mainly established in the Bas-Congo Province (West of Kinshasa) and in Kinshasa, but they are also present in the North and South on the Atlantic coast, from Pointe-Noire (Congo-Brazzaville) to Luanda (Angola);
- the Balubas (12% of the population), established in Kasai, headed in 1960 by Emperor Albert Kalonji in South-Kasaï and by Patrice Lumumba in East-Kasaï, who created the Mouvement National Congolais (MNC) a political party soon separated into two rival parties;
- the “Balubakats” (6% of the population), Balubas of Northern-Katanga, headed in 1960 by Laurent-Désiré Kabila;
- the Lunda, not representing an important part of the population, but established over a large territory in Katanga (with extensions in Zambia and Angola), headed in 1960 by President Moïse Tshombe.

Other influential groups included populations from the North, e.g. in the Equateur Province (from which originate e.g. President Mobutu, Vice President Bemba), from the Bandundu Province (e.g. Prime Minister Gizenga), or the East (the Kivus - with rebels Gbenye and Soumialot - see below Sub-section 9.02 [3] [b]), and Congolese Tutsis and Hutus settled in the Kivus, sometimes for decades.

For the next 50 years and even nowadays, the divide is still quite noticeable, as can be seen from Figures 3 and 4 below, although the trend of political parties is to try to have a national, rather than regional, basis.
Belgium is often blamed for its failed decolonization. One of the reasons is that it came so quickly and one of the reasons therefor may be found in the Cold War and in the fast rising popularity of Lumumba, who was seeking assistance from the Russians. To clip his wings and his popularity, independence was granted in June 1960, with Joseph Kasavubu as President and Patrice Lumumba as Prime Minister, with a coalition of the main political parties.

Only a few weeks after independence granted on 30 June 1960, the country fell into the first of the numerous turmoils that it would have to endure for the next fifty years. Only five days after independence, mutinies started in the army, associated with lootings, murders and rapes. Belgian troops intervened to protect Belgian nationals and the United Nations were called by the Congo government to provide assistance. Lumumba also called Russia for help.

United Nations blue helmets were quickly sent to Congo, probably to show the Russians they should stay away. In a few weeks only, Congo became the center of the Cold War. Then Katanga, the rich copper province, declared its secession on 11 July 1960, only 11 days after independence, followed by South-Kasai, the diamond province. In September 1960, President Kasavubu sacked Prime Minister Lumumba, who himself sacked President Kasavubu! Most of the European civil servants in the public administration and officers in the army left the country, which added to the confusion, except in Katanga, where a relative order was maintained by the local armed forces, the “Katangese Gendarmerie” still under command of Belgian officers, soon joined by Belgian paratroops and mercenaries hired by the Katangese government.

Upon the Kasavubu-Lumumba crisis above in September 1960, a young colonel named Mobutu, assisted by a group of intellectuals, decided to restore order, probably with the help of the CIA. President Kasavubu could stay as President, but under close watch, while Lumumba was put under house arrest. Mobutu sent him to Katanga in January 1961, where he was assassinated.

In November 1960, Lumumba partisans, among whom Antoine Gizenga, then deputy Prime Minister and who 45 years later became a Prime Minister of President Joseph Kabila, found refuge in Stanleyville (now Kisangani), where he purported to continue representing the Lumumba government, of which he declared being the new Prime Minister.

As a result, after only five months of independence, Congo had four governments spread across the country:

- Léopoldville (now Kinshasa), with neutralized President Kasavubu, Mobutu and his supporters, backed by the U.S. and the United Nations;
- Elisabethville (now Lubumbashi), with the secession of Katanga of President Tshombe, unofficially backed by Belgium and probably the U.S. and financed by taxes paid by the Belgian mining company Union Minière du Haut-Katanga (to which the current State-owned mining company GECAMINES succeeded);
- Bakwanga, with the secession of South Kasai of self-declared Emperor of the Balubas, Albert Kalonji, financed by taxes paid by the diamond company Forminière (now MIBA);
- Stanleyville (now Kisangani), in the Oriental Province, with Prime Minister Gizenga, supported by the U.S.S.R. and by China.
Both the Kinshasa and the Stanleyville governments claimed to be the sole legitimate governments of Congo. Eventually, on 22 November 1961, the Kinshasa government managed to be recognized by the United Nations and got its seat in the general assembly in New York.


Context

As from January 1961, the Kinshasa government tried to re-unify the country, and succeeded partly in the course of 1961, at least on paper, by re-appointing Gizenga, still remaining in Stanleyville (!) as a Vice Prime Minister and by re-integrating South Kasai in January 1962. Rebellions continued in the East and Katanga was still in secession. With its mining riches and its civil service still managed by Belgian colonial civil servants renamed overnight as “development cooperation agents”, Katanga remained prosperous and quiet, except in the North where it suffered attacks from the Balubas. Meanwhile, the rest of Congo faced rebellions, army mutiny, economic crisis, departure of experienced civil servants with a government deprived of resources from wealthy mining provinces.

By its Resolution 161 dated 21 February 1961 (one of many concerning Congo) in response to a request from the Kinshasa government, the UN Security Council, *inter alia* (part A):

1. Urged the UN to take “immediately all appropriate measures to prevent the occurrence of civil war in the Congo, including arrangements for cease-fires, the halting of all military operations, the prevention of clashes, and the use of force, if necessary, in the last resort”;
2. Urged “that measures be taken for the immediate withdrawal and evacuation from the Congo of all Belgian and other foreign military and paramilitary personnel and political advisers not under the United Nations Command, and mercenaries”;
3. Decided “that an immediate and impartial investigation be held in order to ascertain the circumstances of the death of Mr. Lumumba and his colleagues and that the perpetrators of these crimes be punished”.

This part A of Resolution 161 directly targeted the Katangese secession.

The Empire of South Kasai and the Stanleyville “government” of Gizenga were also targeted by Resolution 161, namely in its part B, which had more of a political purpose by urging the convening of the Parliament and the reorganization and control of the Congolese army. Both parts were regained
by Kinshasa, respectively in December 1961 and January 1962 after severe military campaigns and the capture of their leaders. Kalonji escaped but eventually surrendered in September 1962. Gizenga was jailed, and escaped to Brazzaville in 1965. He could only return to Congo in 1992, when multipartyism was allowed again by the National Sovereign Conference (see below, Sub-Section 9.02 [3] [d]).

**Katanga**

Several political rounds on the subject of Katanga were held with little success. The UN blue helmets launched a number of military operations against Katanga, but without real success, except for the expulsion of the Belgian troops and officers, soon replaced by mercenaries. On 17 September 1961, the UN Secretary General Dag Hammarskjöld flew to Zambia to try to negotiate a cease-fire with Tshombe, when his airplane crashed causing his death and that of the other passengers. There are theories that the crash was not an accident. His replacement, Secretary General U Thant, toughened the attitude of the UN.

Pursuant to Resolution 169 dated 24 November 1961 of the UN Security Council, the Secretary General was empowered “to take vigorous action, including the use of the requisite measure of force, if necessary, for the immediate apprehension, detention pending legal action and/or deportation of all foreign military and paramilitary personnel and political advisers not under the United Nations Command, and mercenaries, as laid down in paragraph 2 of Security Council resolution 161 A (1961) of 21 February 1961”. This resolution now allowed a sort of unlimited use of force and, in January 1963, after a number of severe fights and the taking of the major cities of Katanga with the help of Gurkha troops, the UN put an official end to the Katangese secession. Tshombe escaped and fled to Zambia. Most of the Katangese troops and mercenaries fled to Angola.

**Kwilu**

In 1964 in Kwilu (Bandundu province, East of Kinshasa), Pierre Mulele, a former Minister in the Lumumba government in 1960 and a supporter of Gizenga (see above), started a “Maï-Maï” rebellion of peasants, which quickly evolved into extreme violence. Although Mulele’s rebellion only lasted from January to May 1964, it soon became a symbol for the opposition against the central government in Kinshasa whom he accused of having sold Congo to foreign supporters. Mulele advocated a new, second independence and became a model for new opponents. Captured in 1968 after an alleged promise for amnesty, he was tortured to death in atrocious conditions.

**Kivu and Maniema**

Later in 1964, in Kivu and Maniema (Eastern Congo, North of Katanga), Gaston Soumialot, also a partisan of Lumumba, started a rebellion with his “Simbas”, supported in Southern Kivu and Northern Katanga by a certain Laurent-Désiré Kabila, who was based in the “maquis” of Fizi and Baraka. Kabila hosted Che Guevara there in 1965, who, with 120 Cubans, led a few failed attacks against governmental positions. Kabila was then already supported by Rwandese Tutsis, opponents to the Hutus in power in Rwanda. As from the end of 1965, his insurrections became more discrete, except for a few expeditions.

Laurent-Désiré Kabila would remain an everlasting opponent, and he kept busy with rebellion, trade and smuggling, spending his life in his maquis or in Tanzania. From time to time, he would set up a military expedition against Mobutu, such as the first and second Moba (harbor city on lake Tanganyka) wars, respectively in 1984 and 1985, without any great success, though. He always rejected offers for peace and money from Mobutu and would remain a permanent but relatively discrete opponent for some thirty years until his region was involved in the Rwandese turmoil as of 1994. He was then selected by the new Rwandese Tutsi power, who thought Kabila would help them to expand their country in the Great Lakes region. This allowed Kabila to return to the forefront (see Sub-section 9.02 [3] [e], below).

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1 Gizenga would have been liberated by Tshombe, as a way to get support from moderate supporters of Lumumba – see P. Nothomb (Belgian consul in Stanleyville during the 1964 hostage taking), “Dans Stanleyville”, 2nd ed. 2011, Masoin, Brussels, p. 24.
2 “Maï” means water in Swahili and other local languages, and shouting “Maï Mulele” was supposed to transform enemy bullets into water.
3 “Simba” means lion in Swahili and other local languages.
Stanleyville Act II

In May 1964, Soumialot and his Simbas moved from Kivu and Northern Katanga to Stanleyville, where, joined by Christophe Gbenye, another former Minister of Lumumba, they took the city in August 1964 and took some 1200 hostages in the European and American population. This is said to be the largest hostage-taking of the 20th century.

Numerous atrocities were committed by the Simbas and their allies; thousands of Congolese were tortured and killed, while some 200 Europeans or Americans were killed. Missionaries were tortured and slaughtered. Women, including missionaries, were raped and killed.

One third of Congo was now under control of the rebels, who declared the formation of the “Popular Republic of Congo”.

President Kasavubu, encouraged by Colonel Mobutu, then chief of the Congolese National Army, appointed Tshombe as a Prime Minister, first, to cut off any bridge-building with the partisans of Lumumba and, second, to benefit from Tshombe’s former army, the Katangese Gendarmerie, supported by mercenaries, who had taken refuge in Angola where they supported the Portuguese colonial power against the local independence fighters. In the event Tshombe had joined the rebels, this would have obviously entailed the end of the Kinshasa regime.

The situation was such that the Congolese National Army could not cope. Accordingly, the Katangese Gendarmerie was integrated in the Congolese Army and mercenaries were recruited, mainly in South Africa. In addition, Prime Minister Tshombe called for help from Belgium and the U.S. A joint operation was set up, where the Congolese National Army and the mercenaries advanced by road towards Stanleyville, while Belgian paratroops, airborne by U.S. Air Force planes, were dropped on 24 November 1965 to secure the Stanleyville airport and from there headed to town where they joined the Congolese National Army and the mercenaries. The situation had lasted only 80 days, but still remains a landmark in Congo history. Other areas in that part of Congo were freed and peace restored with the help of Belgian paratroops.

Instability cut-off – Mobutu takes over

In 1965, Tshombe won the elections for Parliament with an overwhelming majority. This meant that his next step was to challenge Kasavubu for the presidential elections. Accordingly, Kasavubu repeated what he had done in 1960 with Lumumba and, in October 1965, he simply sacked Tshombe and appointed a yes-man as Prime Minister. This potential for new turmoil was stifled at birth by Mobutu, who, on 24 November 1965, seized power without a gunshot being fired. Strangely but not unsurprisingly, the Parliament acclaimed Mobutu for his coup. Kasavubu retired to his Bakongo Province, where he died in 1969. Tshombe found refuge in Spain but was captured and jailed in Algeria, where he died in 1969 in dubious circumstances.

Mercenary mutinies

Some mercenaries and the Katangese Gendarmerie who had helped the Congolese National Army to beat the Stanleyville rebels had been integrated into the army, and assisted it to combat the outstanding rebellion in the area. Twice, they engaged in mutiny, namely in 1966 and 1967, based on rumors about Tshombe and a new Katanga secession. Led by Jean Schramme, a former Belgian farmer, made a colonel by Mobutu, the mutineers lacked any political and international support. The some 130 European and 1250 Katangese-strong mutineers fled in 1967 to Bukavu, on the lake Kivu near the Rwanda border, where they resisted for several weeks but were eventually beaten by the 15,000-strong Congolese National Army and were evacuated to Rwanda.

At the end of 1967, most of the country was pacified except the region of Fizi and Baraka, where a certain Laurent-Désiré Kabila continued to resist.
Mobutu’s absolute reign – From 1965 to 1991

President Mobutu remained in power from 1965 to 1991. A number of landmarks of his reign characterize the decline of Congo’s social and economic climate.

Single-party rule

In 1967 Mobutu put in place a new Constitution and imposed, despite provision to the contrary in the Constitution that provided for a two-party system, a single-party rule, the Mouvement Populaire de la Révolution, which somehow presented features of the tribal system: only Congolese could be members and all Congolese were members as from birth. It assimilated the State to the party, in such a way that the party controlled all levels of the State, which became an emanation of the party.

Nationalization of Union Minière

In 1967 also, Mobutu nationalized the famous Belgian mining company Union Minière du Haut-Katanga, which became Gécomin, then Gécomines and finally Gécamines, the giant State-owned metal mining and producing company in Katanga. However, Mobutu was visionary enough to maintain the European staff within Gécamines, who were essential to the growth of the company until they could be gradually replaced by a national workforce having gained university degrees.

Authenticity and Nationalism

In 1971, with a view to better anchor his power as a tribal chief into African traditions, Mobutu, upon the advice of his Information Minister Dominique Sakombi, imposed on the whole country a return to “Authenticity”. This implied a number of measures meant to induce the population to rediscover its cultural traditions: suppression of old colonial names, including that of the country (which became “Zaïre”) and of the river after which it is named, suppression of European names and Christian names for individuals, suppression of the wearing of a tie and of a European-style suit for males replaced by the “abacost” (“À bas le costume” – “Down with the suit” !), females were forbidden to wear skirts and trousers and had to wear the traditional “pagnes” or “boubous”, Western music was banned from the radio etc. On top of that, all titles were changed: ministers became “Commissaires d’Etat”, “Sir”, “Mr” or “Mrs.” were banned and replaced by “Citoyen” and Citoyenne”, except for foreigners. This policy was obviously also a form of nationalism, which led to expropriations (see below), and an attempt to solve issues arising with Rwandese immigrants.

In 1972 (replaced in 1981), a law targeted at such Rwandese immigrants in the East (Kivu), clarified but limited their Congolese nationality provided they were established in Kivu since 1 January 1950 and continued residing in Zaïre since then. This law was replaced in 1981 by a law setting criteria for the Zairian nationality. The 1981 law was amended in 1999 and replaced by the law No. 04/024, which also set objective criteria.

Zaïrization - Radicalization

Motivated by strong nationalism, Mobutu initiated the Zaïrization at the end of 1973, which was a brutal expropriation in favor of Zaïre nationals of businesses, farms and industries owned by foreigners. This measure went along with legislation reserving the whole commercial sector to nationals. Within a few months, the whole economic base of the country was ruined. In an attempt to save the situation, Mobutu decreed the “Radicalization” at the end of 1974, where numerous zaïrized companies were taken over by, and declared property of the State.

As from then, unfortunately, the economy started its slow but certain descent, discouraging investments and destroying the commercial network of the country. However, the then extraordinary high metal prices and country’s record copper production concealed this and encouraged Mobutu to continue his predatory practices and to indebt the country.
In 1959, the country’s copper production (see Figure 7 – Sub-section 9.03 [1] below) was close to 300,000 tonnes pa (8% of global production). In the 80’s, the country’s copper production (all by Gécamines) amounted to around 400,000 tonnes pa, with a peak of some 475,000 tonnes in 1986, and more than 50% of the country’s revenue from exports came from its copper production. As a comparison, in 1991 (probably due to the massive expulsion of skilled workers, employees and managers originating from the Kasai province), Gécamines produced only 200,000 tonnes pa, in 1994 only 35,000 tonnes pa and in 2002 no more than 20,000 tonnes pa. In 2010, Gécamines managed to raise its production back to some 35,000 tonnes and has the ambition to produce more than 100,000 tonnes in the next few years (see Figure 16 – Sub-section 9.03 [2] below).

Retrocession

The situation worsened and, eventually, Mobutu decreed a “retrocession” in 1975 allowing the former owners to recover 60% of the shares of the expropriated companies. This policy cannot be described as a success as many of the former expropriated economic operators did not insist on coming back.

First Shaba war

In 1977, former Gendarmes Katangais, assisted by Cubans and Angolans, occupied the famous copper mining city of Kolwezi (in Shaba, as Katanga had then be renamed) for 80 days, but were driven back with the help of Moroccan troops supported by French army logistics.

Second Shaba war

In 1978, the Katangese rebels again tried to invade Katanga and attacked Kolwezi on 11 May. They were assisted by Eastern Block counselors and Cubans, and took thousands of Europeans in hostage and killed hundreds of Congolese and Europeans. Mobutu called for help from the U.S., Belgium and France, who liberated the city on 20 May 1978.

Belgium and France sent paratroops, but each with a different purpose: the Belgians had to evacuate all Europeans, among which a majority of Belgians working in the mining industry and their families, while the French were supposed to (unofficially) expel the rebels. It is said that this gave rise to serious differences between the Belgian and the French paratroops, the French laughing at the Belgians and qualifying them as “air hostesses”!

White Elephants, indebtedness and inflation

Benefitting from economic growth, international aid and an increase of commodity prices, among which that of copper, Mobutu elaborated megalomaniac projects, somehow encouraged to do so by Western suppliers and banks. These projects were nick-named the “White Elephants”, and include the following projects:

• The Inga I power station (351 MW) in 1972, and the Inga II power station (1424 MW) in 1982 (said to have cost USD 0.5 billion), which nowadays produce less that 20% of their capacity due to lack of maintenance;
• The Inga-Shaba (Katanga) power line, 1,700 km long, which took twelve years to build, from 1970 to 1982 and cost around USD 1 billion;
• The Maluku steel plant near Kinshasa, from 1972 to 1974, supposed to use the Inga power and produce the steel and iron needed for the Inga-Shaba line; its cost was about USD 180 million; it never worked properly and was closed after five years;
• The Gbadolite city, built on the hamlet where Mobutu was born, with an international airport, a power station, and immense palaces; it was nick-named “the Versailles of the jungle”.

These White Elephants dramatically resulted in a gigantic foreign debt amounting to USD 4.6 billion in 1983 that rose to USD 6.9 billion in 1989 after refinancing due to unpaid interest. In 1984, 42% of the budget was allotted to debt service, and 55% in 1985. Meanwhile, the education budget fell from 24% to 7%. In 1990, the debt amounted to USD 8 billion and reached USD 13 billion in 2000.
Inflation rose from an annual average of 46% in the years 1966-1990, to beyond 23,000% (!) in 1991-1996, as compared to 5% in 1998 and 26% in April 2011 (see Figure 14 – Sub-section 9.03 [2] below).

Repression of opponents

In the eighties, the opposition started organizing itself and notably Etienne Tshisekedi, a former supporter and minister of Mobutu, formed the UDPS. He and many of its members were former members of Parliament or officials, who openly defied Mobutu. They were severely repressed. Others, such as the Katangese Nguza Karl-I-Bond or Bernardin Mungul Diaka were neutralized by Mobutu who bought them off, sometimes after a death penalty or banishment, by granting them official positions and money.

The beginning of the end

In 1990, the so-called “civil society” arose, students started to strongly protest and demonstrate. Demonstrations and rebellions were severely repressed by Mobutu. As of 1991, hundreds of unions and political parties were created, contrasting with the one-party and one-union rule that Mobutu had imposed for more than 15 years. Besides, many new newspapers appeared – and still exist to date, such as *Le Phare*, *Le Potentiel*, *La Tempête des Tropiques*, etc, replacing the “Authentic” *Elima* and *Salongo*.

Tribal clashes arose, in particular in Katanga, the copper province, where in 1991 many Kasai-originating Baluba tribe members were violently expelled.

Lootings occurred in Kinshasa in September 1991, probably initiated by Mobutu's own soldiers, with deaths and casualties, which caused disinvestments and closures of many businesses. Some 20,000 foreigners were evacuated by Belgian and French troops.

Inflation rose to several thousand percent per year, corruption, mismanagement of public services and other depredating practices ruined the country.


The 1990-1991 events described above meant the beginning of the end of Mobutu's reign, with the creation, in 1991, of the “National Sovereign Conference”.

The 1991 lootings were probably an attempt by Mobutu to destabilize the National Sovereign Conference. Sabotaged by Mobutu, the latter did not achieve any tangible result and was declared closed by Mobutu in January 1992. This was too much for the population, which, on Sunday 16 February 1992, organized a March for Hope in the whole country. More than a million people were on the streets. It became a bloodbath as Mobutu's troops shot indiscriminately and killed dozens of people. They even also used napalm. The scandal resulting from this repression allowed the National Sovereign Conference to reopen in April 1992. From then on, it paved the way to a change of political regime with the intention to gradually bring the country to democracy.

The National Sovereign Conference was followed by the “High Council of the Republic – Transition Parliament”. A number of attempts resulted in the issue, in April 1994, of a new provisional Constitution that abolished Mobutu's Constitution, and was supposed to bring the country to democratization. This new provisional Constitution was called the “Constitutional Act of the Transition”, which withdrew most of Mobutu's powers and was characterized by a number of freedoms and liberties: press, strikes and the collegiality of decisions for an important number of matters.

A new Government was put in place and elections remained to be organized.
The new Government, headed by Prime Minister Kengo wa Dondo, in an effort to relaunch the country’s economy, opened the country to mining investors (see Figure 15 – Sub-section 9.03 [2] below). In 1994, Gécamines started to look for partnerships and a number of them were concluded in the following years, such as the Gécamines - OMGroup - Forrest joint venture to operate cobalt slags on the “Big Hill” in Lubumbashi in Katanga (STL), and the Tenke Fungurume copper and cobalt project. As regards gold, Banro with projects in South-Kivu and Maniema (Kindu), or Barrick Gold in the famous Kilo Moto region were also initiated then.

This Constitutional Act of the Transition was replaced on 27 May 1997 by a Constitutional Decree-Law enacted by President Laurent-Désiré Kabila, who suspended the transition.

9.02 [3] [e] Laurent-Désiré Kabila’s rise and fall – From 1996 to 2001

Kabila’s first Congo war with the help of the Rwandese - October 1996 to May 1997

During the summer of 1996, the tensions in Kivu between Rwandese former Hutu forces, exiled after the 1994 genocide, and official Rwandese Tutsi forces supported by Uganda, became more acute. Kivu hosted some 1.5 million Hutu refugees, among which many troops, who planned to re-invade their country.

It is said that Kagame, the Rwandese leader, was looking to expand his country and take Kivu and would have concluded an agreement thereto with Laurent-Désiré Kabila, the everlasting opponent to Mobutu, who had managed to keep his maquis of Fizi and Baraka outside of Mobutu’s reach. With two Tutsi leaders from Kivu and one Tetela tribe leader from Maniema, L-D Kabila formed the Alliance des Forces Démocratiques pour la Libération, the AFDL, backed by Rwanda and Uganda, and with the help of his chief of staff James Kabarebe, in fact a Rwandese, he started a war against the Hutu forces in Kivu and the Zaïrian army. In a few months, the AFDL took Kivu, as initially agreed with the Rwandese. The Zaïrian army, badly equipped, unmotivated and unpaid, offered such weak resistance that L-D Kabila’s forces, supported from the outset by Rwandese Tutsis chasing the Hutus, were joined by the Angolans who took an opportunity to chase UNITA opponents in Congo. Also equipped by Zimbabweans, L-D Kabila’s forces managed to reach Kinshasa on 17 May 1997. Mobutu fled to Togo and then to Morocco, where he died in September 1997.

L-D Kabila had quickly understood the profit he could make of Congo’s mineral riches and signed numerous Accords Prélminaires (Preliminary Agreements), which lacked a sound legal basis, with a series of investors of various reputation, friends and allies. All of them had to be regularized later, or were cancelled (see Section 9.06 below about the mining contracts review).

Kabila’s second Congo war against the Rwandese – August 1998 to 2001

President L-D Kabila felt trapped by the Rwandese (Tutsis), who wanted to exercise their influence on the country’s management. More and more criticism arose from the Congolese population about interference by the Rwandese in Congolese matters. On 26 July 1998, he announced on the radio that he had decided to terminate the presence of the Rwandese troops who had assisted in the liberation of the country. The day after, he fired his chief of staff James Kabarebe, a Rwandese Tutsi, who left Congo and immediately became Rwanda’s new chief of staff.

On 2 August, Rwanda, supported by Uganda and Burundi launched an invasion of Kivu – again. Former Rwandese Hutu troops and Mai-Mai, local rebels, supported by Kinshasa, united to fight the Rwandese Tutsi invaders. On 4 August, airborne Rwandese and probably Ugandese troops landed in Kitona in Bas-Congo, where they persuaded former Mobutu troops to join and march on Kinshasa. They took the seaports of Boma and Matadi and the Inga dam power station, and so cut the power and drinking water during 18 days to Kinshasa and strangled its traditional supply route from the Atlantic. It looked like this was the end of Mzee Kabila.
Geo-politics took over, though, and Mzee Kabila rapidly obtained support from troops from Angola and Zimbabwe, followed by Namibia, to fight the Rwandese. On 25 August, Mzee Kabila’s troops, helped by the Kinshasa population, defeated the invaders in Kinshasa and its region.

However, in the North (Equator Province), Jean-Pierre Bemba started a war against Kabila as well, supported by Uganda. Mzee Kabila obtained support from Sudan and Libya, followed by Chad. In the East, Uganda and Rwanda invaders got as far as Kisangani (ex-Stanleyville), in the region of which diamonds had been discovered!

All countries supporting Mzee Kabila had their own reasons in addition to a common motivation to fight Western influence: Zimbabwe wanted to protect its investments in Katanga, Angola did not appreciate Rwanda supporting UNITA, Namibia supported Angola, Sudan had differences with Uganda, Libya wanted to come out of its international isolation and play a role, and Chad acted in solidarity with its own main supporter Libya.

Then, in 1999 and 2000, Uganda and Rwanda had a number of fights about Kisangani, which turned to Rwanda’s advantage, which placed there its Congo ally, the Rassemblement Congolais pour la Démocratie (one of many), the RCD-Goma. Uganda withdrew and kept a hand on the North-East gold rich area.

The Lusaka cease-fire agreements signed in the summer of 1999 were not complied with and the war continued. Congo was again, as in 1960 (see Figure 3 - Sub-section 9.02 [3] [a] above) divided into four main areas, the boundaries of which were moving according to the fate of local battles:

- Kinshasa, held by Mzee Kabila, which kept the West (Bas-Congo), the centre (Bandundu and part of Kasai) and the South (most of Katanga);
- Equator, held by Jean-Pierre Bemba;
- The East, with Kivu, up to and including Kisangani and its area, held by Rwanda and its supporters, opposed by the former Rwandese Hutu troops and the Mai-Maïs supported by Kinshasa;
- The North-East, with Ituri gold (Kilo-Moto area) and newly discovered diamond deposits, held by Uganda.

Decline of what was remaining of the economy and infrastructure

Unfortunately, the hopes that President L-D Kabila had initially raised in Congo and in the international community with his reconstruction project, soon faded due to his lack of vision and of sense of how to govern a country. As a true dictator, he sent opponents and journalists to jail, and started a reign of terror. This, added to the war and its ensuing systematic pillaging by the invaders, plunged the country again in a hopeless situation.

Assassination of Mzee Kabila

Mzee Kabila was a troublemaker and had many enemies, inside and outside the country. He escaped a number of assassination attempts, until, on 16 January 2001, he was assassinated in his Kinshasa palace. His death did not seem to prompt many regrets locally and internationally.

His son Joseph Kabila, who had been appointed a major-general by Mzee Kabila and who was the chief of staff of the Congolese land forces when the second Congo War started (see here above) was immediately appointed by his father’s counselors to succeed his father.


Joseph Kabila was sworn in as a President on 26 January 2001. He immediately resumed peace talks and transition to democracy, and received support from the international community, including the World Bank and the International Monetary Fund.
End of war in 2002

This resulted in the Sun City (South Africa) so-called “Global and Inclusive Agreement for Transition in the Democratic Republic of Congo” signed on 17 December 2002 under the auspices of the United Nations, with the formula “1+4”, this is one President and four Vice Presidents, each representing one of the main political components and a government with representatives of the political parties. One important political party was not part of the government: Tshisekedi’s UDPS, who had expressed reservations and had refused to participate.

A Constitution of the Transition was enacted on 4 April 2003, pursuant to the Global and Inclusive Agreement and a new government put in place.

UN blue helmets, the United Nations Mission in the DRC, “MONUC”\(^4\), could actually deploy forces (before, Mzee Kabila had reluctantly accepted only the presence of observers) to maintain peace. A multinational commission, the Comité International d’Accompagnement de la Transition, “CIAT”, was set up to help Congo’s transition to democracy.

Elections in 2006 – New Constitution

Elections were organized in 2006 to adopt a new Constitution enacted on 18 February 2006 pursuant to a referendum, in order to elect a new Parliament and to elect a new President. The Presidential elections revealed three challengers after the first round, namely:

- Joseph Kabila, with his Parti du Peuple pour la Reconstruction et la Démocratie “PPRD”, dominant in the East and South; he obtained nearly 45% of the vote;
- Jean-Pierre Bemba, leader of the Mouvement de Libération du Congo “MLC”, then presumably allied to Nzanga Mobutu (the son of), dominant in the West, except Bandundu; he obtained 20%;
- Antoine Gizenga, the old Lumumba supporter (see Sub-sections 9.02 [3] [a] and 9.02 [3] [b] above), now a leader of the Parti Lumumbiste Unifié “PALU”, dominant in Bandundu (including the Kwilu region, where the revolutionary Pierre Mulele had led a violent revolt in 1964 – see Sub-section 9.02 [3] [b] above); he obtained 13%.

\(^4\) In 2010, it was renamed United Nations Organization Stabilization Mission in the Democratic Republic of the Congo “MONUSCO”
Numerous military clashes opposed Bemba’s personal guard to Kabila’s Garde Présidentielle and, again, many lives were lost. Kabila then formed a coalition called the Alliance de la Majorité Présidentielle formed by various political parties, including Gizenga’s and Nzanga Mobutu’s and, eventually, Kabila won the second round (with 58% to Bemba’s 42%) of the elections at the end of October 2006 and he appointed Gizenga as Prime Minister and Nzanga Mobutu (the son of the late President Mobutu (see Sub-section 2.3.3 above) as a Minister of State of a government of coalition that excluded Tshisekedi’s UDPS, Bemba’s MLC and other smaller parties. The stability that followed was marked by an increase in foreign investment (see Figure 15 – Sub-section 9.03 [2] below) and an increase in mining production, particularly noticeable in the copper industry (see Figure 16 below).

Bemba left the country in 2007 and was arrested in 2008 and handed over to the International Criminal Court in The Hague, where he is being tried for war crimes and crimes against humanity committed by his troops in 2002 and 2003 in the Central African Republic, a country that neighbors Bemba’s Equator Province.

The government was reshuffled on several occasions. Gizenga was replaced in 2008 as Prime Minister by Adolphe Muzito, a member of the same party.

New presidential elections are due to take place in 28 November 2011. In January 2011, the Constitution was amended in such a way that it consolidates President Kabila’s powers.

**Continuous turmoils in the East**

The Eastern provinces of South-Kivu (Bukavu) and North-Kivu (Goma) and the Uganda border territories remain places of many turmoils due, in particular to the presence there of Hutu refugees and troops from Rwanda, of Congolese Tutsis, Mai-Mais, and other uncontrolled groups that are led by warlords who are then supported, then dropped by the Rwandese government, the Congo government or the Uganda government according to relatively hermetic arrangements, from which commercial considerations and monetary interest are probably not entirely excluded. Indeed, this part of Central Africa is particularly concerned by conflict minerals and diamonds (see the paragraphs on this subject in Sub-section 9.03 [2] and Sub-section 9.05 [2] below).

**The Congo Provinces**

Under the current Constitution, the currently existing eleven provinces (including Kinshasa – see Figure 2) should have become 26 provinces (including Kinshasa) in 2009, but the administration needed to implement this is such that it is uncertain when and whether this division will enter into force.
The new provinces would shape the Congo as follows:

![Image of political map of Democratic Republic of the Congo](image)

Figure 5 – Future division of Congo provinces

The purpose of the division is to more equally divide the country’s wealth and to favor proximity of the administration to the citizens.

9.03 The economy

9.03 [1] Before independence

The Congo economy before independence in 1960 was based on agriculture and mining:

- **Agriculture**: in addition to a very active food program for local consumption (the country’s population never suffered from famine), the country exported *inter alia* cotton (3rd African producer), palm oil (6th world producer), coffee, timber, bananas and rubber. Some twenty different products were exported and represented 40% of the value of exports.

- **Mining**: Congo was the No. 1 producer of industrial diamonds, and in metals was ranked as follows:
  - Copper: 4th global producer, with close to 300,000 tonnes p.a. (8% of global production);
  - Cobalt: first global producer, with 5,500 tonnes p.a. (75% of global production);
  - Gold: 11,500 tonnes p.a.
  - And: zinc (6th global producer), tin (9th global producer), manganese, columbite-tantalite (“coltan”), coal (420,000 tonnes), silver, etc.

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5 The author thanks Julien Sad, associate with McGuireWoods LLP in Brussels, for his research on economic and financial data and for his tables and graphs. Unless otherwise stated, the economic data cited in this Section are taken from various reports and tables of the DRC section made available on the World Bank web site.

6 Source: UROME – Royal Belgian Overseas Union (www.urope.be)
In 1958, the GDP per capita amounted to US$90 and was the highest in Africa.

Regarding copper, the following two diagrams show the evolution of production at global level and at Congo level, and reveal that the Congo production continued increasing relatively steadily (until the mid-eighties – see Sub-section 9.02 [3] [c] above), even when the global production fell after the first and the second World Wars.


After independence, unfortunately, the country’s agricultural capacity decreased dramatically due to the tragic situation with rebellions and mutinies that started immediately after independence in 1960 and lasted five years, followed by the expropriations and mismanagement under Mobutu’s rule (see Sub-sections 9.02 [3] [a] to 9.02 [3] [c] above). The country started to rely more and more on revenue from its natural resources, namely oil, diamonds and copper essentially, and other metals such as cobalt, zinc, or manganese.

Very few reliable figures exist for the first years after independence and the main statistics than can be relied upon start in 1971.
A comparison with countries such as China, France, Chile and the U.S. reveal that Congo and its neighbor Rwanda, which has a population of 10.2 million (or six times less than Congo) and is much poorer as it has very little natural resources, are far behind other countries. Between 1971 and 2009, Congo’s GDP was around US$6.26 billion with a peak close to US$8.3 billion in 1988. In 2009, the country recorded a GDP amounting to US$6.39 billion (in constant US$ of the year 2000), as compared with US$3.21 billion for Rwanda. As a comparison, the United States accounted for US$11,500 billion in 2009 (in constant 2000 US$). In 2009, Congo’s GDP in US$ of 2009, amounted to US$10.58 billion. Chile, a copper producing country like Congo, is a good example, being a country that recorded a remarkable growth since its transition to democracy, after having experienced troubled periods including nationalizations and collapse of the economy, a military coup, repression and dictatorship.

According to the Congo Minister of Plan, Congo achieved in 2010 a GDP of US$ 12.5 billion, which could be raised to US$19 billion depending on the mode of calculation, which shows a strong increase of the economic activity.

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7 Speech of the DRC Minister of Plan, Olivier Kamitatu, at the Congo EU Economic Forum held in Brussels on 9 and 10 June 2011.
Congo’s GDP per capita strongly decreased these past years and reached its lowest level, amounting to US$81, in 2001, to compare with the US$90 in 1958 (see Sub-section 9.03 [1] above), such 1958 GDP per capita being approximately equal to US$550 in 2001. In 2009, a slight increase to US$97 was noticeable, in US$ of the year 2001, which is US$160 in US$ of 2009. However, 75% of the Congolese population has to cope with no more the one dollar per day\(^8\). As a comparison, Rwanda had in 2001 a GDP per capita which amounts to US$321.

\(^8\) “Du maintien à la consolidation de la paix: quelles perspectives pour la MONUSCO”, Speech of Richard Zink, Head of the EU Delegation in the DRC, delivered at the seminar organized by the French Mission to the UN, 28 April 2011; http://eeas.europa.eu/delegations/congo_kinshasa/index_fr.htm
China recently accomplished some progress but is still suffering from a low GDP per capita, a little over US$2000 in 2009, as compared with US$23,000 and US$37,000 for France and the United States respectively.

Growth

Congo’s GDP growth achieved an average of 5% pa from 2000 to 2010, but was also hit by the recession as the graph below clearly indicates.

![GDP Growth, annual % (2000 - 2010)](image)

Figure 12 – GDP growth 2000-2010 - Source: World Bank, World Development Indicators database, April 2011

Gross Domestic Product by sector

In 2009, the country generated a GDP of about US$6.38 billion. As illustrated on the graph below, Congo’s economy is mostly driven by industries resulting from the primary sector (about 40% of its GDP). Extractive industries, including mining, contributed no more than 8.9% to GDP in 2009 as compared to 21.6% in 2008, as a result of the recent 2007-2009 recession. Exportation of mining products however still represented in 2009 a value close to 70% of total export earnings. According to a recent statement of the Congo Minister of Plan, extractive industries increased back to 22% in 2010⁹.

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⁹ Speech of the DRC Minister of Plan, Olivier Kamitatu, at the Congo EU Economic Forum held in Brussels on 9 and 10 June 2011.
However, as explained here below, the data relating to the mining sector does not seem to be reliable enough to draw conclusions.

According to the Head of the EU Delegation in Congo, the Congo government apparently collected in 2010 less than US$200 million from the mining sector, while oil earnings exceeded US$400 million. The mining sector still suffers from serious dysfunctions and especially from governmental mismanagement. As a result, the country does not have any reliable data about the number of mining operators and their production, or even data on exported commodities.\(^{10}\)

**Inflation**

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The country was hit by strong inflation during the Mobutu era, with an annual average rate of 46.62% between 1966 and 1990, followed by crazy thousands of per cents from 1991 to 1994 (over 23,000% in 1994!) that marked the end of Mobutu (see Sub-section 9.02 [3] [c] above). As results from a comparison (see Figure 14, left) with countries such as Chile, China, France, Rwanda and the US, Congo’s inflation was the highest and not really correlated to foreign inflation.

Stabilization measures undertaken by the government in 2001 managed to reduce the hyperinflation from 514% in 2000 to 4% four years later, but in 2009, the inflation rate was still close to 53% and has been reduced by about 50% in 2010. As at 5 June 2011, the annualized inflation rate amounted to 27.47%\textsuperscript{11}.

**Foreign investment**

Like any other third world country, Congo needs to rely on private investment to increase its economic growth, particularly in the mining sector, where the investments are heavy and expensive.

\textsuperscript{11} Source: Banque Centrale du Congo (www.bcc.cd).
As can be seen, the opening to foreign investment at the end the Mobutu era in 1994 (see Sub-section 9.02 [3] [d] above) raised some interest as from 1996, which then decreased with the first Congo War and again with the beginning of the second Congo War (see Sub-section 9.02 [3] [e] above). The assassination of Mzee Kabila in January 2001 marked the beginning of a new increase of foreign investment, with the adoption of the Mining Code in 2002 with the support of the World Bank, which was intended to promote an attractive climate for private investment in the country’s mining resources through a clear and modern legal framework. It is interesting to note that when the transition to democracy process was achieved in 2006 with the adoption of a new Constitution and the holding of elections, the flow of foreign investment returned. In 2007, investments increased by 15% to reach US$1.8 billion but fell by about 10% two years later due to the recession.

**Mining activities**

As regards mining, the following tables show the recent evolution of the mining production.

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**Figure 15 – Foreign Direct Investment in Congo 1991-2009 – Source: World Bank, World Development Indicators database, April 2011**

**Figure 16 – Copper Production 2011-2010 - Source: Banque Centrale du Congo, 2011 and Gécamines**
The copper province of Katanga is part of the so-called Central African Copper Belt that stretches through Congo and Zambia. It is the second richest copper province in the world with reserves estimated at 70 million tonnes of copper, just below Chile with 88 million tonnes. As a comparison, USA and Russia reserves are respectively estimated at 45 and 20 million tonnes. In addition, it also contains cobalt, zinc, germanium and uranium\textsuperscript{12}, and even coal.

Industrial copper production started in Congo in 1911 with the Union Minière du Haut Katanga. In 1967, UMHK was nationalized (see Sub-section 9.02 [3] [c] above) and its activities were taken over by a state-owned company that eventually became GECAMINES (\textit{La Générale des Carrières et des Mines}), which is now a \textit{société par actions à responsabilité limitée} (joint stock company also called “company limited by shares” – see Sub-section 9.04 [3] below), with the Congo State as the sole shareholder.

From the beginning of industrial copper mining to 2010, approximately 19 million tonnes of copper were produced. A peak was recorded in the 1980s with approximately 500,000 tonnes. The following decade, copper production decreased to about 30,000 tonnes per year. In 2008 and 2009, total copper produced increased to around 300,000 tonnes per year, and reached nearly 500,000 tonnes in 2010.

Copper production increased by 60\% in 2010, close to 500,000 tonnes. Gécamines increased its production to approximately 35,000 tonnes in 2010 as compared with its 13,000 tonnes in 2009. Copper remains the first commodity produced in DRC.

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{cobalt_production.png}
\caption{Cobalt Production 2001-2010 – Source: Banque Centrale du Congo, 2011}
\end{figure}

Cobalt production sharply increased between 2007 and 2010. These last four years, the cumulated production amounted to 214,298 tonnes.

Zinc production rose by 27.4% in 2009. The annual production decreased by approximately 10,000 tonnes in 2010.

Diamond deposits are mainly located at Kasai Occidental and Kasai Oriental, Katanga, Kivu as well as in the north of the country.

The country recorded a peak in the diamonds production in 2005 with around 33 million carats. In 2010, the annual production only reached 17 million carats as a typical reflection of the recent recession.
Gold production had been quite insignificant in the last few years and the industry is currently undergoing a reshuffle with investors such as AngloGold with its Kilo and Moto projects in Ituri (North-East), Banro’s project in Eastern Congo and with other projects that are arising in various places. However, according to unofficial sources, some neighboring countries of Congo became new gold exporters over the last decade and would operate mines or buy gold (and other mineral resources, such as coltan or cassiterite) from parts of North-Eastern and Eastern Congo, that are controlled by warlords and escape the Kinshasa rule (see Sub-section 9.02 [3] [f] above).

This raises the issue of the conflict minerals and diamonds.

**Conflict minerals** and diamonds

A the beginning of the years 2000, the UN Security Council started in to enact resolutions aimed at sanctioning people trading with armed groups in the Eastern Congo and at ceasing illegal trading of minerals. These initiatives were later supported by MONUSCO (see Sub-section 9.02 [3] [f] above), which conducted a number of armed operations with the Congo army (FARDC) in 2009 and 2010 to expel the rebels and recover the mining deposits and production sites. The Congo government also prohibited, in September 2010, the trade of artisanal minerals in the East (Kivus and Maniema) as an attempt to stop the illegal trade and the trade of such minerals by armed groups (“conflict minerals”). Unfortunately, these actions did not succeed in stopping the trade of conflict minerals in that part of Africa.

This is why measures are now being taken to avoid the sale of conflict minerals on the commodity markets. Such measures include backward traceability, up to the place of the mine and the place of exportation, and the related certification of minerals.

The OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, adopted in 2010, provides a methodology and suggests measures for a number of minerals, but it is not binding and has therefore a limited efficiency. For more details, please refer to the OECD web site (www.oecd.org).

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15 Organisation for Economic Co-operation and Development.
The US Dodd-Frank Act (called the “Obama Law” in Congo), enacted in July 2010, imposes a series of duties to mining companies in respect of conflict minerals (including gold, coltan, cassiterite et.al.) that serve to finance conflict in Congo or in an adjoining country (including, Rwanda, Burundi, Sudan, Uganda et.al.). These duties include notably specific disclosures as regards the mining products and their production, source and chain of custody, health and safety data and certain payments made.

The Kimberley Process Certification Scheme (“KPCS”), launched in 2003 with the support of the United Nations (see also Sub-sections 9.02 [3] [b] above and 9.05 [2] below), imposes requirements on its members to enable them to certify shipments of rough diamonds as “conflict-free” and prevent conflict diamonds from entering legitimate trade. The KPCS imposes certain minimum requirements in terms of legislation and institutions to be put in place to allow export, import and internal controls, as well as transparency and exchange of information. Members can only legally trade with other members who also meet the minimum requirements. International shipments of rough diamonds must be accompanied by a KP certificate guaranteeing that they are conflict-free. More details are available on the KPCS website (www.kimberleyprocess.com). Congo implemented these minimum requirements with a ministerial decree issued by the Minister of Mines on 31 May 2003\(^\text{16}\). It was followed by implementing measures\(^\text{17}\) that extend to other precious and semi-precious minerals and stones and other typical conflict minerals such as coltan and cassiterite.

**Current account balance**

![Current Account Balance 1961 - 2009 (Constant 2000 US$ Billion)](image)

*Figure 21: Current account balance - Source: World Bank, World Development Indicators database, April 2011*

Again, the end of the Mobutu era is clearly noticeable. More recently, the country has been marked by a deterioration of the current account balance between 2000 and 2008. Despite a slight improvement of exports since 2009, a lot remains to be done, but the potential is there.

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17 See Arrêté ministériel n° 2503 CAB.MIN/MINES/01/07 du 5 février 2007 portant procédure d’évaluation, d’expertise et de certification de substances minérales.
Such a result is related to the demand contraction of key DRC exports on the international market, in particular mining, following the 2007-2009 recession. However, the imports growth seems mostly due to the implementation of important investments in the construction and public works sector. For example, the country accounted for an imports level close to 22% of GDP in 2009 compared to 10% concerning exports. The deficit is financed by foreign direct investments and donor assistance, including debt relief\textsuperscript{18}.

**External debt**

![External debt - Source: World Bank, World Development Indicators database, April 2011](image)

The Mobutu years - from 1965 to 1997 (see Sub-section 9.02 [3] [c]) - placed Congo in a significant situation of indebtedness with a regular growth of the external debt until 1996. The country’s indebtedness increased from US$4.6 billion in 1983 to US$6.9 billion in 1987 and even reached about US$12 billion in 2000. In 1984, the external debts reimbursement represented about 42% of the Congolese budget compared to 55 % in 1985 (see Sub-section 9.02 [3] [c]).

In 2010, Congo reached the completion point as set by rules of the International Monetary Fund (IMF) and the World Bank’s International Development Association under the Heavily Indebted Poor Countries (HIPC) Initiative and the Multilateral Debt Relief Initiative (MDRI), in view of getting debt relief close to US$12.3 billion, out of a total debt of US$ 13.7 billion\textsuperscript{19}.

A three-year Extended Credit Facility (ECF) arrangement was approved by the IMF on 11 December 2009, which provides a debt relief equivalent to US$561 million. Recently, IMF has completed the third review of the country’s economic performance and enabled a disbursement around US$80 million under such initiative, bringing total disbursements to an amount close to US$320 million\textsuperscript{20}.

On April 26, 2011, an agreement was reached between the Congolese authorities and the United States providing additional debt relief of more than US$1 billion. Such agreement reveals the strong US support to the economic and social development of the DRC\textsuperscript{21}. On May 30, 2011, Belgium, Italy and

\textsuperscript{19} International Monetary Fund, “IMF and World Bank Announce US$12.3 billion in Debt Relief for the Democratic Republic of the Congo”, www.imf.org (July 1, 2010).
\textsuperscript{21} www.digitalcongo.net (29 April and 7 June 2011).
The Netherlands granted Congo a debt relief totaling over US$1.9 billion, while on June 7, 2011, France granted a debt over US$1 billion \(^{22}\). More recently, Japan and Sweden respectively granted debt relief for US$1.1 billion and 157 million \(^{23}\). In all, Congo would have obtained already approximately US$10 billion debt relief and the balance of Congo’s external debt would now amount to US$ 2.9 billion \(^{24}\).

9.03 [3]  Improvement of business climate

In 2009, the Congo government launched a commission in charge of making recommendations for the improvement of the business climate in view of rendering the country more attractive to foreign investors. A series of measures were undertaken, among which the decision to adhere to OHADA (see Sub-section 9.04 [1] below) and a few modernization measures of publication of companies’ acts and the registration of companies with the register of commerce. Moreover, the government declared in March 2011 its intention to adhere to the 1958 New York Convention on the recognition and enforcement of arbitral awards, which would complete the OHADA arbitration rules and give them full efficiency.

One item that appears on all screens is the tax penalty system by which a part of the penalty is paid back in the form of bonuses to agents of the tax agencies and State authorities that participated in the assessment and collection of the penalty. This system should be reviewed in order to avoid any abuse.

9.04  Legal provisions applicable to mining operations

<table>
<thead>
<tr>
<th>Selected legislation:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Decree of the King-Sovereign dated 27 February 1887 on commercial companies, as amended (very similar to the Belgian company law), and related legislation;</td>
</tr>
<tr>
<td>Decree of the King-Sovereign dated 30 July 1888 on contracts or contractual obligations (most provisions were taken over from the Napoleon civil code related sections);</td>
</tr>
<tr>
<td>Royal Decree dated 22 June 1926 on companies limited by shares, as amended (very similar to the Belgian company law), and related legislation;</td>
</tr>
<tr>
<td>Code of Civil Procedure (Code de Procédure Civile – Decree dated 7 March 1960);</td>
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<tr>
<td>Code of judiciary organization and competence (Code de l’organisation et de la compétence judiciaire – Ordinance-Law No. 82/020 dated 31 March 1982);</td>
</tr>
<tr>
<td>Mining Regulations (Règlement Minier - Decree No. 038/2003 dated 23 March 2003), available in French only on the web site of the Cadastre Minier (mining registry): <a href="http://www.cami.cd/">www.cami.cd/</a> - an unofficial English translation circulates, which also contains numerous inaccuracies;</td>
</tr>
<tr>
<td>Law No. 10/002 dated 11 February 2010 authorizing the adhesion of the DRC to OHADA.</td>
</tr>
</tbody>
</table>

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\(^{22}\) www.digitalcongo.net (1 June 2011)


\(^{24}\) Speech of the DRC Minister of Plan, Olivier Kamitatu, at the Congo EU Economic Forum held in Brussels on 9 and 10 June 2011.
Selected readings:
- Hubert André-Dumont, “Getting the Deal Through – Mining 2011”, Chapter on Democratic Republic of Congo, published July 2011, London (www.gettingthedealthrough.com)” – certain portions of Sections 9 [04] and 9 [05] of this Chapter 9 are similar to certain parts thereof;
- Adolphe Kilomba Sumaili, “La protection juridique des investisseurs étrangers par le nouveau Code Minier de la RDC”, [July 2010];

9.04 [1]  

**OHADA**

The OHADA Treaty dated 17 October 1993 on the harmonization of the business law in Africa and the related common sets of rules, called “uniform acts”, was adhered to by the DRC in 2010. Most of the former French sub-Sahara colonies have joined this initiative, together with Equatorial Guinea and Guinea-Bissau.

Its purpose is to put into place a common business law, “simple, modern and adapted, in view of facilitating the life of businesses”. However, the entry into force in the DRC of this adhesion is suspended until the filing of the ratification instruments by the DRC government.

Once the DRC will have filed these, the OHADA uniform acts will enter into force after a period of sixty days. The documents are available on the OHADA web site (www.ohada.org). This will entail a number of important changes in the business law of the DRC, notably for what concerns security interests, general commercial law, company law and accounting. These are all civil law based and very similar to current principles existing in French and Belgian law. Moreover, arbitration and Supreme Court recourse are provided, with a view of securing community of interpretation of legal provisions, coherence and impartiality, and avoiding undue influence and corruption.

9.04 [2]  

**Civil law basis**

The legal system of Congo is civil-law based. Its legislation is inspired by the Napoleonic Code and most parts of its family law, contract law, torts law, company law, security law, etc., are inspired from the Belgian legislation as it existed before independence. It is therefore also very similar to French law and to the legislation of other French speaking African countries.

9.04 [3]  

**Types of business structure**

The main business structures used by private parties to carry on mining activities are the two following types of locally incorporated companies:

- the private limited liability company (société privée à responsabilité limitée - “SPRL”), with a minimum of two shareholders; this type of company does not qualify to benefit from tax deductions for interest on shareholders’ advances; and
- the company limited by shares (société par actions à responsabilité limitée - “SARL”), with a minimum of seven shareholders; this type of company requires a presidential decree (called “ordonnance”) to approve its incorporation and main changes to its Bylaws.

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25 A commercial web site www.ohada.com also provides good information, but this web site is not the OHADA official web site.
The SARL type of company has recently been adopted by the main State-owned companies, known before as “public enterprises”, such as Gécamines (copper and cobalt company active in Katanga) or Sokimo (gold company active in the Kilo-Moto area in Oriental Province), the electricity company SNEL etc. Once the OHADA sets of rules will be implemented in Congo, the Congolese company laws will be totally reshuffled and modernized, and the burdensome requirements that apply to SARLs will disappear when the DRC’s adhesion to OHADA takes effect (see Sub-section 9.04 [1] above).

9.04 [4]   **Mining legislation**

The mining industry is regulated by the Mining Code, adopted in 2002, and its ancillary Mining Regulations, adopted in 2003. Both apply throughout the entire Congo. With the support of the World Bank, they were put into place during the post-Mzee Kabila transition (see Sub-section 9.02 [3] [f] above) and replaced, for mines and quarries, the 1981 Mining Law and the 1967 Mining Regulations. However, both the 1981 Mining Law and the 1967 Mining Regulations remain applicable to hydrocarbons until a new Hydrocarbons Code is enacted.

The Mining Code purports to provide a comprehensive set of rules applicable to all aspects of mining on a self-contained basis, including acquisition, transfer, operation and termination of mining rights, environment protection, cultural heritage, protection of neighboring communities, tax and customs incentives, currency exchange, force majeure, marketing and transport, pledges and mortgages, etc. The Mining Code and the mining regulation also cover quarrying activities, which will not be discussed herein.

9.04 [5]   **Main features of the Mining Code**

9.04 [5] [a]  **Suppression of mining conventions**

One of the purposes of the Mining Code was, in addition to being a self-contained set of rules, to suppress the so-called mining conventions, i.e. mining development agreements concluded between investors and Congo State, in order to favor transparency, equitableness and equal treatment of investors and other stakeholders, and discourage influence peddling, favoritism, or worse, corrupt practices. The intention was also to suppress tax exonerations that were detrimental to the Public Treasury. However, the Mining Code acknowledges that tax advantages are key to attract mining investors, which is why it put in place a uniform preferential tax and customs system. This preferential tax and customs system applies to all mining operators, without exception (see Sub-section 9.04 [5] [e] below).

Those mining conventions that were regularly effective prior to the enactment of the Mining Code, that is, those that were in full compliance with the 1981 Mining Law provisions, could, until their contractual expiry, remain in place unless their title holders decided to “opt in” for the Mining Code. This meant the suppression of all the dubious Accords Préliminaires concluded during the Mzee Kabila era. Only those fully regularly concluded and duly approved mining conventions, as provided by the 1981 Mining Law, could continue for their contractual duration and continue to be governed by the said 1981 Mining Law.

When the Mining Code was enacted in 2002, there existed very few mining conventions with foreign investors: one for diamonds (Sengamines, now cancelled), three for gold (Minière d’Or de Kisenge “MMDK”, Ashanti-AngloGold Kilo “AGK” and Banro), one for copper and silver (Anvil Mining for its Dikulushi project, now operated by Mawson West) and one for copper and cobalt (Tenke Fungurume Mining).

The startling announcements of the China mega-contract (“copper against infrastructure”) in September 2007 and the Areva uranium contract in March 2009 obviously caused some trouble: mining conventions were suppressed by the Mining Code but nevertheless the Government signed new mining agreements.
State ownership

As is the case in many countries, the legislation reserves for the State the ownership title to mineral resources in the soil and subsoil. As a result, a clear distinction exists between surface rights and mining rights, in such way that the holder of a surface right has no right to claim any right to mineral resources situated within his surface right area.

However, any eligible party may apply and obtain, provided the legal conditions are met, rights to explore and mine (“exploit”) mineral resources and transport, process and market the mineral products extracted or processed.

This principle of State ownership of mineral resources already existed when Congo was a Belgian colony, and this, as from the outset. The path had already been laid by article 552 of the Napoleonic Code, on which the Congo colonial legislation was based, which provides that the owner of the land is entitled to the subsoil subject notably to the specific legislation on mines.

Obtaining a mining right

While artisanal mining is reserved for Congolese nationals (and will not be further reviewed herein), any private party can engage in non-artisanal research or exploitation of mineral substances in Congo provided he or she is the holder of a valid mining right. Two types of mining rights exist: research (exploration) and exploitation (operation), for which permits can be obtained upon completion of the corresponding administrative procedure. Each permit relates to one or more specific minerals for which it was applied for, but extensions to other minerals can be applied for under certain conditions.

There are three types of exploitation permits: exploitation permit, tailings exploitation permit and small scale exploitation permit. The exploitation permit is the standard, large scale operating permit. The tailings exploitation permit is quite similar to the exploitation permit and the small scale exploitation permit is reserved to investments requiring between USD 100,000 and USD 2,000,000, for “exploitable” reserves with a mine life below ten years and the operations of which are "sufficiently mechanized”.

The granting of mining rights is based on a “first-come, first-served” principle: the applications for mining rights for a given “perimeter” are registered in the chronological order of their filing.

A mining perimeter is a demarcated surface area with indefinite depth. A mining perimeter is composed of quadrangles or “squares” of a surface of 84,955 hectare each. The total surface of the perimeter of a research or exploitation permit cannot exceed 400 km², this is a maximum of 471 squares. Moreover, no person and his affiliated companies are allowed to own more than fifty permits and in any case no mining perimeters in excess of 20,000 km² or 23,542 squares.

In exceptional cases, the Minister of Mines may submit to tender, open or by invitation, mining rights relating to a specific deposit.

The famous USD 9 billion China mega-contract, by which the DRC would trade infrastructure works against non-ferrous minerals, did not need to comply with such tender procedure because the concerned mineral deposits belong to the State-owned company Gécamines. Its perfection needs legislative adaptation to secure the specific total exemption of taxes, royalties, import and export duties etc. So far, this has not happened.
Nationality of title holder

The Mining Code does not impose distinctions between mining rights that may be acquired by domestic parties and those that may be acquired by foreign parties, except for artisanal diggers and traders, who can only be individual DRC nationals, and except for foreign companies that are requested to incorporate a local company before they apply for an exploitation permit.

Foreign parties must elect domicile with an authorized domestic mining and quarry agent and act through his or her intermediary.

A foreign party does not need to have a local partner to acquire a mining right. Neither is there any legal requirement as to the nationality of the directors of the title holder. As regards the management, specific limitations exist under separate legislation, which provides for a maximum rate of foreign employees and specific positions that are reserved to Congolese nationals (see Sub-section 9.04 [5] [i] below).

Transfer of 5% free carried interest to the State

It is a condition, in order to obtain an exploitation permit, that the applicant be either a DRC individual or a DRC company.

In the latter case, it is a condition that 5% of its share capital be transferred to the State, as a non-dilutable share and free from any encumbrance. The transfer must be made for free.

This condition of a 5% free carried interest did not feature in the draft mining code prepared with the support of the World Bank. It was added at the request of members of Parliament and raised many concerns initially. The fact that a local partner, even a State-owned partner such as e.g. Gécamines, has a stake in the operating company does not relieve the investor from complying with this 5% State-shareholding condition.

This condition is also different from those appearing in a model that circulated in May 2010 and that was prepared at official level. This model provides inter alia for the following parameters:

- a Congo national shareholding of at least 35% (non dilutable) is imposed,
- the local shareholder is entitled to have three board members out of seven and to appoint the deputy general manager and one other manager out of a total of five;
- the funding by the foreign investor must be without interest for 30% of the funding and at market rate for the balance;
- the local shareholder is entitled to a transfer bonus (in French: “pas de porte” or “key money”) equal to 1% of the value of the deposit as determined by the feasibility study, to be raised if the subsequent prospection and research reveal additional geological reserves; and
- the local shareholder is entitled to receive a royalty of 2.5% of gross sales proceeds.

Some parameters from this model can be found, as adapted, in the few contracts resulting from the mining contacts review that were disclosed by the Ministry of Mines (see Sub-section 4 below).

Maintaining mining rights

To maintain the validity of its mining rights, the holder must: commence exploration within six months (research permit) or commence development and construction works within three years (exploitation permit) as of the date the title evidencing its right is issued; and pay the surface duty per square relating to its title at the counter of the Mining Registry. If it fails to fulfill any of these obligations, the holder may be deprived of his or her right.

A title holder must also comply with specific rules relating to, among others, protection of the environment, cultural heritage, health and safety or construction and planning of infrastructure.
Duration and renewal of mining rights

A research permit is granted for four years for precious stones and for five years for other minerals.

An exploitation permit lasts for 30 years, renewable, while a tailings exploitation permit lasts for five years, renewable, and the small scale exploitation permit lasts for maximum ten years.

A number of conditions relating to payment of duties, update of environmental reports etc. apply for the renewal of mining rights. In addition:

- A research permit can be renewed, but at each renewal, the holder must renounce 50% of the perimeter of his research permit. This is to induce title holders to either start exploitation or to release part of their perimeter and so avoid “freezing” potential deposits; for precious stones, the renewal can be granted twice for two years, while for other minerals, the renewal can be granted twice for five years;
- An exploitation permit can be renewed by periods of 15 years as long as the deposit can be mined;
- A tailings exploitation permit can be renewed by periods of five years as long as the tailings can be mined;
- A small scale exploitation permit can normally not be renewed beyond a period of ten years from its initial granting, but extension can be obtained.

9.04 [5] [c] Mining operations

A research permit confers upon its holder, inside its perimeter, the exclusive right to conduct exploration activities for those minerals for which he obtained the permit. He is also allowed to export samples under certain conditions and to obtain an exploitation permit for the relevant minerals provided he establishes the existence of a deposit that is economically viable.

An exploitation permit confers upon its holder the exclusive right, inside its perimeter, to conduct exploration, development, construction and exploitation (mining) activities for those minerals for which he obtained the permit. In addition, an exploitation permit allows its holder to build the installations and infrastructure needed for the mining exploitation, use the water and forestry resources inside the mining perimeter, and process the minerals extracted from the mining perimeter, transport and market them. In addition, with the authorization of the Provincial Governor, the holder of an exploitation permit is allowed, within the mining perimeter, inter alia to occupy the land required for his activities, build housing facilities and social facilities, build roads and other means of transport within the mining perimeter, and outside the mining perimeter, to establish means of communications and transport of any nature.

In any case, any occupation of land preventing the rightful surface right title holders from using the surface, or any modification rendering the land unfit for cultivation, will entail the obligation for the mining title holder to fairly compensate the surface right holder.

Besides pure mining activities, mining operators are supposed to comply with environmental obligations pursuant to the Mining Regulations. Congo mining legislation does not provide so far for social development relating to mining projects. In addition, like any employer, mining operators have to provide medical care for their employees. Most mining operators also provide social development projects (schools, drinking water wells, etc), either under their mining conventions concluded with the state and/or under the partnership agreements concluded between their foreign parent company and the state-owned company. Others do that on a voluntary basis. Some Congo provinces impose the operation or support of local agricultural projects, such as e.g. Katanga, which, since 2008, obliges mining companies to develop at least 500 hectares of farmland.
9.04 [5] [d]  **Strict liability – Punitive damages**

The liability of the holder of a mining title is a strict liability, that is, a liability without need for the victim to prove a fault committed by the mining operator. It is sufficient for the victim to prove the damage suffered and relate them to the mining operations to be able to obtain indemnification.

This type of liability is relatively rare in civil law countries where the law of tort requires a fault (including negligence) and a damage suffered, as well as a causal relation between such fault and the damage to trigger the liability of the tortfeasor and cause him to indemnify the victim, but it is often applied in mining matters.

In the case of transfer of the mining title, the liability for damage resulting from works made before the transfer are borne by both the transferor and the transferee who are jointly liable towards the victim of the damage. However, the transferee has a right of recourse against the transferor in the event the latter did not disclose the dangers and constraints he was aware of.

Damages are increased with 50%, unless the damaged goods are restored in the state they were before the occurrence of the damage.

As regards the occupation of land, the title holder whose mining activities will deprive the rights holder of land from its use, must pay an indemnity equal to the rent, or to the value of the land increased with 50%.

9.04 [5] [e]  **Tax benefits**

The Mining Code provides for a self-contained “exhaustive” and “exclusive” tax and customs system, which means that only those taxes and customs duties provided for in the Mining Code apply to the holders of mining titles for their mining activities.

Moreover, the tax benefits of the Mining Code extend to the suppliers and contractors of the title holder, and the Mining Code provides for a stability period of 10 years as from the granting of the mining title (or the entry into force of the Code for the titles that existed before).

There are discussions as to whether or not these tax benefits extend to administrative taxes such as e.g. those in relation to immigration and labor law to obtain a visa and a work permit.

The taxes, duties and the mining royalty provided by the Mining Code are the following:

**Mining royalty**

A mining royalty is owed as from the date of commencement of effective exploitation. The mining royalty is calculated on the value of sales made, less transport costs and less costs of assay, insurance and marketing. The rate of the mining royalty is 0.5% for iron or ferrous metals, 2% for non-ferrous metals, 2.5% for precious metals, 4% for precious stones, 1% for industrial minerals, solid hydrocarbons and other not cited substances, and 0% for standard construction materials. The mining royalty paid is deductible from the taxable basis of the professional tax on profits.

As a means to encourage local production activities, the title holder benefits from a tax credit equal to one third of the mining royalty paid on products sold to a transformation entity located in Congo.

**Profit-based tax**

The professional tax on profits is set at a preferential Mining Code rate of 30% (instead of the 40% standard rate) and is levied on the net profits. The net profits from exploitation are determined in accordance with the general accounting and tax legislation in force. In addition, the Mining Code sets a number of specific rules, for depreciation, deductible costs etc.
Revenue-based taxes

Domestic turnover tax

The holder is liable for the domestic turnover tax on sales, purchases and services ("impôt sur le chiffre d'affaires", abbreviated "ICA").

A total reorganization of the turnover tax “ICA” has been undertaken since 2005 and it should be replaced as from 1 January 2012 by a “taxe sur la valeur ajoutée” (value added tax). This is a modern and simplified tax on the value added on each stage of the production/distribution process, which is applied in 140 countries worldwide including a number of African countries. Its main feature is that it is supposed to be neutral because it is not part of the production costs as it affects the end consumer and is recoverable by the economic operators. A single rate of 16% will apply on imports and sales of goods and services and 0% on exports. As regards mining, exemptions are provided, notably for imports of equipment, materials and chemical products, but exclusively in relation to “prospection, exploration and research”. Obviously, specific provisions will need to be provided to avoid an adverse effect of the VAT on the mining operators, who benefit from the tax benefits of the Mining Code and from a guarantee of stability (see below Sub-section 9.04 [5] [j]).

Sales of products to a transformation entity in Congo are exempted. Sales of equipment and agricultural inputs in Congo remain taxable at the rate of 3% pre-dating the Mining Code. All other sales of products in Congo are taxable at the preferential Mining Code rate of 10% (instead of 15%).

Purchases of locally manufactured products for mining activities are taxed at the preferential Mining Code rate of 3% (instead of 15%).

A preferential Mining Code rate of 5% applies to services received by the title holder that are directly related to its corporate purpose. Services received by the title holder not directly related to its corporate purpose are taxable at the standard rate of 18% if rendered by a Congo provider, 30% if the provider is based abroad, 9% if rendered by banking and financial institutions, for loans, other than agricultural loans and loans for investment or allocated for professional purposes, or 6% or 15% respectively for national and international transport services.

This condition of services relating to “corporate purpose” is obviously a typical cause of discussion with the tax administration, which would e.g. like to exclude construction works because they consider that such type of works are not actually mining works.

Services rendered by the title holder are taxable at the same standard rates.

Turnover tax on imports

The Mining Code does not provide for a turnover tax on imports.

However, a 2004 law subjects mining activities to the standard regime of turnover tax on imports. Under this regime, imports of equipment; agricultural, breeding and veterinary inputs; and products specifically designated in the tariffs of import duties and taxes are taxed at a preferential rate of 3%, while the standard rate is 15%. Only payments at the 15% rate are deductible from later domestic turnover tax payments. It is argued that this law breaches the Mining Code's guarantee of stability (see above). In practice, the customs authorities tend to apply the turnover tax on imports only to goods that do not appear on the approved “list of assets benefiting from the preferential regime” in terms of custom duties (see below), despite the exhaustive tax and customs regime of the Mining Code, which does not provide for a turnover tax on imports.

Taxes on rental income

Rental income is taxed at the standard rate of 22%.
Withholding tax on interest and dividends

The 20% standard rate of the withholding tax is not applied to interest paid on loans contracted abroad in foreign currency. In addition, loans from affiliates must be on interest rates and other conditions as favorable as or better than those of loans that could be obtained from third parties to benefit from this exemption.

Dividends and other distributions are subject to the preferential Mining Code withholding tax at the rate of 10%.

Withholding tax on salaries

The holder is liable to pay the standard withholding tax on salaries payable by its employees at the progressively increasing standard rate ranging from 3 to 50%, capped at a total tax of 30% of taxable income.

The holder is liable to pay a 10% tax on indemnities paid as the result of the termination of employment or the breach of the employment contract or contract for the hiring of services.

Exceptional tax on expatriates’ salaries

The holder is liable to pay the exceptional tax on expatriates’ salaries at the preferential Mining Code rate of 10%, instead of the 25% standard rate. This tax is deductible from the professional tax on profits.

Asset-based taxes

Tax on real estate property

The title holder is liable to pay the tax on real estate property as determined by general tax legislation, except for buildings situated inside the mining perimeter, which are only subject to the tax on the surface area of mining concessions.

Tax on vehicles

Tax on vehicles as determined in accordance with the general tax legislation is due, but those vehicles used exclusively within the mining perimeter for transport of staff or materials, or for handling or traction are exempt from this tax.

Tax on the surface area of “mining concessions”

A research permit holder is liable for the tax on the surface area of mining concessions at the rates of US$0.02 per hectare for the first year, US$0.03 for the second year, US$0.035 for the third year and US$0.04 for each subsequent year.

An exploitation permit holder is liable for this tax at US$0.04 per hectare for the first year, US$0.06 for the second year, US$0.07 for the third year and US$0.08 for subsequent years.

Although “mining concessions” do not exist anymore under the new code, this tax has been maintained by the new code as it applies to research permits and exploitation permits.

Annual area fee per square

A special area fee, payable annually, is levied on the number of squares held by a title holder. One square is 84.955 hectares (see Sub-section 9.04 [5] [b], paragraph “Obtaining a mining right”, above). The fee is meant to cover service and management costs of the Mining Registry (Cadastre Minier) and the Ministry of Mines.
For a research permit, the annual duty per square amounts to US$2.55 for each of the first two years, US$26.34 for each subsequent year, US$43.33 for each year of the first renewal period and US$124.03 for each year of the second renewal period.

For an exploitation permit, the annual duty per square is US$424.78 for an ordinary exploitation permit, US$679.64 for a tailings exploitation permit and US$195.40 for a small-scale exploitation permit.

Other taxes

The holder is subject, when carrying out activities outside the mining project, to the general tax legislation.

Annual traffic tax

The holder of a mining title is liable to pay the annual traffic tax pursuant to the general tax legislation except for those vehicles used exclusively within the mining perimeter.

Nevertheless, the tax administration sometimes purports to obtain a payment of this tax even for vehicles used on non-public roads situated within the mining perimeter. Local city halls also try to levy “parking” taxes for such vehicles even though they will never leave the mining perimeter and never park in their cities.

Consumption and excise duties

The title holder is liable for the consumption and excise duties as per the general law, except for fuels (0% instead of 15%).

Customs duties

Import duties at preferential rates

Before the effective commencement of exploitation work (and under certain conditions during extension activities), all goods and products imported strictly for mining use are subject to import duties at the preferential rate of 2%, provided these goods appear on a “list of assets benefiting from the preferential regime” that must first have been approved by a joint decree issued by the Ministers of Mines and Finance.

In principle, such decree must be issued within thirty days of the request made by the title holder, failing which, the list is deemed approved. Any rejection must be motivated in writing.

As from the effective commencement of exploitation work, the import duty rate of 5% applies under the same conditions. However, fuels, lubricants, reagents and consumables for mining activities remain taxed at 3%.

Imports by the title holder of equipments and goods that do not appear on the approved list are subject to the standard import duties at the rates of 5, 10 or 20%.

Export duties

The title holder is fully exempted (0% instead of a series of duties from 1% to 10%) from all customs duties and other taxes, regardless of their nature, for exports in relation to the mining project.

Remuneration fees and duties for official services on exports are capped at 1% of the export value.

However, the cap of 1% is not complied with by the various State agencies involved with export formalities and the total fees often reach 2% or more of the export value.
A special leave from the Minister of Mines is required for exporting unprocessed ore, provided always that the title holder establishes:

- that it is impossible to process the ore in Congo at a cost that is economically viable for the mining project; and
- the benefits for Congo if the export leave is granted.

9.04 [S] [f]  Foreign exchange

In line with the foreign exchange rules currently applicable in Congo, there are no restrictions or limitations on the import of funds or on the use of proceeds from the export or sale of mineral products, except for special reporting requirements and for the obligation to repatriate 40% of the exports revenue to the main bank account in Congo of the mining operator. This 40% need not be converted into DRC currency, though, but can be used, inter alia, to buy or lease imported equipment; pay for goods and services from abroad if these cannot be procured locally at identical conditions, price, quality and quantity, reimburse shareholders short-term advances provided the debt-to-equity ratio does not exceed 3:1 (if this ratio is exceeded, normal currency exchange rules will apply\(^{26}\)), pay dividends to foreign shareholders, pay for training abroad of Congolese staff, pay for social security contributions and insurance of expatriate staff, etc.

Any transfer of foreign exchange must take place through a bank approved by the DRC Central Bank, where accounts in foreign exchange can be maintained without need for conversion into Congo currency.

A foreign exchange duty of 0.2% is due on foreign exchange transfers, inbound and outbound, except on the compulsory repatriation of the 40% exports revenue. This is because upon export, the same foreign exchange duty of 0.2% is applied on the value of the exported mineral products.

Although this is not expressly provided for in the Mining Code, the holder of the mining title has to pay to the DRC Central Bank an exchange control duty of 0.2% on the value of the exports realized. This results from a broad interpretation of a provision of the Mining Code that imposes to “file foreign exchange forms for exports pursuant to the current foreign exchange regulations”. And the filing of such forms triggers the obligation to pay the duty. The rationale that is being given is that upon export, the country is deprived from assets (which is why the foreign exchange duty needs to be paid), but upon repatriation of the sales proceeds from such exports, the duty is not owed because the same value is coming back.

Foreign debt service can be paid from a foreign bank account without need for a prior repatriation. Loan agreements must be disclosed to the Administration of Mines to allow a verification of whether the financing complies with a duly authorized mining operation. Loans concluded with affiliates must comply with market conditions.

9.04 [S] [g]  Environment, health and safety

The Mining Code and the Mining Regulations provide for mainly self-contained environmental measures and health and safety rules.

Environment

Exploitation permits are subject to the prior approval of an environmental impact study (Etude d’Impact Environnemental - “EIE”) and an environmental management plan (Plan de Gestion Environnementale du Projet - “PGEP”). Exploration operations under a research permit are subject to the prior approval of a mitigation and rehabilitation plan (Plan d’Atténuation et de Réhabilitation - “PAR”) subsequent to the delivery of the research permit. Prospecting and small-scale exploitation permits are only subject to codes of conduct.

\(^{26}\) Such rules provide, i.a. to disclose a copy of the loan agreement and to make detailed declarations about the purpose of the loan. Similar conditions also exist in the Mining Code.
As part of its environmental management plan, the holder of a research or exploitation permit must provide for measures of remediation and environmental rehabilitation after closure, the costs of which need to be entirely backed by a financial guarantee. However, the funding of the guarantee depends on the type of operation and its duration, and can take place over time. The amount is revised half-term.

**Health and safety**

A set of specific rules should be enacted, as provided by the Mining Code, to regulate health and safety matters in mining.

So far, no such specific rules were published and an old decree of 1930 is supposed to still govern the matter.

9.04 [5] [h] **Mortgages and pledges**

With a view to facilitate mining investments, the Mining Code sets specific rules for mortgages and pledges applicable to mining activities:

Mortgages can be taken on all mining rights, including buildings and fixtures, but needs leave from the Minister of Mines. In the case of default of the debtor, the mortgagee is entitled to either appropriate the mining right and request its transfer in its own name or in the name of a nominee (provided they are eligible – see Sub-section 9.04 [5] [b] above), or enforce the mortgage pursuant to the general law.

Before the Mining Code, only *mining concessions* (equivalent to exploitation permits) could be mortgaged, and the mortgagee could not appropriate the mortgaged goods, having to enforce it through the general law procedure, with garnishment and forced sale.

Pledges are allowed on mineral merchant products, and are governed by the general law on pledges.

The legislator missed the opportunity to authorize, as it did for mortgages, the pledgee to appropriate the pledged goods in the case of default of the debtor. As a result, the pledged goods will need to be sold upon leave granted by the judge, by private sale or by public auction. Moreover, the Mining Code, which is very restrictive as to the trade of minerals, does not expressly provide for a leave granted to the buyer of the pledged goods to be allowed to transport and market them. Accordingly, since authorized traders ("négociants"), trading agencies ("comptoirs") and exchange markets ("marchés boursiers") are only allowed to exercise their activities in respect of artisanal mining and since no-one other than the title holder is entitled to transport and market the mineral products from his mining perimeter, the implementation of this security right is expected to cause a number of practical problems. Would a solution be to export the pledged goods and enforce the pledge abroad? This is uncertain since the Mining Regulations require the exportation of *sold* products.

9.04 [5] [i] **Employment of expatriates**

The Mining Code provides for freedom of hiring staff, subject to priority given to Congolese nationals with equal qualifications and subject to the existing specific legislation in force. The legislation on employment contracts imposes restrictive rules concerning the employment of expatriates. In the mining sector, operators are allowed to hire a maximum of 2% of foreign employees for management staff and a maximum of 4.5% for other positions, but derogations can be granted up to 50% of the maximum allowed\(^\text{27}\). Certain jobs are reserved for DRC nationals, but derogations (limited in time) may also be granted\(^\text{28}\). Foreign employees are required to obtain a work permit, generally valid for two years and renewable.


\(^{28}\) See Arrêté départemental n° 86/001 du 31 mars 1986 déterminant la liste des emplois interdits aux étrangers.
The Mining Code grants investors a number of guarantees, among which, in addition to the one relating to taxes (see Sub-section 9.04 [5] [e] above) and the one mentioned here above about the hiring of staff (Sub-section 9.04 [5] [i] above), the right to keep foreign exchange on its local bank accounts, the right to receive appropriate compensation in the event of expropriation and the benefit of stability of legislation for a period of ten years at least as from the legal amendment, depending on the nature of the mining title.

Resolution of mining disputes

The DRC judicial system adheres to the rule of law enforced pursuant to established procedures, by courts and tribunals that are in principle independent from the legislative branch, and more importantly, from the executive branch of the State.

It cannot be concealed that the Congo courts and tribunals, however, are not well equipped in terms of logistics and legal sources and that local judges are not used to deal with sophisticated mining disputes. This is probably why, as set out below, the Mining Code provides for arbitration for a number of matters.

Mining disputes can typically be of two types:

• Civil, such as disputes between a mining title holder and a surface right holder;
• Administrative, such as claims to obtain the registration of a mining right.

In addition, criminal offenses, such as infractions for breach of specific provisions of the Mining Code are provided for, such as illegal mining, theft of mineral substances, fraudulent export, corruption etc., which are nearly all of a criminal nature sanctioned by specific penalties, and are enforced by the criminal courts and tribunals pursuant to criminal procedural rules.

The Mining Code provides for a specific recourse system granted to the State and to a title holder and organizes three ways to resolve mining disputes or threats over mining rights, depending on the nature of such threat or dispute and enumerates those matters for which each type of recourse is available:

• Administrative recourse;
• Judicial recourse; or
• Arbitral recourse, allowing both domestic arbitration and international arbitration pursuant to the ICSID Convention.

The purpose of organizing recourse is to offer certainty, efficiency and attractiveness, in particular as it regards foreign investors. However, without entering into the details because the author has already described them in an article cited at the head of this Section, a number of inconsistencies and inaccuracies entail that further clarification should be added in the Mining Code to afford its full effectiveness to the recourse system.

Public services in charge of mining activities

The main public services in charge of mining activities, including the various tax agencies are the following:
Administrative entities

The main administrative entities in charge of regulating mining activities are the following:

- The President of the Republic, who is entitled to classify, declassify or reclassify mineral substances as mines or as quarry products, or vice-versa; declare, classify or declassify an area as a prohibited area for mining activities or quarry works; declare, classify or declassify a mineral substance as a “reserved substance” (which are subject to special rules, such as radioactive minerals); and confirm the reservation of a deposit which is subject to tender pursuant to a Ministerial Decree. The President exercises his powers by decree enacted on his own initiative or on the proposal of the Minister of Mines, after having received the opinion of the Directorate of Geology or of the Mining Registry (Cadastre Minier).

Since the enactment of the 2006 Constitution, such powers of the President are exercised in the form of ordinances (“ordonnances”) that need to be countersigned by the Prime Minister.

The Minister of Mines, who has, *inter alia*, jurisdiction over the granting, refusal and cancellation of mining rights, exercises his powers by way of decrees (“arrêtés”); the web site of the Ministry of Mines is www.mines-rdc.cd

This power of the Minister of Mines does not exclude the deemed granting of a mining right in the event all conditions needed to obtain it are met, which allows the Mining Registry to issue the related permit.

- The Governor of the Province is responsible for the issuance of a number of authorizations for works and quarries on public land and for the delivery of traders permits;
- The head of the Provincial Division of Mines is responsible for the delivery of lower level permits (artisans and certain quarries);
- The Mining Registry (Cadastre Minier), a public service with legal personality, is in charge of administrative proceedings concerning the application for, and registration of mining rights, as well as the withdrawal, cancellation and expiry of those rights; its web site (www.cami.cd)
- The Directorate of Geology, in charge, *inter alia*, of geological research and classification of mineral substances, and, more importantly, responsible for the registration of samples;
- The Directorate of Mines is responsible for inspecting and supervising mining activities with regard to safety, health, work practices, production, transport, sale and social matters, and for establishing statistics, inspecting mining operations and other tasks;
- The Service in charge of the protection of the mining environment (Service Chargé de la Protection de l’Environnement Minier), which is part of the Ministry of Mines, is responsible for the definition and implementation of the mining regulations concerning environmental protection and the technical evaluation of the mitigation and rehabilitation plan, the environmental impact study, and the environmental management plan;
- The CTCPM (Cellule Technique de Coordination et de Planification Minière), which is an advisory and coordination body; its web site is: www.miningcongo.cd;
- The SAESSCAM (Service d’Assistance et d’Encadrement du Small Scale Mining), the purpose of which is to facilitate and frame small scale mining and artisanal mining;
- The CEEC (Centre d’Evaluation, d’Expertise et de Certification des substances minérales précieuses et semi-précieuses), the purpose of which is to frame the artisanal and industrial mining and marketing of precious and semi-precious mineral substances and to provide valuations and certifications; its web site is www.ceec.cd. The CEEC is also in charge of issuing certificates for shipments of rough diamonds under the Kimberley Process Certification Scheme (see Sub-sections 9.03 [2] on Conflict minerals and diamonds above and Sub-section 9.05 [2] below).
In addition, the following public services are also involved with mining activities:

- The OCC (Office Congolais de Contrôle), the purpose of which is to control the quality, quantity, value, compliance in a variety of matters, and inter alia for imports and exports; its web site is www.occ-rdc.cd
- The Central Bank of Congo (Banque Centrale du Congo) as it regards foreign exchange control and exports; its web site is www.bcc.cd
- The INSS (Institut National de Sécurité Sociale) for social security matters; its web site is www.inss.cd
- The DGM (Direction Générale de Migration) for visa and residence permit matters; its web site is www.dgm.cd/
- The Ministry of Labor, for what concerns work permits for foreigners and for the very important day-to-day labor aspects of a mine;
- The CN-ITIE/RDC (Comité National de l’Initiative pour la Transparence dans la gestion des Industries Extractives en République Démocratique du Congo - www.itierdc.org), in charge of the follow-up of the implementation of the principles and criteria of the Extractive Industries Transparency Initiative;
- Etc.

**Tax agencies**

The following national tax agencies are involved with mining activities:

- The DGI (Direction Générale des Impôts), which is in charge mainly of collecting income taxes, asset based taxes, turnover taxes and assimilated taxes; the large companies are framed by the DGE (Direction des Grandes Entreprises);
- The DGRAD (Direction Générale des Recettes Administratives, Judiciaires, Domaniales et de Participations), which is charge, in addition to the collection of a series of administrative duties and fees, of collecting the mining royalty;
- The DGDA (Direction Générale des Douanes et Accises), formerly called OFIDA, in charge of customs and excise duties.

Other taxes are levied at provincial and town hall level and are framed by local authorities.

**9.05 Interference of international treaties, foreign legislation and guidelines**

**9.05 [1] International treaties**

**9.05 [1] [a] Multilateral treaties and organizations**

Congo is a member of numerous international organizations and treaties, among which the World Trade Organization (WTO) and the World Bank Group, including the International Finance Corporation (IFC), the Multilateral Investment Guarantee Agency (MIGA), the Economic Community of the Great Lakes Countries (CEPGL), the Economic Community of Central African States and the OHADA (however this adhesion to OHADA is not yet in force – see Sub-section 9.04 [1] above).

Congo is also a member of the Convention establishing the International Centre for Settlement of Investment Disputes (ICSID – www.icsid.worldbank.org), which is one of the bodies in charge of the resolution of certain mining disputes under the Mining Code – see Sub-section 9.04 [6] above).

Congo was accepted in February 2008 as an EITI Candidate Country (Extractive Industries Transparency Initiative – www.eiti.org). It launched its first EITI report (covering 2007) in March 2010 and in December 2010, was designated as an EITI Candidate country that is “Close to Compliant”. Congo was granted six months, expiring 12 June 2011, to complete the remedial actions needed to achieve compliance. A new validation can be required by the EITI board if the remedial actions are not completed by then.
Congo also concluded international environmental treaties such as the Vienna Convention for the Protection of the Ozone Layer, the Rio Convention on Biological Diversity, the Stockholm Convention on Persistent Organic Pollutants, various instruments concerning hazardous waste, etc, and the Kyoto Protocol to the UN Framework Convention on Climate Change.

Lastly, within the framework of its efforts to improve the business climate (see Sub-section 9.03 [3] above) in view of attracting investors, the Congo government declared in March 2011 that it would adhere to the 1958 New York Convention on the recognition and enforcement of arbitral awards.

9.05 [1] [b]  **Bilateral treaties**

Among the bilateral treaties that may concern mining activities, Congo concluded or initialled bilateral investment treaties (BITs) with ten countries (including Belgium/Luxembourg, Egypt, Guinea, Italy and Korea), but only four of these actually entered into force (those with France, Germany, Switzerland and the US) (source: UNCTAD, April 2011; http://www.unctad.org/templates/docsearch.aspx?id=779).

However, there are no pure international tax treaties currently in force, except for two limited transport tax treaties (source: International Bureau of Fiscal Documentation, April 2011; www.ibfd.org). Some limited tax provisions are contained in the above mentioned investment treaties.

9.05 [2]  **Foreign legislation**

Foreign legislation may impact economic activities as they relate to Congo, provided there is a link with the relevant country. Without entering into details, one can mention legislation against corruption, such as the US Foreign Corrupt Practices Act, the UK Bribery Act, and any other similar legislation of other countries.

A recent law also having an impact on trade of minerals with the Congo region is the Dodd-Frank Act as it relates to conflict minerals (see Sub-section 9.03 [2] in fine, above).

The Kimberley Process Certification Scheme (“KPCS” - see the paragraph about conflict minerals and diamonds in Sub-section 9.03 [2] above), which aims at preventing conflict diamonds from entering legitimate trade, entered into force in 2003 pursuant to UN General Assembly Resolution 55/56 of 1 December 2000. It concerns some 75 countries, which had to include the process into their own legislation. It was also included in the Congo legislation (see the paragraph about Conflict minerals and diamonds in Sub-section 9.03 [2] above).

This year (2011), the KPCS is chaired by Congo, a task that is particularly topical with the continuing turmoil in the North-Eastern and Eastern parts of Congo where conflict minerals and diamonds continue to fuel the rebellion (see Sub-section 9.02 [3] [f] above).

9.05 [3]  **Voluntary principles**

A series of international organizations and NGOs have set a number of guidelines, principles and recommendations that are encouraged to be applied by mining companies and other economic operators. Without entering into details, it is useful to mention the following:

- The Voluntary Principles for Security and Human Rights (www.voluntaryprinciples.org), which provide guidelines to companies to maintain “the safety and security of their operations within an operating framework that ensures respect for human rights and fundamental freedoms”, to which participate a series of governments, NGOs and some of the largest global mining companies;

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29 However, this web site mentions two treaties that in fact concern the neighboring “Republic of Congo” also called Congo-Brazzaville: one with the UK and another one with Switzerland.
• The Equator Principles (www.equator-principles.com), which is set of standards for determining, assessing and managing social and environmental risk in project financing with a view to provide sustainable project finance, to which adhere some of the largest banks and financial institutions;

• The International Finance Corporation (IFC) Performance Standards and Guidance Notes on social and environmental sustainability (available on www.ifc.org), that relate inter alia to topics such as pollution prevention and resettlement of villagers, particularly relevant for mining activities and that need to be complied with to receive the support from the IFC.

These guidelines, principles and recommendations are particularly pertinent in Congo, since the Mining Code and the Mining Regulations do not provide in detail for social standards in relation to mining operations.

9.06 Mining contracts review

During the wars led by Mzee Kabila (see Sub-section 9.02 [3] [e] above), many mining and other rights (such as telecoms licenses) were sold to a variety of foreign investors to finance these wars. A certain number of the agreements concluded were so obviously predatory that, in 2004, the National Assembly (Parliament) set up a special commission to investigate the agreements signed during the wars of 1996-1997 and from 1998 to 30 June 2003 and to evaluate these agreements. The report of this commission, called the Lutundula Report (after its chairman), was issued in June 2005. Its general conclusions included recommendations for renegotiation and regularization of numerous agreements.

In addition, at the beginning of 2005, the COPIREP (then the Comité de Pilotage de la Réforme des Entreprises Publiques, now the Comité de Pilotage de la Réforme des Entreprises du Portefeuille de l’Etat), a State agency whose mission is to reorganize the State owned companies, commissioned a legal review of the partnership agreements concluded by Gécamines, the State owned mining company operating in Katanga, mainly in copper and cobalt (see Sub-section 9.02 [3] [c] and 9.03 [2] above). Its conclusions, delivered in the course of 2006, were not officially rendered public, but it seems that a number of renegotiations and terminations featured among its recommendations and that it induced the government to officially launch its mining contracts review.

In May 2007, the Congo government set up a commission charged with a review (called “revisitation”) of all mine development partnership agreements concluded during the unstable war periods between the nineties and the transition to democracy in 2006. The review concerned 57 partnership agreements concluded with State owned companies and six mining conventions (see Sub-section 9.04 [5] [a] above) concluded with the State and in some cases with State owned companies, totaling 63 agreements. The review lasted three years, but the review of most of the smaller projects was completed after two years. A series of reports on the mining contract review were rendered public, but the final results of the mining contracts review was not officially published by the government, and only a few renegotiated contracts were rendered public30, but in the end, it appeared that at least one mining convention was cancelled (Sengamines - diamond), and that about twenty partnership agreements were cancelled. The outstanding agreements were renegotiated and resulted generally in an increase of the benefits for the Congolese side including some of the criteria relating to shareholding, royalties and management as featured in a model agreement that had circulated in May 2010 (see Sub-section 9.04 [5] [b] above, comments under “Transfer of 5% free carried interest to the State”). The KMT-First Quantum review resulted in a cancellation of the agreement by the government, which resulted in an ICC arbitration proceedings being launched by the foreign investors (First Quantum, the IFC and the South African IDC) against Congo and its State-owned mining company Gécamines.

30 See the web site of the Ministry of Mines (www.mines-rdc.cd ) and of the Ministry of Finance (www.minfinrdc.cd ).
Thus, the following main characteristics result from a review of the available data pursuant to agreements signed in the course of 2010:

a. Shareholding: the State owned company (“Congo partner”) generally has a stake of around 30%, with some exceptions (SOKIMO owns 13.78% of the AngloGold Kilo gold project; Gécamines owns 20% of the Tenke Fungurume copper and cobalt project);

b. Royalty: in addition to the mining royalty, which is a tax owed to the Public Treasury (see Subsection 9.04 [5] [e] above), an additional royalty has to be paid to the Congo partner, ranging between an unknown percentage, if any (SOKIMO), to 1% (Manono Minerals) or 2.5% (e.g. Metalkol, which took over First Quantum's Kinganyambo tailings project; and Sodifor in Sakania); it is generally calculated on the same basis as that of the mining royalty; other benefits are granted on certain milestones being achieved on cumulated production and on the determination of additional reserves (Tenke Fungurume);

c. Transfer bonus (called “pas de porte” or entrance fee/key money): it depends obviously on the value of the deposit and can vary from a few million up to US$350 million (China mega-contract) that the foreign investor has to pay to the Congo partner;

d. Joint venture company: ranges from 20% to 40% board membership reserved to the Congo partner, depending on his shareholding; generally the chairman of the board is appointed by the foreign investor and the deputy chairman by the Congo partner, while the general manager is appointed by the foreign investor and the deputy general manager is appointed by the Congo partner; in some cases, a special majority is provided for important decisions and generally a minimum share of the profit has to be distributed (and not reinvested);

e. Funding: the foreign investor has to provide the initial funding, generally at varying concessional rates, sometimes on specific parts of the funding, ranging e.g. from nil (China mega-contract) to LIBOR + 1% (China mega-contract), LIBOR + 3.5% (Sodifor) or a fixed 6.1% (China mega-contract).

With a view to increasing transparency and restoring a favorable business climate, a joint decree of the Prime Minister, the Minister of Hydrocarbons, the Minister of Mines and the Minister of Environment (for forestry) dated 20 May 2011 now imposes the publication of contracts concluded between the State or any State owned company and Congolese or foreign private investors concerning the research or exploitation of natural resources, which include mining, oil and forestry resources.

9.07 Conclusion - A challenging place for mining investments

With its incredible riches in natural resources of all kinds, Congo has potential wealth for centuries to come. There is enough for everybody.

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31 Decree No. 01/26 dated 20 May 2011 of the Prime Minister enacting the obligation to publish any contract having natural resources as its subject matter.
As featured on the above maps, a variety of mineral resources are spread over the whole country, the development of which will benefit all of Congo provided such development is well framed and managed.

Although Congo suffers from rampant corruption and mismanagement, improvements are slow but noticeable. The government achieved, with the help of international institutions such as the World Bank, the International Monetary Fund, the African Development Bank and the European Union, in addition to bilateral aid from individual countries, a number of successes in terms of debt reduction, inflation control and GDP growth, thus allowing it to allocate funds, formerly used for debt service, to education and health programs, transport and communications and other key elements required for the emergence of a healthy economy. It also adopted a few measures facilitating the registration formalities of commercial companies. The country now ranks 175 out of 183 countries on the ease of doing business in the World Bank/IFC Doing Business 2011 survey (www.doingbusiness.org), while it ranked 182 in 2010. According to Transparency International, Congo now ranks 164 (2009: 162) out of 178 countries under the 2010 Corruption Perception Index (www.transparency.org).

The government acknowledged the need to improve the business climate and has committed to it. A few measures that should be taken as soon as possible in that respect and that are really crucial, concern the accomplishment of the formalities to perfect Congo’s adhesion to OHADA, a rationalization of the tax system (adoption of VAT, suppression of the incentive on tax penalties), and a better support to the State administration and public services (salaries and equipment of civil servants). Unfortunately, it is uncertain when these measures will actually be implemented.

Despite its recurring hurdles and difficulties, the situation is improving gradually and Congo certainly remains an attractive place for investors having solid finances, a good political awareness and effective government relations, as well as a willingness to contribute to local welfare. Challenges will arise every day, but will not prevent success stories.