

Addressing the Capacity Building Challenge in the Mining Sector in Rwanda: The Implications of Rwanda's 2014 Mining and Quarry Law

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Abstract

Few mining countries face capacity building challenges comparable to Rwanda's. Worsened by the genocide, a 2009 report put the number of mining scientists in Rwanda at 40, fewer than four below the age of 40. The government has however recognized that local skills development is crucial to the potential of mining to contribute to the country's economic development. This has been demonstrated through a series of reforms, culminating in the mining code of 2014. This article considers two issues critical to capacity building in the mining sector: formalization of artisanal and small-scale mining and the promotion of local content / procurement. Its main thesis is that the code provides limited opportunities for local mining capacity building and its local content provisions are rather nervously worded. This is worsened by the fact that Rwanda has no freestanding local content legislation. The article calls for Rwanda to adopt such legislation, with specific provisions on local skills training.

Keywords

Artisanal mining, small-scale mining, capacity building, formalisation, local procurement, Rwanda

INTRODUCTION

Few countries are confronted with a mining skills deficit comparable to that of Rwanda. A 2012 skills survey showed that the Rwandan mining sector alone had a total skills deficit of 2,721 labour units in the short term, of which 89.9 per cent were skilled mining artisans, 4.1 per cent managers, 2.8 per cent technicians, 1.4 per cent liberals and 1.8 per cent scientists.¹ The survey reported the absence of training institutions in Rwanda offering training programmes for mining professionals and technicians, such as mine engineers, geologists, metallurgists, geophysicists and geochemists: professionals who are in high demand in mining labour markets.² A major culprit in this

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1 Rwanda Development Board (RDB) "Mining sector report: Rwanda skills survey 2012" at viii, available at: <<http://www.lmis.gov.rw/scripts/publication/reports/Mining.pdf>> (last accessed 13 July 2017).

2 Ibid.

debacle was the 1994 genocide in which Rwanda's professional class was virtually annihilated.³ As Teeffelen observed, after the genocide "not much was left of Rwanda's mining sector".⁴ Teeffelen's research finds that during the genocide "laboratories were looted, equipment destroyed and geologists murdered".⁵ To survive, Rwanda has relied on foreign mining professionals and technicians, but the low wages offered in Rwanda have hampered the country's ability to attract highly skilled workers.⁶ A 2009 document put the number of locally available mining scientists in Rwanda at just 40, of whom four were below the age of 40.⁷ The most important skills needed are those of geologists, mining engineers, mining technicians, business managers, laboratory technicians / sample analysts, environmental compliance officers and geophysicists.⁸ With foreign professionals and technicians forming the majority of the high earning workforce in Rwanda however, the prosperity of the mining sector cannot trickle down adequately to ordinary Rwandans, since the expatriate workers eventually repatriate their funds to their home countries. This has implications for poverty perpetuation in Rwanda⁹ and even, by extension, for human rights, since poverty inhibits an individual's right to enjoy even basic human rights, such as the right to life. As the UN Development Programme (UNDP) pointedly puts it, "[p]overty is a denial of human rights".¹⁰ Given the importance of mining to economic development in Rwanda, the need for a comprehensive strategy on the part of Rwanda to enhance local capacity to harness the country's mining resources is readily apparent and compelling.

3 African Union *Rwanda: The Preventable Genocide* (July 2000), paras 14.6, 17.5 and 17.7, available at: <<http://www.refworld.org/pdfid/4d1da8752.pdf>> (last accessed 3 August 2017).

4 J van Teeffelen "The EU raw material policy and mining in Rwanda: Policy coherence for development in practice" (Evert Vermeer Foundation, Netherlands, February 2012) at 25, available at: <<http://www.fairpolitics.nl/doc/Impact%20Study%20FINAL.pdf>> (last accessed 13 July 2017).

5 Ibid.

6 RDB "Mining sector report", above at note 1.

7 Government of Rwanda Ministry of Natural Resources (MINIRENA) "A revised Rwandan mining policy: Transforming Rwanda's mining industry" (October 2009) at 13, available at: <http://nrna.rw/uploads/media/Mining_policy_draft-sent_to_the_minister-30-10-09.pdf> (last accessed 13 July 2017).

8 Ibid.

9 The link between capacity building and poverty reduction is well recognized. As the International Monetary Fund has noted, institutional capacity building is essential for the realization of the Millennium Development Goals. See International Monetary Fund "The role of capacity building in poverty reduction" (March 2002), available at: <<https://www.imf.org/external/np/exr/ib/2002/031402.htm>> (last accessed 13 July 2017).

10 UNDP "Poverty reduction and human rights: A practice note" (June 2003) at iv, available at: <[http://www.undp.org/content/dam/aplaws/publication/en/publications/democratic-governance/dg-publications-for-website/poverty-reduction-and-human-rights-practice-note/HRPN_\(poverty\)En.pdf](http://www.undp.org/content/dam/aplaws/publication/en/publications/democratic-governance/dg-publications-for-website/poverty-reduction-and-human-rights-practice-note/HRPN_(poverty)En.pdf)> (last accessed 13 July 2017).

To be sure, the Rwandan government recognizes that “[o]ne of the key means of ensuring that the mining industry has a positive impact on rural communities and the country as a whole is through the development of local skills”.¹¹ This recognition has been demonstrated through a series of policy and legislative reforms that culminated in the enactment of Law No 13/2014 of 20 May 2014 on Mining and Quarry Operations,¹² which came into force on 30 June 2014. The question for this article is: to what extent does this law address the country’s vast capacity building challenge in the mining sector?

The article begins with an overview of mining development in Rwanda in order to underline the importance of the mining sector to Rwanda’s economic development. This overview includes a review of the policy and legislative initiatives the Rwandan government took to enhance its mining capacity, before enacting Law No 13/2014. This paves the way for consideration of how Law No 13/2014 has advanced the capacity building struggle. Two issues deemed critical to capacity building in the context of mining development in Rwanda are considered: the formalization of artisanal and small-scale mining (ASM) and the promotion of local content / procurement. The main thesis of the article is that, despite the Rwandan government’s recognition of its dire need for capacity building in the mining sector, aside from the formalization of ASM, Law No 13/2014 provides very limited opportunities for rebuilding Rwanda’s capacity in the sector. Its local content provisions are rather nervously worded and provide limited opportunities for Rwandans to integrate themselves into the mainstream of mining development in Rwanda. This is worsened by the fact that Rwanda does not currently have local content legislation. The article calls for the adoption of separate local content legislation in Rwanda, with detailed rules on training locals, local procurement, local hiring and value addition generally, as well as mechanisms for monitoring implementation.

OVERVIEW OF THE MINING SECTOR IN RWANDA

The advent of mining in Rwanda can be traced to the early period of the Iron Age.¹³ However, the first official “geological observations” in Rwanda were made in 1909 during the visit of the German Duke Mecklenburg.¹⁴ The Belgians carried out further exploration in the 1920s and 30s.¹⁵

11 MINIRENA “A revised Rwandan mining policy”, above at note 7 at 13.

12 (2014) 26 *Official Gazette* 16, available at: <<http://www.refworld.org/pdfid/53fb08cd4.pdf>> (last accessed 13 July 2017).

13 R Perks “Digging into the past: Critical reflections on Rwanda’s pursuit for a domestic mineral economy” (2013) 7/4 *Journal of Eastern African Studies* 732 at 737, pointing out that the oldest preserved African iron furnace dates back to 689 BC and is said to originate from Gasiza in today’s Muyunzwe district of Rwanda.

14 MINIRENA “A revised Rwandan mining policy”, above at note 7 at 5.

15 *Ibid.*

Minerals exploration and production were largely undertaken through a “sub-contracting” arrangement, under which the right of access to the minerals was vested in local entrepreneurs and landowners who organized artisanal miners into teams and paid them for their labour based on the quantity of minerals produced.¹⁶ While this arrangement had the advantage of enabling mining permit holders to make the best use of the abundant local labour available without assuming any direct responsibility towards the labourers, it promoted informality in the sector and sowed the seed for the predation and smuggling (which thrive in an atmosphere lacking, or with limited, governance) that remain prevalent to this day.¹⁷

After Rwanda’s independence, the government grouped together all existing mining companies into a public company known as Société Minière du Rwanda (SOMIRWA) in which it held a minority share of 49 per cent, while two mining companies held the remaining shares.¹⁸ However SOMIRWA was beset by a myriad of problems, including poor financing, which culminated in its bankruptcy in July 1985.¹⁹ The government then initiated the formation of an artisanal mining cooperative in 1988, Coopérative de Promotion de l’Industrie Minière Artisanale au Rwanda (COPIMAR), to revitalize the sub-sector that had by then become moribund. A year later it formed another public company, Régie d’Exploitation et de Développement des Mines (REDEMI), to continue SOMIRWA’s work.²⁰ According to Perks, this was against the advice of international financial institutions, which had recommended privatizing SOMIRWA rather than nationalizing it through the formation of REDEMI.²¹

The economic exigencies of the time forced the government to shift its policy focus from a state-based to a market-based economy, beginning from the early 1990s. This entailed the privatization of government-owned mines and culminated in the privatization of REDEMI, which was completed in 2006.²² However privatization did not affect state-owned enterprises that were performing well.²³ There are conflicting accounts about the impact of the privatization efforts. According to MINIRENA, the government has seen increased productivity since the privatizations, due not only to high prices in

16 Perks “Digging into the past”, above at note 13 at 739. See also id “Re-framing the nature and success of the ‘post-conflict’ mineral reform agenda in Rwanda” (2016) 3 *Extractive Industries & Society* 329 at 335, describing the subcontracting model as “a practice where miners worked on mining concessions but had a loose relationship to the mine owner”.

17 Perks “Digging into the past”, *ibid.*

18 MINIRENA “A revised Rwandan mining policy”, above at note 7 at 5. See also Rwanda Geology and Mining Authority “Strategic plan 2010–2013” (final draft, April 2010) at 5, available at: <http://rmra.rw/uploads/media/Stragetegic_Plan-OGMR-April_2010_1_validated.pdf> (last accessed 13 July 2017).

19 MINIRENA, *id* at 5–6.

20 *Ibid.*

21 Perks “Re-framing the nature”, above at note 16 at 335.

22 *Id* at 336.

23 *Ibid.*

international commodity markets, but also to better management practices adopted by the companies.²⁴ Field research carried out by Perks shows, however, that many Rwandans, in both government and industry circles, are dissatisfied with the performance of the Rwandan mineral economy following the privatizations, many questioning the nature of the companies that were granted minerals permits and their adherence to labour standards.²⁵ “The result of such a mediocre privatisation”, writes Perks, is that “[a]rtisanal practices still dominate the landscape despite distinctions made between the ‘large companies’ and ‘small cooperatives’ or ‘independent operators’”.²⁶ The government’s simultaneous pursuit of a mineral trade liberalization policy may have contributed to the failure of privatization to deliver its promises.²⁷

During the early period of mining exploration in Rwanda, mining’s contribution to economic development was immense, particularly between 1930 and 1968 (six years after independence), when mining accounted for 42.5 per cent of Rwanda’s foreign exchange earnings.²⁸ However, due to lack of investment in the sector after independence, foreign exchange earnings from mining began to drop and by 1984 they were only just 10 per cent.²⁹ The 1994 genocide worsened the situation because, as noted above, mining facilities were decimated and the country lost virtually all of its professional workforce.

Reconstruction after the 1994 genocide was long in coming. Not until 2004 was a mining policy formulated³⁰ and not until 2008 was a mining law enacted: Law No 37/2008 of 11 August 2008 on Mining and Quarry Exploitation. At about the same time, the Rwanda Geology and Mines Authority (RGMA) was created with various responsibilities, including to: conduct geological and mining surveys based on “major national priorities”, “facilitate” the creation of mining standards in Rwanda, “supervise and monitor” mining activities, and contribute to law, policy and strategy formulation in relation to geology and mining in Rwanda.³¹ In 2009 the government established the Public Sector Capacity Building Secretariat as one of its strategies to rebuild the capacity of its public institutions.³² In 2010, the RGMA published a

24 MINIRENA “A revised Rwandan mining policy”, above at note 7 at 6.

25 Perks “Re-framing the nature”, above at note 16 at 336.

26 Ibid.

27 Id at 337.

28 van Teeffelen “The EU raw material policy”, above at note 4 at 25.

29 Ibid.

30 RGMA “Strategic plan 2010–2013”, above at note 18 at 15.

31 Law No 25/2007 of 27 June 2007 Establishing Rwanda Geology and Mines Authority (OGMR) and Determining its Responsibilities, Organization and Functioning, available at: <http://ilo.org/wcmsp5/groups/public/-ed_protect/-protrav/-ilo_aids/documents/legaldocument/wcms_232681.pdf> (last accessed 13 July 2017).

32 Republic of Rwanda Ministry of Local Government “5 years capacity building strategy for local governments (2011–2015)” (December 2010) at 10, available at: <www.minecofin.gov.rw/fileadmin/templates/documents/LG_Districts/Fiscal_Decimalisation_document/Local%20Government%20Capacity%20Building%20Strategy-%202011-2015.pdf> (last accessed 31 August 2017).

four-year strategic plan covering 2010 to 2013, with the objective of reviving and sustaining the geology and mining subsector. The plan's implementation programmes included programmes targeted at: "improv[ing] geological and mining knowledge in Rwanda", "improv[ing] operating and investment conditions in Rwanda" and "add[ing] value to mineral and quarry resources in Rwanda".³³

In 2011, Rwanda adopted a Strategic Capacity Building Initiative to address the capacity building challenge in a more focused manner, with national priority areas clearly delineated, including increasing government revenue from mining.³⁴ The critical step towards that was to provide a legal framework that integrated local capacity building into mining development and that would result in increased government revenue. Recognizing and promoting ASM was seen as an important way to integrate local capacity building into mining development. The Rwanda Natural Resources Authority (RNRA) was established in the same year.³⁵ The RNRA absorbed the responsibilities of the RGMA as well as those of the National Land Centre and the National Forestry Authority. Article 3 of the law establishing RNRA entrusts the RNRA with responsibility to manage, supervise, monitor and ensure the implementation of policies and programmes relating to the promotion and protection of Rwanda's natural resources. The next section addresses the extent to which the Rwandan government advanced these initiatives through Law No 13/2014.

Today, Rwanda's mining sector is one of the country's key exports and the country is best known for the "3 T" minerals: tin (cassiterite), tungsten (wolframite) and tantalum (coltan). The European Union has designated these minerals, particularly tungsten and tantalum, as "critical" because they "display a particularly high risk of supply shortage" (because of the concentration of their production in a few countries) and are "particularly important for the value chain".³⁶ This puts Rwanda in a strategic position in global mining. In 2010, the mining sector accounted for over 40 per cent of Rwanda's foreign exchange earnings, mostly coming from tin, which is mined in 26 of Rwanda's 30 districts. In 2011, the mining sector was rated the "most prosperous" in Rwanda, as it earned the country approximately \$150 million, behind only the tourism industry, which earned approximately \$200 million.³⁷

33 RGMA "Strategic plan 2010–2013", above at note 18 at 6.

34 Ibid.

35 Law No 53/2010 of 25 January 2011 Establishing Rwanda Natural Resources Authority (RNRA) and Determining its Mission, Organization and Functioning (2011) 10 *Official Gazette* 5, available at: <http://www.parliament.gov.rw/fileadmin/Images2013/Presidential_Order_determining_official_holidays__N__06.01_du_16.02._2011.....Page_41.pdf> (last accessed 13 July 2017).

36 European Commission "Tackling the challenges in commodity markets and on raw materials" (COM (2011) 25 final) at 12, available at: <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0025:FIN:en:PDF>> (last accessed 13 July 2017).

37 RDB "Mining sector report", above at note 1 at 1.

CAPACITY BUILDING AND LAW NO 13/2014

Formalization of artisanal and small-scale mining

Meaning and importance of formalization

Formalization has been viewed from a number of perspectives. As summarized by Siegel and Veiga, to some it is about creating a legislative framework for ASM; to others, it is about “the process of registering, organizing, and tracking mining activity in the field”; and to yet others, it is about recognition of rights: “the right to mine, the right to land title, and the right to minerals”.³⁸ Property rights are at the heart of this last view. In the absence of land tenure rights, access to credit is hampered and there is little incentive for miners to comply with environmental regulations.³⁹ Siegel and Veiga explain that “formalization is the means of absorbing existing customary practices - developed informally by miners - into the mainstream of a country’s legal and economic affairs”.⁴⁰ Reflecting on the problems associated with ASM, a 1999 document published by the International Labour Organization (ILO) strikes at the heart of formalization:

“If small-scale mining is to be encouraged to operate legally, legislation must be (at least) even-handed in allowing small-scale miners access to suitable land for prospecting and mining activities. It must be “user friendly” as far as the issuing of permits and the granting of licences are concerned - permits that provide clear security of tenure for a reasonable period so that small-scale mining can become established.”⁴¹

Recognizing the importance of ASM to economic development, a UN Economic and Social Council (ECOSOC) report calls for:

“Building the legal and regulatory framework for artisanal and small-scale mining in a way that both recognizes its contributions to livelihood and

38 S Siegel and MM Veiga “Artisanal and small-scale mining as an extralegal economy: De Soto and the redefinition of ‘formalization’” (2009) 34 *Resources Policy* 51 at 52. See also R Maconachie and G Hilson “Safeguarding livelihoods or exacerbating poverty? Artisanal mining and formalization in West Africa” (2011) 35 *Natural Resources Forum* 293 at 294, defining formalization as the “process of registering and organizing unregulated mining”.

39 JJ Hinton “Communities and small scale mining: An integrated review for development planning” (Communities and Small-Scale Mining Initiative, Mining Department, World Bank Group, 2005) at 7, available at: <<http://www.eisourcebook.org/cms/June%202013/CASM,%20an%20Integrated%20Review%20for%20Development%20Planning.pdf>> (last accessed 13 July 2017).

40 Siegel and Veiga “Artisanal and small-scale mining”, above at note 38 at 51.

41 ILO “Social and labour issues in small-scale mines: Report for discussion at the tripartite meeting on social and labour issues in small-scale mines” (ILO Sectoral Activities Program, ILO, May 1999) at 86–87, available at: <http://www.unites.uqam.ca/gmf/globalmercuryforum/files/articles/small_scale_mining/General%20ILO%201999%20-%20Social%20and%20labour%20in%20small-scale%20mines.pdf> (last accessed 13 July 2017).

tries to maximize its social benefits through legal recognition of small-scale mining activities; adequate zoning of land suited for artisanal and small-scale mining activities; facilitation of registration for miners; and provision of technical support to small mining communities.”⁴²

Due to the high labour-absorbing capacity of ASM, its high market value and its potential to generate socio-environmental problems, many scholars believe that the first step towards ensuring sustainable ASM development is formalization. Formalization enables ASM to be subjected to “oversight and regulation”⁴³ and has been described as “the inevitable policy route” towards ensuring that ASM benefits local people.⁴⁴ Veiga and Beinhoff, for instance, regard formalization as “a pre-requisite to change behaviour and transform underprivileged people into citizens”.⁴⁵ Formalization will ensure “order” and “human security” in ASM, because titleholders will respect each other’s title and human security will improve.⁴⁶ The ILO highlights “the extent of economic loss” developing countries suffer as a result of the non-legalization of ASM, stressing that “legalization ... is an important step towards transforming [ASM] into a sustainable activity”.⁴⁷ A 2005 report to the Ugandan government states that “[i]mprovements in the technical, environmental and socio-economic performance of the ASM sector hinge on the organization, formalization, and legalization of ASM activities”.⁴⁸ However formalization comes not only with recognition of rights, but also with the imposition of corresponding duties on miners to comply with certain standards of conduct, such as environmental, labour and human rights standards.⁴⁹ Formalization also facilitates the accessibility of legal redress when miners’ rights are violated by the government or their fellow miners. In a study of the benefits of small and large-scale mining in a political district in Indonesia, Langston et al found

42 ECOSOC “Policy options and actions for expediting progress in implementation: Mining” (report of the secretary general, December 2010, Commission on Sustainable Development, 19th session), doc E/CN.17/2011/7, para 26(c), available at: <http://www.un.org/ga/search/view_doc.asp?symbol=E/CN.17/2011/7&Lang=E> (last accessed 13 July 2017).

43 JD Langston et al “Comparative development benefits from small and large scale mines in North Sulawesi, Indonesia” (2015) 2 *Extractive Industries & Society* 435.

44 Id at 436.

45 MM Veiga and C Beinhoff “UNECA Centers: A way to reduce mercury emissions from artisanal gold mining and provide badly needed training” (1997) 20/4 *UN Environment Program - Industry and Environment* 50, cited in Siegel and Veiga “Artisanal and small-scale mining”, above at note 38 at 51.

46 S Geenen “A dangerous bet: The challenges of formalizing artisanal mining in the Democratic Republic of Congo” (2012) 37 *Resources Policy* 323.

47 ILO “Social and labour issues”, above at note 41 at 86.

48 JJ Hinton “Artisanal and small scale mining in Uganda: Key issues, constraints and opportunities” (summary report prepared for Ministry of Energy and Mineral Development, Department of Geological Survey and Mines, Uganda, 2005) at 44, cited in Siegel and Veiga “Artisanal and small-scale mining”, above at note 38 at 51.

49 Siegel and Veiga, id at 52.

that formalization enhanced the “political purchasing power” of artisanal and small scale miners with district governments.⁵⁰

Formalization is also critical to a country’s ability to implement the transparency principles promoted under the auspices of the Extractive Industries Transparency Initiative, because payment and revenue tracking is impossible without the proper documentation of transactions. In the case of Rwanda this is especially critical, as several reports have implicated Rwanda as a transit route for conflict minerals in central Africa, a factor found to be fuelling the crisis in the Democratic Republic of Congo (DRC).⁵¹ Rwanda is considered a preferred route not only because of its geographical proximity to the DRC, but also because exports of tantalum concentrates are not taxed in Rwanda but are taxed in the DRC, making it profitable to export them to Rwanda.⁵² Placing due diligence obligations on mineral trading companies in Rwanda with regard to the source of the minerals they trade would therefore go a long way towards stopping illegal mineral trading in Rwanda and in central Africa generally.⁵³ It would be extremely difficult (if not impossible) to regulate trading in the absence of formalization of the process by which what is being traded is produced. Such formalization would include making provisions regarding who can engage in mineral trading, where and how.⁵⁴

50 Langston et al “Comparative development benefits”, above at note 43 at 443.

51 See, for instance, UN Security Council *Final Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo*, doc S/2002/1146, available at: <http://www.pcr.uu.se/digitalAssets/96/96819_congo_20021031.pdf> (last accessed 13 July 2017); UN Security Council *Interim Report of the Group of Experts on the Democratic Republic of the Congo*, doc S/2010/252, available at: <http://www.un.org/ga/search/view_doc.asp?symbol=S/2010/252> (last accessed 13 July 2017); UN Security Council *Final Report of the Group of Experts on the Democratic Republic of the Congo*, doc S/2014/42, available at: <http://www.securitycouncilreport.org/atf/cf/%7B65BFC9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2014_42.pdf> (last accessed 13 July 2017); “The hill belongs to them: The need for international action on Congo’s conflict minerals trade” (December 2010) *Global Witness*, available at: <<https://www.globalwitness.org/sites/default/files/library/The%20hill%20belongs%20to%20them141210.pdf>> (last accessed 13 July 2017).

52 R Bleischwitz, M Dittrich and C Pierdicca “Coltan from central Africa, international trade and implications for any certification” (2012) 37/1 *Resources Policy* 23.

53 “The hill belongs to them”, above at note 51 at 12.

54 As a member of the International Conference on the Great Lakes Region, an inter-governmental organization comprising the countries in the African Great Lakes Region (Angola, Burundi, Central African Republic, Republic of Congo, Democratic Republic of Congo, Kenya, Rwanda, Republic of South Sudan, Sudan, Tanzania, Uganda and Zambia), Rwanda is a party to the Protocol Against the Illegal Exploitation of Natural Resources as part of a pact on security, stability and development in the region. The adoption of the protocol represented the countries’ recognition of the link between the illegal exploitation of natural resources and conflict and instability in the region. Rwanda has issued a number of ministerial regulations (such as No 001/MINIFOM/2011 and No 002/2012/MINIRENA of 28 March 2012 on the Regional Certification Mechanism for Minerals) to implement the protocol domestically. Both of these sets of regulations were issued pursuant to Rwanda’s 2008 mining and quarry

However, while formalization would give legal authority to local miners, it could also produce negative outcomes, such as upsetting power relations within communities. “Improper use of power”, favouritism and marginalization of vulnerable groups in the formalization process can lead to increased income inequality within communities.⁵⁵ In a study of the regulatory complexities in the informal mining sector in Indonesia, Spiegel found that the formalization process mostly favours “more powerful stakeholders” and others who are willing to pay bribes to government authorities and that it has not led to “meaningful redistribution of opportunities” across the board, especially for vulnerable groups.⁵⁶ Part of the problem are the complex and lengthy bureaucratic processes for processing permit applications. Fiscal barriers, such as difficulties obtaining financing and the inability to pay the permit fees, also prevent many local miners from participating in the formalization process.⁵⁷ Based on field research carried out within the diamond industry in Liberia, Bockstael adds that most of the formalization laws are “inflexible” and out of tune with local reality, forcing local miners to adopt “coping strategies”, which involve making informal arrangements with underpaid local government officials who seize the opportunity to supplement their income.⁵⁸

However, Verbrugge argues that, while these entry barriers and political bottlenecks explain the persistence of informality despite efforts to regulate ASM, they do not explain the persistence of informality in labour arrangements in cases where miners have obtained permits.⁵⁹ Based on a study of ASM regulation in Ghana and Tanzania (two countries with a long history of ASM regulation), he proposes an “integrative approach” to the understanding of persistent informality: informality persists due to a combination of two causes: fiscal, administrative and political barriers; and “exploitation” of the workforce by financiers and miners who have the financial strength to join the formal sector.⁶⁰ The exploitation, which the state condones and sometimes even facilitates,⁶¹ induces people to opt for self-financing and they

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law: Law No 37/2008 of 11 August 2008 on Mining and Quarry Exploitation. However, when Law No 13/2014 was adopted, it repealed Law No 37/2008 pursuant to which these regulations were issued, in language that makes no reference to the regulations. Further research is needed to ascertain the effect of this repeal on the continued legal validity of the regulations.

55 Langston et al “Comparative development benefits”, above at note 43 at 443.

56 SJ Spiegel “Governance institutions, resource rights regimes, and the informal mining sector: Regulatory complexities in Indonesia” (2011) 40/1 *World Development* 200.

57 B Verbrugge “The economic logic of persistent informality: Artisanal and small-scale mining in the southern Philippines” (2015) 46/5 *Development & Change* 1023 at 1032–33.

58 S Van Bockstael “The persistence of informality: Perspectives on the future of artisanal mining in Liberia” (2014) 62 *Futures* 11.

59 Verbrugge “The economic logic”, above at note 57 at 1024.

60 Id at 1027.

61 Id at 1040.

continue to operate in the informal sphere until they have saved enough to be able to join the formal sector. Verbrugge's perspective is important because it demonstrates that democratization of the permit granting process alone is not the panacea to persistent informality. Attention should also be paid to the protection of labour rights. Above all, it is necessary to consider the local context in which formalization occurs.

ASM formalization in Rwanda and Law No 13/2014

The slow growth rate of ASM formalization in Rwanda (and in other parts of Africa) and the poverty associated with it are substantially attributed to a lack of interest, particularly on the part of international donor agencies, such as the World Bank. The bank demonstrated "a large-scale 'bias'" against ASM in the early days of mining legal and policy reforms in Africa and downplayed the growth potential of ASM in Africa.⁶² ASM remained at the fringes of international development policy for a long time. Its potential to contribute to poverty reduction in rural communities escaped the notice of development policy makers who focused their attention on promoting small scale agriculture as their main poverty reduction strategy.⁶³ ASM's poverty reduction potential was first brought to the international scene in May 1995 at the International Roundtable on Informal Mining.⁶⁴ The purpose of the roundtable was to consider: how ASM could be carried out "safely and in an environmentally acceptable manner"; how the sector could "contribute to economic progress"; and what "technical, financial and regulatory measures" were required to achieve these.⁶⁵ The roundtable concluded that "no real solutions are possible unless artisanal miners are given full legal and transferable mining titles to their claims".⁶⁶ This belated recognition of ASM as a viable venture led to frantic efforts that produced interventions that were largely free-standing and not properly integrated into the overall economic development agenda of the individual countries.⁶⁷ The eventual rise of ASM in Rwanda also reflects its rise in other parts of Africa, the compelling need for rural

62 G Hilson "Farming, small-scale mining and rural livelihoods in sub-Saharan Africa: A critical overview" (2016) 3 *Extractive Industries & Society* 550; G Hilson and J McQuilken "Four decades of support for artisanal and small-scale mining in sub-Saharan Africa: A critical review" (2014) 1 *Extractive Industries & Society* 112.

63 Hilson "Farming", id at 551.

64 M Barry (ed) "Regularizing informal mining: A summary of the proceedings of the international roundtable on artisanal mining" (organized by the World Bank, 17–19 May 1995, Industry and Energy Department occasional paper no 6, Washington, April 1996) at 1, available at: <<https://www.hsph.harvard.edu/mining/files/Barry.pdf>> (last accessed 13 July 2017). The paper observes that, while previous conferences had considered artisanal mining, it was within the broader scope of small mining, and this conference was the "first" to consider specifically the problems of artisanal mining.

65 Id at 2.

66 Ibid.

67 Hilson "Farming", above at note 62 at 550.

communities to seek alternative means of livelihood and the recognition by African policy makers of ASM's employment-generating potential.

Although discussions about ASM formalization have continued in Rwanda for decades, they have often given way to political discussions regarding security in the Great Lakes Region.⁶⁸ Part of Rwanda's policy justification for formalizing ASM is that, through effective protection of private property rights and organizational representation, miners would be better able to access market opportunities and obtain financing.⁶⁹ Formalization would enshrine a well-defined tax regime that would lead to increased tax revenues and increasingly enable the industry to be in a position to ensure the protection and rehabilitation of mines and quarries.⁷⁰ It is also considered crucial to the containment of mineral theft and smuggling, which are endemic in Rwanda.⁷¹

Under Law No 13/2014, ownership and control of all minerals resides in the Republic of Rwanda, regardless of any ownership rights a person may possess over the soil beneath which the minerals are found.⁷² A person who wishes to carry out exploration or mining operations must therefore obtain a mineral licence from the Rwandan government. Although the law does not define ASM or large-scale mining (which is left to a future ministerial order), it defines the size and area each may cover. Artisanal mining is treated separately from small-scale mining. The mineral licence area for small-scale mining is defined as 100 hectares, while that for artisanal mining is 49 hectares and for large-scale mining 400 hectares.⁷³ The law also makes provisions for the acquisition of both ASM and large-scale mining rights and creates rights and obligations for holders of each of these rights.⁷⁴

Law No 13/2014 does not, however, spell out the modalities for applying for a mineral licence. Instead, it assigns to the responsible minister the power to do so by way of an order.⁷⁵ The minister is under no obligation to subject the licensing process to competitive bidding. However, in the case of areas where minerals are discovered through exploration carried out by the government itself and areas with known mining potential based on past exploration or mining operations, the minister is given the discretion to require that the licensing process be subjected to competitive bidding.⁷⁶ In such cases, the bidders must comply with Rwanda's public procurement laws. These provisions apply as much to ASM as to large-scale mining. While the minister may decide to subject all licensing to competitive bidding, the lack of a legal provision

68 Perks "Digging into the past", above at note 13 at 736.

69 MINIRENA "A revised Rwandan mining policy", above at note 7 at 35.

70 *Id.* at 24–25.

71 Perks "Digging into the past", above at note 13 at 740–41.

72 Law No 13/2014, art 4(1).

73 *Id.*, art 10.

74 *Id.*, arts 17–22.

75 *Id.*, art 5.

76 *Id.*, art 6.

mandating the minister to do so does not augur well for transparency. Too much power seems to have been given to the minister, without adequate guidelines or safeguards on how the minister is to exercise that power.

One remarkable feature of ASM formalization in Rwanda is the organization of ASM cooperatives. While ASM cooperatives have existed in Rwanda since the 1920s, it was not until Rwanda's independence from Belgium that they became very popular.⁷⁷ The principal reason for promoting the cooperative model was to enhance indigenous participation in mining. However, the growth of the cooperative system was hampered by financial constraints.⁷⁸ In 1988 the government initiated the formation of COPIMAR to strengthen the cooperative model and revive the ASM sector, with the aim of improving production, promoting good practices and increasing benefits to the miners.⁷⁹ In 2012, cooperative members produced a combined total of 42 per cent of Rwanda's total 3 T mineral production.⁸⁰ Despite these strides, however, challenges to the effective functioning of mining cooperatives still remain, one of which is the low financing of cooperatives.

Although Law No 13/2014 does not address the formation of mining cooperatives, article 2 defines "person" to include "a cooperative". The development of the ASM cooperative system is not driven by mining-related laws but by policy and the laws regulating the formation and organization of cooperatives. ASM cooperatives are under no obligation to join COPIMAR, but sensitization programmes are carried out to encourage them to join.⁸¹

The promotion of ASM cooperatives is important in the ASM formalization process. Given the large number of participants in ASM, regulation would be easier if the miners could group themselves into cooperatives with representatives with whom the government can deal directly. In addition, given the low economic power of artisanal and small-scale miners relative to large-scale miners, the formation of mining associations such as cooperatives offers artisanal and small-scale miners the best hope to build their professional and technical capacity and bolster their bargaining strength in their relations with both the government and large-scale miners. They may thus be able to influence government mining policies in their favour. However, the issue of

77 JD Nyamwasa "Jump-starting the Rwandan cooperative movement" in P Develtere, I Pollet and F Wanyama (eds) *Cooperating Out of Poverty: The Renaissance of the African Cooperative Movement* (2008, ILO) 281 at 282, available at: <http://www.ilo.org/public/english/employment/ent/coop/africa/download/coop_out_of_poverty.pdf> (last accessed 20 August 2017).

78 T Nishiuchi and R Perks "Unleashing the subsoil: Mining and its contribution to national development" (6th Rwanda Economic Update, World Bank, August 2014) at 25 and 32, available at: <<http://documents.worldbank.org/curated/en/908721468307137337/pdf/901410NWP0Rwan0ug02402014000PUBLIC0.pdf>> (last accessed 20 August 2017); RGMA "Strategic plan 2010–2013", above at note 18 at 18.

79 Id at 15.

80 Id at 18.

81 Id at 44.

capitalization of the cooperatives through the provision of credit facilities is one that the government of Rwanda must tackle if the benefits of the cooperative model are to be best realized.

Local content / procurement

Meaning of, and policy justifications for, the local content policy

Defined as the requirement that “a given percentage of domestic value added or domestic components be embodied in a specified final product”,⁸² local content policies (LCPs) are designed to enable a country to maximize its gains from foreign direct investment. As a form of productive development policy, their goal is to “strengthen the productive structure of a particular national economy”.⁸³ Typically, LCPs mandate investors to utilize local raw materials in manufacturing and indigenous companies in goods and services procurement, and to give preference to local populations regarding employment.⁸⁴ The requirements are either implanted in contractual agreements between governments and investors or enacted legislatively. They may also be established in bidding requirements as part of the criteria for winning contracts or, more indirectly, in regulations and tax regimes that discriminate in favour of local industries.⁸⁵

The policy justifications for LCPs are legion. It is believed that LCPs would reduce the inequalities faced by domestic companies in relation to foreign companies, increase participation of the national industry in specific sectors of economic activity, improve national technological development, create job opportunities for nationals to improve their personal income, support economic diversification and reduce over-dependence on one sector by enhancing the value-creating capacity of a particular sector, and enable domestic

82 GM Grossman “The theory of domestic content protection and content preference” (1981) 96/4 *Quarterly Journal of Economics* 583 at 583.

83 A Melo and A Rodríguez-Clare “Productive development policies and supporting institutions in Latin America and the Caribbean” (Inter-American Development Bank Research Department competitive studies series working paper C-106, February 2006) at 5, available at: <<http://www.iadb.org/res/publications/pubfiles/pubc-106.pdf>> (last accessed 13 July 2017).

84 GU Nwokeji “The Nigerian National Petroleum Corporation and the development of the Nigerian oil and gas industry: History, strategies and current directions” (The James A Baker III Institute for Public Policy and Japan Petroleum Energy Center, Rice University, March 2007) at 44, available at: <http://bakerinstitute.org/media/files/page/9b067dc6/noc_nnpc_ugo.pdf> (last accessed 13 July 2017).

85 WTI Advisors “Local content requirements and the green economy” (paper presented at the Ad Hoc Expert Group Meeting on Domestic Requirements and Support Measures in Green Sectors: Economic and Environmental Effectiveness and Implications for Trade, 13–14 June 2013, Geneva) at 7, available at: <http://unctad.org/meetings/en/Contribution/DITC_TED_13062013_Study_WTI.pdf> (last accessed 13 July 2017); S Lec “The petroleum sector value chain” in S Tordo, BS Tracy and N Arfa (eds) “National oil companies and value creation” (World Bank working paper no 218, 2011) 1 at 8–9, available at: <<http://siteresources.worldbank.org/INTOGMC/Resources/9780821388310.pdf>> (last accessed 13 July 2017).

companies to compete regionally and internationally.⁸⁶ It has also been pointed out that LCPs help to correct market failures, which occur “when there is a distortion that keeps the market from allocating resources efficiently and adjusting to a steady state”.⁸⁷ In the context of LCPs, market failure occurs when “domestic industries cannot gain the necessary technology and capacity to compete on the open market without outside intervention and protection”.⁸⁸ The unavailability of local skills to meet the needs of the industry results in inefficient allocation of the resources in the market. LCPs can intervene to correct the market failure because, by requiring firms to participate in the development of local skills, LCPs help to ensure that skills are available to meet the needs of the market.⁸⁹

However LCPs also come with certain challenges and tradeoffs. For instance, their accord with World Trade Organization (WTO) rules, particularly the General Agreement on Tariffs and Trade (GATT), the Trade Related Investment Measures and the Agreement on Subsidies and Countervailing Measures (ASCM), has been questioned.⁹⁰ These agreements maintain the “national treatment” principle, which obliges WTO member countries to grant one another the same treatment as they grant their own nationals. As scholars have pointed out, however, these agreements are rarely enforced.⁹¹ Moreover, there is some room for manoeuvre for developing countries. For instance, under article 5 of ASCM, to challenge a subsidy, the challenging country must show evidence of “adverse effects” on it. Also, under article III (8) of GATT, if the requirement under challenge relates to government procurement, without a view to commercial resale, the national treatment principle would not apply. Some scholars regard LCPs as a necessary part of the “policy space” that developing countries should be allowed to enable them

86 S Tordo et al “Local content policies in the oil and gas sector” (World Bank study, 2013) at 120; R Ado “Local content policy and the WTO Rules on Trade-Related Investment Measures (TRIMS): The pros and cons” (2013) 2/1 *International Journal of Business and Management Studies* 137 at 137–38; International Petroleum Industry Environmental Conservation Association “Local content strategy: A guidance document for the oil and gas industry” (2011) at 3, available at: <<http://www.ipieca.org/publication/local-content-strategy-guidance-document-oil-and-gas-industry>> (last accessed 13 July 2017).

87 A DiCaprio and KP Gallagher “The WTO and the shrinking of development space: How big is the bite” (2006) 75 *The Journal of World Investment & Trade* 781 at 783.

88 Ibid.

89 C Nwapi “A survey of the literature on local content policies in the oil and gas industry in east Africa” (School of Public Policy technical paper 9/16, April 2016) at 4, available at: <<https://www.policyschool.ca/wp-content/uploads/2016/05/local-content-east-africa-nwapi.pdf>> (last accessed 3 August 2017); C Nwapi “Defining the ‘local’ in local content requirements in the oil and gas and mining sectors in developing countries” (2015) 8/1 *Law & Development Review* 193.

90 For a detailed analysis of this, see Nwapi “Defining the ‘local’”, id at 193–96.

91 C Cimino, GC Hufbauer and JJ Schott “A proposed code to discipline local content requirements” (Peterson Institute for International Economics policy brief no PB14–6, February 2014) at 1, available at: <<http://www.iie.com/publications/pb/pb14-6.pdf>> (last accessed 13 July 2017); Nwapi “Defining the ‘local’”, id at 194.

to pursue their own economic development goals, regardless of whether LCPs violate international trade agreements.⁹² Another scholar believes that “fair trade” in the sense of a “level playing field” does not necessarily mean applying the same set of trade rules to all countries, but includes recognizing that some countries need “reasonable accommodation” under the international trade system in order to pursue their own development path successfully.⁹³

Furthermore, it is believed that LCPs put such undue pressure on companies to use local workers that this might discourage investment. As a former general counsel of Chevron Nigeria Limited put it, “whether or not new or existing targets are met, [companies] will remain under pressure to justify every single position that is occupied by a [foreigner]”.⁹⁴ This problem may however be addressed by a clear definition of what constitutes local content and by setting realistic and quantifiable targets for companies.

Local content / procurement and Law No 13/2014

As noted above, the Rwandan government recognizes that one of the key means of ensuring the sustainable development of the mining sector and ensuring the positive impact of mining on local communities and the country as a whole is through the development of local skills.⁹⁵ While there are several ways of developing local skills, including the establishment of educational institutions and skills acquisition centres, an approach increasingly being adopted by many countries is to involve the private sector in skills development. This approach is often coupled with restricting companies from employing foreign workers unless they demonstrate that there is no local who has the requisite skills to perform the task for which the foreigner is to be hired. In more stringent countries, a company hiring a foreign worker is required to provide a plan of succession that would enable a local to take over, within a reasonable time, the job the foreigner is being hired to perform.⁹⁶ That succession plan must include the training plan the company has for its local employees to prepare them to perform the task for which the foreigner is to be hired. The goal of this initiative is not merely to create jobs for the country’s nationals, but, more broadly, to increase the company’s value addition to the economy.

92 D Rodrik *One Economics, Many Recipes: Globalization, Institutions and Economic Growth* (2007, Princeton University Press).

93 YS Lee *Reclaiming Development in the World Trading System* (2nd ed, 2016, Cambridge University Press) at 462–63.

94 I Oguine “Nigerian content in the Nigerian petroleum industry: Legal and policy issues” (2011) 29 *Journal of Energy & Natural Resources Law* 405 at 409.

95 RDB “Mining sector report”, above at note 1 at 34.

96 Ghana represents one such country. Ghana’s Petroleum (Local Content and Participation) Regulations 2013, regs 17 and 18, enjoin companies to ensure that, in situations where Ghanaians are not employed due to lack of the requisite skills, every reasonable effort is made to train Ghanaians to perform jobs in that field and to submit a plan showing how a Ghanaian would be trained to take over that position from the non-Ghanaian occupying it.

As noted above, one of the policy reasons behind Rwanda's mining policy reform was to boost the capacity of Rwandans to take charge of their development path after the decimation of the country's already meagre professional class in the 1994 genocide. One would therefore expect that the 2014 mining law would chart a legal course for rebuilding Rwanda's mining capacity and set the framework for effective value addition in the mining sector. Quite to the contrary, the legal provisions regarding value addition to Rwanda's economy are rather timidly adopted. Article 50 of the 2014 mining law provides that "a mineral licence may include provisions requiring the holder" to consider the feasibility of processing and refining the mineral products in Rwanda, the goal being to add value to the Rwandan economy. The use of the permissive word "may" implies that the responsible minister is not under any obligation to require mineral licence holders to consider the feasibility of processing and refining their products in Rwanda before considering doing so outside Rwanda. For a country whose domestic professional and technical capacity is in a shambles and that needs to exploit all value addition opportunities possible, one would expect a bold and more stringent provision permitting outside processing and refining only where these are not feasible in Rwanda, rather than a fainthearted adoption of a very important value addition instrument. The government would then support the gradual realization of the goal of such a provision by providing incentives to the companies to establish processing and refining facilities in Rwanda.

Related to this are provisions relating more directly to local content. Article 48 of Law No 13/2014 requires mineral licence holders and their subcontractors to comply with applicable labour laws in Rwanda and states further that "[a] mineral licence must include conditions requiring its holder to provide training to employees to enable them to perform well their duties". Furthermore, article 49 requires mineral licence holders to "give priority to Rwandan contractors" in the procurement of services, "provided that the rates, quality and time schedule for delivery are competitive to what is submitted by nonresident contractors". It also requires that, in the procurement of goods, priority be given to "materials and goods produced in Rwanda, so long as they are comparable in quality, quantity, price and delivery to materials and goods produced outside of Rwanda".

Thus, in contrast to the procurement of local goods and services, there is no legal requirement to favour the employment of qualified Rwandans. Nor is the training that licence holders are required to provide to their employees to be directed preferentially at employees of Rwandan nationality. The provision fails to take adequate cognizance of Rwanda's dire need for capacity building, which was one of the principal policies that drove the enactment of the law. In fact, that the provision is contained in a part of the law headed "Miscellaneous, transitional and final provisions" shows its relative unimportance to the drafters of the law. Augustin Bida, president of the Federation of Mining Cooperatives in Rwanda, is quoted to have decried the impact of lack of capacity on the adoption of environmental and safety standards in Rwanda's mining sector. He states that the organization has only four staff

members with a higher education: the executive secretary, the financial supervisor, the accountant and an electro technical engineer. Because of the lack of adequately trained personnel at mine sites, tunnels are not built with adherence to adequate safety procedures and engineering principles.⁹⁷

The authors of the 2012 skills survey mentioned above identified the type of skills needed in Rwanda's mining sector and made a number of recommendations for how to bridge the skills gap. The recommendations include launching and implementing knowledge and skills development training programmes for artisanal and small-scale miners, and enhancing qualitative skills among mining employees in private establishments.⁹⁸ A provision in the law requiring preferential hiring in favour of qualified Rwandans and specifically directing mining companies to offer skills training to their Rwandan employees to enhance their capacity to perform the very tasks that foreign professionals are hired to perform would boost the positive impact of the mining industry on the country.

CONCLUSION

In terms of advancing Rwanda's capacity building initiatives, Law No 13/2014 is a disappointment. While the law makes ample provisions for the formalization of ASM, it is in the critical area of charting an effective legal course for the development of local skills through technology transfer that further advances are most urgently needed. While the Rwandan government has explicitly recognized the dire need for local capacity building in the mining industry, it missed an opportunity to carve an effective legal course to facilitate the development of Rwanda's capacity to take control, within a reasonable time, of its mining industry. Rwanda needs a clear and comprehensive local content strategy that should form an integral part of the mineral licensing process to guide the maximization of the gains from mining development. Delivering local benefits to the local communities where mining activities take place is not merely desirable but necessary for the sustainable development of the mining sector. In fact this is something that is being mandated increasingly in many countries, both developed and developing. Capacity building cannot come about by happenstance, but requires a deliberate and measured strategy towards its realization. This is crucial even in the context of ASM because, while these miners are likely to be Rwandans, there is no apparent legal barrier to non-Rwandans engaging in ASM in Rwanda.

97 See van Teeffelen "The EU raw material policy", above at note 4 at 37.

98 RDB "Mining sector report", above at note 1 at viii.