



New Report

Mining Contracts Renegotiation in the Democratique Republic of Congo: Freeport-McMoRan and First Quantum Minerals Exposed

Freeport (Tenke Fungurume Mining) and First Quantum (Kingamwanbo and Musonoi Limited) must renegotiate their mining contract with the Congolese government, says a report just released by the Southern Africa Resource Watch (SARW) and Congolese civil society.

SARW, together with a group of Congolese civil society organisations, call on Freeport and First Quantum to renegotiate their mining contracts with the Congolese government in good faith in order to restore justice in the share of mining benefits with the Congolese people.

The two companies are resisting calls from the Congolese government to change the terms of their contracts. This deadlock is threatening the entire renegotiation process. Faced with the refusal to negotiate these two contracts, the Congolese government is unable to conclude the renegotiation process. There is a risk of other companies, which have already renegotiated their contracts, to not honour commitments they have already made. This situation shows the weak position of the Congolese. The Congolese government finds itself unable to deal with the resistance of the investors in the two partnerships.

1. Observations and recommendations to Freeport (Tenke Fungurume Mining)

The Tenke Fungurume mining site development project in Katanga province is one of the largest and most ambitious projects that exist in the DRC. The mining basin of Tenke and Fungurume is considered

to be one of the richest and most under-developed metalliferous deposits in the world. This ore is vital to the economic development of the DRC and the world. SARW and the Congolese civil society believes that a harmonious and balanced development together with rational management of this site is a key to socio-economic growth for this part of the region in particular and for the entire country as a whole.

The company “Tenke Fungurume Mining Sarl”, is a partnership between Freeport-McMoRan Copper&Gold (established according to American law with 57.75%), Lundin Mining/Tenke Mining Corporation (established according to Swedish law with 24.75%) and Gécamines – Congolese State (with 17.5%)¹ as negotiated in 2005. It is

¹ See TFM Information Sheet - March 2009.

important to note that initially Lundin won the tender launched in 1996 thanks to the conditions presented by it at that time, in particular that of 55% of company shares for itself, 45% for Gécamines, the payment of USD 250 million as “pas de porte” (key money), etc.

Civil society is of the view that the period chosen by TFM for negotiating the amended and redrafted mining agreement (2005) was not a good time to guarantee the validity of consent. The period concerned was that of transition (2003-2006), a period in which Congolese political leaders, uncertain about the future and subjected to all sorts of political, economic and security pressures and guarantees of support for electoral campaigns, were more concerned about the preparation of elections. Those officials were therefore vulnerable to manipulation.

TFM categorically refuses to return to the terms and conditions of the 1996 agreement on the grounds that the latter had been duly and legally negotiated. *Congolese civil society considers the 2005 negotiations between the parties to have been fraudulent in relation to the 1996 Agreement signed by an international call for tenders, and that they cannot therefore be legitimate.*

SARW and the Congolese civil society note that neither the Congolese government nor Gécamines, nor Freeport, and even less Lundin, ever explained how the latter Lundin, after having sold its shares (55%) to **Phelps Dodge**, still found itself with some shares undoubtedly these must have come from Gécamines. The important issue is to understand how Gécamines and Lundin negotiated with each other.

What is clear is that Freeport and/or **Phelps Dodge** bought Lundin’s shares and not those

of Gécamines. In this contract, Gécamines saw itself reduced to 17.5% of the company’s shares for reasons that are not clear today. Who or what was at the root of this coup? It is furthermore unclear how many Lundin shares were sold to **Phelps Dodge** and at what price. What was the reserved share of Gécamines in this sale? Why, after this sale, did Lundin still hold 24.75% and Gécamines only 17.5%? What is the cost of Lundin’s contribution to the current investment which is estimated at close to US\$1.9 billion? This situation does not exonerate Freeport and/or TF Holdings. This company therefore needs to renegotiate. If this does not happen, the obligation to apply the 1996 mining agreement should apply, together with all the rights so acquired.

SARW and Congolese civil society also observe that there exists a discrepancy between the figures, the period of production and/or exploitation (one century) and the reserves declared by TFM (that is 2 million tonnes of copper) which persuades civil society to believe that there is predation at play. Certain disclosures refer to over 22 million tonnes of copper for an exploitation of approximately one century compared with 18 million declared on the stock exchange. SARW believes that in the midst of this confusion TFM has adopted a strategy of occupation and control of the copper deposits by unilaterally increasing its investment and production capacities in excess of what is permitted under the agreement. *There is a discrepancy between the production programme of 30.000 tCu/annum provided for in the Contract and the current production programme of 115.000 tCu/annum for the first year. This fact further justifies a review of the 2005 contract.*

Civil society has also observed the tendency by TFM to organise, at its own cost, visits by members of government and members of parliament, to its site, not in the general interest of the DRC but in the interest of individuals and that this sometimes translates into contentious public statements by members of government.

These uncoordinated and unsanctioned visits of members of government to a company which is in the process of renegotiating its contract could compromise the government's capacity to finalise the process. They also believe that the attitudes of certain government officials could be the reason for TFM's obstinacy. Disclosures would seem to confirm that certain people in authority and/or public figures may have promised Freeport protection in exchange for certain benefits.

In analysing TFM's proposals, especially the proposal relating to the provision of assistance to the Congolese government by the American government and international institutions, Congolese civil society is critical of this kind of action on the part of the DRC, a state which is subject to control by multinationals to the disadvantage of its sovereignty and its people. This is definitely a case of influence trafficking, compounded by blackmail on the part of TFM and its partners.

Civil society is also concerned that TFM is refusing that Gecamines gets involved in the day-to-day management of TFM, although other partners in other joint ventures have not found this to be a problem.

Civil society also deplores the situation whereby most sub-contractors are foreigners. This represents a stranglehold on the emergence of the middle class in the DRC

compared to what is envisaged by the Mining Code.

SARW and the Congolese civil society are also concerned by the Company's inability to meet its social responsibility obligations. Most of the realisations are disproportionate to the size of its declared investment of US \$2 billion.

SARW and the Congolese civil society recommend:

- a. That TFM aligns its position to that of Gecamines, taking into account the acceptance of other partners of the principle of 2.5% royalties, the payment of key money, Gecamines' involvement in day-to-day management, the price to pay for win-win partnership.
- b. That, in the light of the duration of exploitation as declared by the company engineers, and owing to the size of the deposit conceded by the state, 18 million tonnes of copper and 680 thousand tonnes of cobalt should be taken into account, instead of just 2 million tonnes of copper, which bears no relation to the declaration of the technical team and does not reflect the reality on the ground.
- c. That it accepts an external assessment of the true value of the deposit, in relation to the declared investment (USD 1,9 million) with a view to establishing a balance between the real value of the deposit, the declared investment, and the interests of all the stakeholders.
- d. Should TFM continue to refuse to renegotiate, the Government could pursue five options:
 - cancellation of the 2005 Agreement (that is abrogation of the Presidential Ordinance which at the time approved the

Amended and Redrafted Mining Agreement, with a view to placing the parties in the same position as they were in 1996);

- exclusion of Lundin from the partnership by re-allocating its 24.75% to Gécamines (which would restore Gécamines to its position of holding 42.25% of the company shares);
- resizing the TFM concession (this would involve delimiting the concession on the basis of the verified and certified investment made by the partners and of the 2 million reserve declared by TF Holdings. The remainder of the concession would then be returned to Gécamines);
- introduction by the government of the principle of “Windfall tax”²
- amendment of tax legislation by integrating all the desired changes.

As far as sub contracting is concerned, TFM must privilege the sub-contracting of Congolese men and women in order to promote the emergence of a national middle class. Where capacity does not exist TFM should implement a local capacity building policy.

As far as corporate governance is concerned, TFM must desist from corrupt tendencies vis-à-vis members of government, civil society and members of parliament, and that it ceases to extend contentious invitations to them in order to win their support.

² Governments receive taxes on certain industries when economic conditions enable these industries to realise above-average profits. Windfall taxes are essentially derived from certain targeted industries which have benefited the most from price increases on the market, most often mining companies.

2. Observation and recommendations on the renegotiation of the KMT Contract

The KMT Project is a partnership between Gécamines (GCM 12,5%), DRC (5%), Industrial Development Corporation (IDC 10%), International Finance Corporation (IFC 7,5%) and First Quantum Minerals Ltd (FQM 65%).³ The project involves the processing of the mine waste from Kingamyambo and Musonoi, for a stockpile of 1 676 000 tonnes of Copper.

SARW and Congolese civil society are of the view that the amount of 21,5 Million USD proposed by KMT for the key money payment is much lower than the original amount that was jointly agreed upon and fixed at 135 Million dollars in the first contract.

Also, KMT’s proposal to accept the payment of 1.5% royalties does not meet the standard required by Gécamines and the Government, i.e. 2.5% and is cancelled out by KMT’s requirement for being paid a 2% management bonus.

Contrary to TFM, KMT is willing to have two executives from Gécamines participate in the daily running: the Deputy Managing Director and the Human Resources Manager.

As far as procurement is concerned , sub-contracting has not benefitted any Congolese national to date.

SARW and he Congolese civil society recommend:

- the Increase of Gécamines shares by buying back shares from other KMT shareholders as proposed by First

³ The majority shareholders of KMT are of Canadian nationality, but we would like to indicate the presence of the International Finance Corporation which is a member of the World Bank Group.

Quantum, without this operation adding any debts to Gécamines;

- that Gécamines partners abandon the call for a 2% management bonus;
- the increase of key money in favour of Gécamines and its discharged debt;
- that Government introduces WindFall Tax.

As far as procurement is concerned we encourage KMT to sub-contract Congolese companies so that a national middle class may emerge.

3. Observations and recommendations to Gécamines

Gécamines activities are presently limited to takings of advances, royalties and key monies to the detriment of developing new mining projects. Part of the Gécamines Central that remains a mining site for this state company is of no value in terms of reserves, and infrastructure need to be rehabilitated.

It is true that these one-sided contracts, disparaged today, were all signed by the Gécamines managers who are free from any lawsuits. Some signatories of these different partnerships are said to have become agents at TFM.

SARW and civil society recommend that :

- Gécamines judiciously evaluates all of its assets in terms of deposits and equipment in order to assess their real value with a view to reviving national interests as best as possible;
- *Dividends, royalties and key monies collected from these partnerships should serve as funds or capital base for Gécamines operations and also for financing the development of its own*

mining projects in lieu of paying arrears and other social benefits;

- With reference to the above-mentioned partnerships, Gécamines must give preference to lease contracts that will enable it to keep the property rights of mining titles.

4. Observations and Recommendations to the President of the Republic

Civil society observes the President Joseph Kabila's commitment in wanting to get to the bottom of this process.

Civil society recommends that the President remains firm in his decision to renegotiate all contracts without exception. In the event that TFM prevaricates about renegotiating its partnership, President Kabila will simply have to annul the Decree approving the Amended and Reformulated Mining Convention, in order to bring the parties back to the initial situation of 1996.

5. Observations and recommendations to the Congolese Government

Looking at the whole process since the signature of dubious contracts, the review and renegotiation of contracts, civil society has concluded that the Congolese Government is responsible for the chaos of the country's mining sector. Despite the presence of war at the time of signing a good number of contracts, it is clear that the Congolese government did not sign in the interest of the people but in the interest of some individuals. The mining companies that signed knew that. They used this weakness to take the lion's share of the deal.

Civil society has noticed that the Government, despite its sovereignty, is incapable of imposing a line of conduct on

TFM and KMT following their intransigence. This unhappy situation is due to the lack of cohesion within government.

SARW and civil society recommend the following:

- The DRC government needs to acknowledge its responsibilities, apologise to the Congolese people for having signed one-sided contracts and renegotiate in a transparent and honest manner so that the interests of the entire nation may be protected ;
- The government should avoid any missed opportunity of solidarity between members who make up Government as this weakens the Congolese State even more and puts the higher interests of the Nation in danger;
- fight against all corrupt practices in which some of its members are said to be implicated as they are protecting the interests of mining companies ;
- Take all useful measures to put an end to the mining contracts review process;
- While waiting to finalise the negotiations of TFM and KMT contracts, publish the terms of agreement of the already renegotiated partnerships;
- With regard to TFM, either annul the Decree of the President of the Republic having approved the Convention of 2005, or re-proportion the TFM concession by returning a section to Gécamines that would **serve as strategic reserves to the nation**. The Swedish partner Lundin must in any event leave the partnership and re-assign its shares to Gécamines who owns the deposit. This would bring Gécamines' shares up to 42,25%. *The TFM deposits*

must be urgently re-evaluated and re-proportioned in order to retrocede to Gécamines that section of the concession that is over and above the 2.000.000 tonnes declared by the partner;

- In the event that Government has limited expertise required to finalise negotiations with KMT and TFM, solicit technical assistance from the African Development Bank which has set up a legal office available to member countries that are negotiating contracts. The DRC must make a formal application to the AfDB;
- Take legal action against of those who negotiated dubious contracts;
- Prohibit visits by members of Government to TFM and KMT in whose competence mining sector management does not lie;
- Government's responsibilities must not be limited to renegotiations. The Government must ensure that bad contracts are never again signed in the DRC.
- After restoring the balance between the interests of the Congolese people and investors in current contracts, civil society is proposing that the Government adheres to the principles of good governance. But certain conditions are imperative to ensure good management of resources in the DRC. Civil society recommends moreover:
 - accelerating the State's reconstruction ;
 - that Government truly and fully plays its role of regulator and promoter in developing the mining sector;
 - build expertise ;

- reinforce transparency in managing revenue. As a signatory, the DRC must put in place consistent strategies or apply relevant EITI resolutions;
- set up a fiscal or reliable taxation system;
- introduce legislation for added value;
- guide companies on matters of social responsibility.

6. Observations and Recommendations to Parliament

Civil society has taken note of Parliament's non-involvement in the review process.

Parliament must get involved in this process and protect the interests of the people who elected it. It must participate in the positive outcome of the two above-mentioned partnerships:

Parliament must ensure that the practice of secret and discretionary tax arrangements are no longer acceptable in the Congolese fiscal mining regime.

7. Observations and Recommendations to international institutions

The Congolese fiscal mining laws were proposed by the World Bank who decreased the taxes significantly so as to attract new direct foreign investments to the sector.

Financial institutions and traditional financial backers of the DRC have made no efforts to ensure that the two partners renegotiate their contracts in an equitable and morally acceptable manner.

It is recommended that:

International financial institutions, in particular the World Bank, AfDB, IDC, EIB and IMF who undertook to fund certain mining projects in the DRC must refrain from doing

so until contracts are balanced and funds are used for the benefit of development in the DRC.

The full report is available at www.sarwatch.org
The report was produced in partnership with the following Congolese organisations:



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