



Rights and Accountability in Development

# **IFC's ill-judged investments in DR Congo's Mines**

## **Why has IFC abandoned Congolese victims of corruption?**

17 September 2019

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## 1. Executive Summary

On 29 August 2019, a United States court confirmed that the corrupt takeover of a mining company in the Democratic Republic of Congo had produced real victims who are entitled to a restitution award. The victims are the former shareholders in a Canadian mining company, Africo Resources Limited, which held a 75% stake in the valuable Kalukundi copper and cobalt concession in southern Congo. The shareholders lost control of their Congolese investment in 2008 when Dan Gertler, a notorious Israeli businessman, working alongside an American hedge fund and high ranking Congolese officials, orchestrated a take-over. “Africo must be screwed and finished totally!!!!”, Gertler wrote in a text message revealed in earlier court papers. Back in September 2016, the hedge fund, Och-Ziff (since renamed “Sculptor”), had admitted violating the Foreign Corrupt Practices Act, with its OZ Africa subsidiary pleading guilty to criminal charges.

One of the investors in the failed Africo mining project was the International Finance Corporation, the private-sector arm of the World Bank Group. IFC was an important “seed” investor, seeking to encourage economic growth and poverty alleviation in Congo after years of devastating conflict. In 2007, it had a 6% holding in the Africo project and an option to buy more shares.

The decision by the US judge that the shareholders were victims and were entitled to restitution could have been an important moment for IFC, setting it on the road to recuperate its losses and to stand-up against corruption, which had robbed it and the Congolese people of much needed socially responsible development. The Congolese people needed a champion to fight for them, especially since residents of the affected mining communities who lost out could not be directly involved as victims in the legal case (US law requires a crime victim to be directly and proximately harmed).

But IFC was surprisingly absent. IFC says it had no entitlement to join the action because it had transferred away its “legal rights”. The “third party” IFC refers to as recipient is, based on company filings, most likely a former Africo chairman, Chris Theodoropoulos. Shares equivalent to IFC’s holding were “repurchased” by the company from Theodoropoulos in 2009. If and when compensation is awarded, IFC will need to explain why it has given away rights worth up to \$50 million, squandering any prospect of recovering funds for ultimate re-investment in Congo. Moreover, because victim restitution rights can only have arisen in September 2016, IFC will also need to explain exactly when it gave up these rights.

By failing to add its weight to the victim claim, IFC has also missed a crucial opportunity to send a strong message to the perpetrators of corruption. Indeed, IFC has never publicly denounced the corruption that so negatively affected its investment, even though the FCPA action against Och-Ziff laid bare the Congolese corruption scheme, with Gertler and then president Joseph Kabila clearly identifiable as co-conspirators. A year later, in 2017, Gertler was named a “corrupt actor” by the US Treasury and placed under sanctions. Yet Gertler and his companies have not been added by the World Bank Group to the list of companies blacklisted from doing business with the Bank (a process known as debarment). Instead, IFC officials stayed quiet and appeared to slowly back away from their investment.

In Congo, a multitude of corrupt deals have left a legacy of exploitation, mismanagement, environmental harm and mass unemployment, all contrary to IFC’s aims to revitalise the local economy and provide desperately needed social investment and environmental clean-up. As well as its investment in Africo, IFC had sunk \$4.5 million into First Quantum’s Kolwezi project, which also

was targeted under the corruption scheme, with the same grim consequences for local communities. Examining IFC's record therefore matters.

Given that IFC's investments in Congo went so spectacularly wrong, the RAID report examines what happened, what lessons could have been learned and why red flags were not raised earlier about Gertler's role. Exactly who now stands to benefit from IFC's restitution rights and under what circumstances did IFC sign these away?

This report forms part of a submission RAID is making to the World Bank Group's Integrity Unit, requesting an investigation into: (i) the role of Gertler and his companies in the Congolese mining projects; (ii) the adequacy of IFC's due diligence prior to investing in the Africo project; (iii) IFC's record during the period of investment; and (iv) whether IFC has done all it can to support victims of corruption (for further information see RAID's letter to the Integrity Vice-Presidency on 17 September 2017).

### *The corruption scheme*

In the September 2016 action under the FCPA, the US Department of Justice (DOJ) detailed the "DRC corruption scheme". Referring to the Africo mining project, the US authorities described how a high-ranking public official "orchestrated the taking of Africo's interest in the DRC Mine" and made it available to the hedge fund's Congolese business partner. That "business partner" was Gertler. The DOJ also describes how the co-conspirators corruptly acquired the Kolwezi project, stripped from its owners (First Quantum) before being obtained by Gertler.

The corruption scheme in Congo thrived in the context of a destabilised state, as the country emerged from two consecutive wars between 1996 – 2002 that cost the lives of millions of people. According to UN experts, Gertler initially used his close ties to then President Joseph Kabila to illicitly trade in conflict diamonds. After Kabila won presidential elections in 2006, Gertler worked with the regime to obtain mineral-rich assets. Och-Ziff's role was to finance the lucrative deals, including making funds available for the payment of bribes.

US court papers describe how numerous valuable mining assets, including Africo's Kalukundi and First Quantum's Kolwezi projects, were corruptly acquired and consolidated in Gertler's company, Camrose Resources. Camrose was then sold on to "a London-listed mining company", identifiable as Eurasian Natural Resources Corporation plc (ENRC). . In April 2013, the UK's Serious Fraud Office launched a criminal investigation into ENRC. This is ongoing at the time of publication.

Those involved in the corruption scheme gained significant profits. According to the DOJ, Och-Ziff received over US\$342 million from Gertler-controlled companies, representing a profit for Och-Ziff of over US\$91 million. In 2013, the influential [Africa Progress Group](#) reported that Gertler's offshore companies acquired assets worth over US\$1.6 billion for an outlay of just US\$275 million (although this figure does not include all of Gertler's Congolese deals). In 2014, an article in *Forbes Magazine* estimated Kabila's wealth at \$US15 billion. In 2019, [according to Forbes](#), Gertler was reportedly worth US\$1.2 billion.

In December 2017, Gertler and more than a dozen associated entities were [sanctioned](#) by the US government under the Global Magnitsky Human Rights Accountability Act. Another 14 Gertler affiliates were [added](#) to the list in June 2018.

### *How much did IFC lose?*

In November 2007, IFC invested \$4 million Canadian dollars into the Kalukundi project, which represented a 6% holding in Africo, with an option to buy more. As part of the corrupt take-over, new Africo shares were issued to Gertler, which heavily diluted the holdings of existing shareholders. In IFC's case, its holding in Africo decreased from around 6% to just over 2%.

For some 15 months after the takeover, IFC sat as an investor alongside Gertler before quietly divesting. A note tucked away in Africo's 2009-10 [financial statements](#) refers to the "repurchase" by the company of 1,731,000 common shares from an Africo director who had purchased them from a "third party" on 22 September 2009 for CAD \$0.75 per share. These are undoubtedly IFC's shares. In written correspondence to RAID on 1 May 2019, IFC subsequently confirmed it had sold its shares in Africo in 2009 to a third party, but declined to answer to whom it had sold the shares. An Africo [news release](#) gives further details of the "repurchase" of the shares on 3 November 2009 by Africo from its then Chairman, Chris Theodoropoulos. At the time of its November 2007 investment in Africo, IFC paid the equivalent of CAD \$2.31 for each of the common shares it purchased, making its loss CAD \$2.7 million.

IFC's loss may prove to be more than just the CAD \$2.7 million of its original investment. It also surrendered a potentially much higher restitution sum. Although a detailed expert valuation report commissioned by the former shareholders remains confidential, the Africo shareholders state in their letter to the judge that Och-Ziff "should pay as much as \$600 million in restitution". While the amount of compensation has yet to be determined, based on this valuation, the amount IFC could have recovered on its holding and its option could equate to an estimated US\$50 million (minus any legal costs).

But there are other possible ramifications. The recent court decision recognizing the shareholders as victims in the OZ Africa case, if it results in a large restitution sum, potentially increases the maximum fine. Such deterrence is in line with the World Bank's zero-tolerance policy on corruption, yet IFC did not add its weight to the cause.

Should the court reject the existing plea agreement, and if restitution and other matters arising cannot be renegotiated, then OZ Africa's has the right to take back its guilty plea. Such action could mean the case might proceed to trial.

### *Why did IFC not join the shareholder action?*

The Africo shareholders represented in the recent legal proceedings comprise more than fifty former holders of 64% of equity in Africo at the time of the bribery scheme. IFC is not among the group, although clearly it was a high-profile and easily identifiable investor in Africo.

In correspondence with RAID, IFC said it had no entitlement to join the Africo shareholder action because "the shareholder claims and related law enforcement actions occurred several years after IFC sold its shares and transferred its legal rights in the Company [Africo] to a third party." Based on common practice, when shares are sold in the market, as was done with the IFC's Africo shares, the "right to restitution" does not automatically accrue to the new owner. Indeed, any restitution rights in this case could only have arisen when OZ Africa pleaded guilty on 29 September 2016. Such a conclusion is at odds with IFC referring to a transfer when it sold its shares several years previously, which RAID has tracked to September 2009.

RAID followed up in writing, asking IFC to provide further details as to whom, when and under what circumstances its shareholder restitution claim was reassigned. IFC declined to comment.

IFC will need to fully explain any signing away of such restitution rights, especially if Theodoropoulos, the former Africo chairman, is the recipient and participating in the restitution claim. RAID contacted Theodoropoulos to ask for further clarification about the assignment of IFC's restitution rights, but he did not reply. IFC's original investment was meant to benefit Congolese residents. It would be scandalous if any restitution awards that may be granted also do not provide impoverished Congolese people with any development benefits.

#### *Complaint to the World Bank Groups Integrity Vice-Presidency*

On 17 September 2019, RAID filed a complaint to the Integrity Vice-Presidency (INT). In this complaint RAID requests the Integrity Vice-Presidency (INT) to investigate:

- **The role of Gertler and his companies in IFC's Congolese mining projects** under the World Bank's sanctions regime with a view to debarring them and remedying the harm to the victims of the corruption, including the Congolese communities near to the projects who were deprived of important benefits that those projects were to deliver;
- **IFC's actions before and after investing in the Africo Project**, with a view to reporting publicly on lessons learned to better combat corruption in the future.
- **The adequacy of IFC's due diligence prior to investing in the Africo project.** The World Bank and other consultants were already alarmed by the lack of transparency around joint venture mining contracts and the potential for corruption, while the dispute around Africo's ownership had already begun when IFC invested.
- **IFC's record during the period of its investment**, including whether it was effective in identifying and acting on 'red flags' associated with Gertler's interventions, how it voted on Gertler's takeover of Africo, and whether its divestment some 15 months after Gertler gained control was timely, transparent and appropriately managed.
- **Whether IFC has done all it can to support the victims of the corruption**, in particular IFC's entitlement to join the shareholder action and the circumstances of any reassignment of restitution rights to another party.

## 2. Update on US Court Judgement Just Prior to Publication

While finalising this report, which examines victim compensation following the corrupt takeover of a mining company in the Democratic Republic of Congo, a US court recognised former shareholders as victims. The judgement published on 28 August 2019 relates to the sentencing after a guilty plea by OZ Africa Management GP, LLC, one of the co-conspirator's in the corruption scheme and a subsidiary of US hedge fund Och-Ziff, the financial backer of the corrupt deals. RAID's focus in this report remains on residents in mining communities in Congo who suffered harm as a result of the corruption. As set out and explained below, the shareholders' claim and recent judgement is pertinent to this concern.

A central tenet of this report is that the International Finance Corporation, which was itself an investor in Africo, ought to have been part of the claim. As the private sector arm of the World Bank, IFC invests to promote growth to alleviate poverty. The fact that the judgement opens the way for restitution further increases the onus on IFC to explain why it did not participate to recover funds and send a strong anti-corruption message. According to RAID research, it appears that IFC instead signed away its restitution rights, which would have arisen at the time of the FCPA action. The most likely beneficiary is a former Africo director, Chris Theodoropoulos, who bought IFC's shares in 2009. It is certainly not the Congolese people, including those still living in poverty in the country's mineral rich provinces.

The main points of the judgement are as follows.:

- Former shareholders in the Canadian company, Africo Resources Limited, qualify as victims under US law and therefore should be entitled to a restitution award.
- The judgement rejects the defendant's argument that the court cannot change the terms of the plea agreement entered into by OZ Africa and now order restitution.
- The judgement, unlike earlier official records, clearly identifies some of the co-conspirators, including Och-Ziff's key partner in Congo, Dan Gertler (already sanctioned by the US as a 'corrupt actor') and his 'special purpose entity', Camrose Resources. For example, the judgement states: 'Gertler arranged for the payment of bribes to DRC officials, including judges...' and describes 'the initial theft of the mining rights would have been futile had Defendant [OZ Africa] and Gertler not paid bribes to ensure they would retain the mining rights via the Camrose takeover....'
- The court has ordered further submissions before deciding how much restitution is owed.
- The court could still decide that providing restitution is outweighed if complexities around determining losses would overly prolong or complicate the sentencing process.
- OZ Africa has asked the court to reconsider its judgement, but is only entitled to do so on strict grounds (in this case, on the court's description of Africo as 'defunct', when OZ Africa argues it is still active).
- The judgment casts into question the terms of the settlement between the DOJ and OZ Africa and Och-Ziff. In particular, if any restitution amount is sufficiently high, the calculation of the maximum fine for the corruption would correspondingly increase.
- Should the court reject the plea agreement, OZ Africa has the right to take back its guilty plea and proceed to litigation.

### 3. Introduction

#### *Purpose of this report*

In 2007, the International Finance Corporation – the World Bank’s private-sector arm – announced its investment in the Kalukundi mining project in the Democratic Republic of Congo, owned by Canadian mining company, Africo Resources Limited, ‘to support economic revitalization in a country that is beginning to stabilize after years of conflict’. The press release continued ‘IFC’s assistance is expected to set a positive example for the local mining sector.’ In September 2016, the United States Department of Justice (DOJ) announced that it had taken action under anti-corruption laws against multi-billion New York hedge fund, Och Ziff Capital Management Group LLC, for its part in bribery schemes across Africa. Referring to this same Kalukundi mining project, the US authorities described how a high-ranking public official ‘orchestrated the taking of Africo’s interest in the DRC Mine’ and made it available to the hedge fund’s Congolese business partner, who texted ‘Africo must be screwd and finished totally!!!!’, when commenting on the level of bribes required.

IFC had considered the Kalukundi project a ‘reasonable risk’ at the time. This report seeks to understand not only how this investment went so wrong for IFC, but also whether it did enough due diligence before committing funds, and whether it acted quickly enough to withdraw when Dan Gertler, Och-Ziff’s Congolese partner and close ally of the Congolese political elite, became involved. The corrupt deals have left a legacy of exploitation, mismanagement, environmental harm and unemployment. Examining IFC’s record therefore also matters for another very important reason: having set out to revitalise the local economy and provide desperately needed social investment and environmental clean-up, to what extent does IFC also owe it to local communities to do everything in its power to ensure they get redress for the harm caused by the corruption?

This is not an immaterial question. While Och-Ziff’s parent company and its executives escaped criminal sanction, it did admit to its role in bribery conspiracies and agreed to pay a fine totaling \$412 million.<sup>1</sup> A wholly-owned subsidiary, OZ Africa Management GP LLC (OZ Africa), also pleaded guilty to conspiracy to violate the anti-bribery provisions of the Foreign Corrupt Practices Act (FCPA) and the case was assigned for sentencing.<sup>2</sup> Yet, at the beginning of 2019, sentencing still has not been concluded because of a challenge to the notion that corporate corruption is a victimless crime. Former shareholders in Africo are seeking restitution in ongoing proceedings. Yet there are many other victims in local communities who also lost out when the corrupt acquisition of the Africo concession ended any immediate prospect of socially responsible development. Their voice is yet to be heard, but because the statute requires a crime victim to be proximately harmed, it is hard to make a direct case; however RAID advocates that, where possible, the IFC should be acting in their interests. This question of redress, coming to the fore in 2019, also means that IFC’s withdrawal from the Africo project and the sale of its shares should not be accepted as drawing a line under its involvement because IFC could also pursue restitution with the ultimate aim of re-investing recovered funds in Congo.

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<sup>1</sup> United States of America against Och-Ziff Capital Management Group LLC, *Deferred Prosecution Agreement* [‘DPA’], Cr. No. 16-516 (NGG), United States District Court Eastern District of New York, 29 September 2016, available at: <<https://www.justice.gov/opa/file/899306/download>>. Och-Ziff is publicly listed, and the SEC, which regulates the New York stock exchange, also announced that Och-Ziff had agreed to settle civil charges of violating the FCPA. See U.S. Securities and Exchange Commission, ‘Och-Ziff Hedge Fund Settles FCPA Charges Och-Ziff Executives Also Settle Charges’, *Press Release*, 2016-203, 29 September 2016, available at: <<https://www.sec.gov/news/pressrelease/2016-203.html>>

<sup>2</sup> United States of America against OZ Africa Management GP, LLC, *Plea Agreement* [‘PA’], Cr. No. 16-515 (NGG), United States District Court Eastern District of New York, 29 September 2016, available at: <<https://www.justice.gov/opa/file/899316/download>>.



By so far failing to come forward to join the action of former shareholders, or to account for why it has not done so, IFC appears to be abandoning Congolese communities that IFC's original investment was meant to ultimately support. The Congolese whose lives are affected by corruption include artisanal miners, women, children, and ex-employees, all caught up in Congo's exploitative and violent mineral sub-economy, who are regularly denied their human rights. This was not the future envisaged by IFC when it invested in Congo's mineral sector, and it must now account for, and seek to intervene where it can, to address this outcome. RAID makes a number of recommendations in this regard.

### *The context and legacy of the corrupt deals*

The corruption scheme in Congo described by the DOJ thrived in the context of a destabilised state, as the country emerged from two consecutive wars between 1996 – 2002) that cost the lives of millions of people.<sup>3</sup> Multinational corporations and unscrupulous businessmen were accused by a United Nations panel of experts of helping to perpetuate conflict for control of Congo's vast natural resources and of profiteering from it.<sup>4</sup> One of those named was Gertler for using his close ties to President Joseph Kabila to illicitly trade in conflict diamonds. The human and economic costs of the war were immense and continued after Kabila won presidential elections in 2006. From this time onwards, Gertler worked with Kabila and Katumba Mwanke, Ambassador-at-Large for the Congolese government and close adviser to Kabila, to obtain mineral-rich assets.<sup>5</sup> Och-Ziff's role was to finance the lucrative deals, including making funds available for the payment of bribes. According to the DOJ, Och-Ziff received over US\$342 million from Gertler-controlled companies, representing a profit for Och-Ziff of over US\$91 million.<sup>6</sup>

The scandal surrounding Och-Ziff and the corruption scheme that it was part of has touched some of the world's biggest mining companies, which acquired concessions in Congo that had been illegally stripped from their competitors and sold on by Gertler. Most of these Congolese mines are rich in cobalt, a metal whose price has increased by 150 percent between September 2016 and July 2018.<sup>7</sup> Cobalt is a key component in rechargeable batteries used to power everything from smartphones to electric vehicles and demand is currently outstripping supply. In 2016, 50% of the global supply of cobalt originated in Congo and production from new mines, many with a provenance linked to the corrupt transactions, are seen as vital in meeting demand over the next 5 – 10 years.<sup>8</sup>

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<sup>3</sup> The conflict is often described in terms of two wars. The first began in 1996 when the Rwandan Army invaded the eastern Congo in support of Laurent-Desire Kabila, who eventually overturned President Mobutu Sese Seko and it ended in 1997. The second war began in 1998, when Kabila broke with his Rwandan and Ugandan allies. The renewal of hostilities eventually drew in Angola, Namibia and Zimbabwe on the side of the Kinshasa government and Uganda, Rwanda and Burundi on the side of the several rebel groups. A peace accord signed in 1999 (Lusaka Peace Accords) broke down and fighting continued mainly in the eastern DRC. In 2002 the main rebel groups agreed the Sun City Peace Accord and, following bilateral accords, Rwanda withdrew its troops. In 2003, the All Inclusive Agreement on the Transitional Government was signed.

<sup>4</sup> UN Security Council, *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*, S/2002/1146, 15 October 2002. The Panel controversially identified business enterprises from outside the region that it believed to be implicated in the conflict, including over 50 OECD-based companies.

<sup>5</sup> While some individuals and entities involved are named in the official DOJ documents, others are not. By comparing facts provided by the DOJ with information on the public record, it is possible to match the details referred to by the US authorities to known individuals and entities. The DOJ's 'DRC Partner' matches Gertler; 'Public Official 1' matches President Joseph Kabila; and 'DRC Official 2,' matches Katumba Mwanke. For more information on this matching process, see RAID, *'Bribery in its Purest Form': Och-Ziff, asset laundering and the London connection*, January 2017, available at: <[http://www.raid-uk.org/sites/default/files/oz\\_bribery\\_in\\_its\\_purest\\_form\\_full\\_report\\_rev.pdf](http://www.raid-uk.org/sites/default/files/oz_bribery_in_its_purest_form_full_report_rev.pdf)>.

<sup>6</sup> PA, Statement of Facts, 58.

<sup>7</sup> World Economic Forum, 'Cobalt crisis: What a shortage of the metal could mean for electric cars,' 14 August 2018, <<https://www.weforum.org/agenda/2018/08/chart-of-the-week-a-bumpy-road-ahead-for-electric-cars>>.

<sup>8</sup> IMF, World Economic Outlook: April 2018, Chapter 1 Global Prospects and Policies, Box 1.SF.1. The Role of Metals in the Economics of Electric Vehicles, <<http://www.imf.org/en/Publications/WEO/Issues/2018/03/20/-/media/Files/Publications/WEO/2018/April/c1.ashx?la=en>>.

These other major companies that went into business with Gertler, including Swiss-headquartered and London-listed £33 billion commodities and mining giant Glencore plc, are now facing questions about their own conduct and what they knew or should have known. RAID extends this scrutiny to consider the role played by IFC.

### *Africo's Kalukundi concession and the role of IFC*

The US Department of Justice's detailed account of 'the DRC corruption scheme' stands in stark contrast to the vision expressed by the World Bank for war-torn Congo over a decade earlier. Development of Congo's vast mineral wealth by the private sector was a central plank of the Bank's strategy to lift Congo out of poverty. But this future was built on the premise that state-owned mines and mineral deposits would be properly valued, that existing joint-venture contracts would be reviewed to ensure fairness and propriety, and that new contracts would be transparent and based upon competitive tendering.

The purpose of IFC is to work with the private sector in developing countries to create markets that open up opportunities for all, and it shares the World Bank Group's twin goals of ending extreme poverty and promoting shared prosperity in every country.<sup>9</sup> IFC has taken a strong stand against corruption, describing it as among the greatest obstacles to economic and social development and how its harmful effects are especially severe on the poor.<sup>10</sup> Yet, as this report shows, IFC's condemnation of corruption and its consequences is not reflected in meaningful practice at the project level, which has actually down-played the risks.

This briefing focuses upon the one corrupt transaction charged in the DOJ's FCPA action, in which the conspirators gained control of Africo Resources Limited, a Toronto-listed company, and its valuable Kalukundi copper/cobalt concession. By using Och-Ziff money to pay bribes to judges and the ruling elite, Gertler was able to ensure that the illegal stripping and ongoing retention of Africo's title to the concession threatened the whole venture. This permitted Gertler and his co-conspirators to take control of Africo in return for 'resolving' the disputed ownership issue.

The Africo transaction has two elements which, when combined, make it unique when it comes to the victims of the 'DRC corruption scheme': firstly, IFC, was a key seed investor in Africo; secondly, one subset of victims of the corrupt transaction, the former shareholders of Africo ('Africo Owners'), are seeking to attach themselves to the sentencing of OZ Africa in order to be compensated for their loss. While attention has focused upon the seemingly heavy fines levied against Och-Ziff, there is little appreciation that, should the losses to the victims be taken into consideration, the punitive element of the fine should increase to around \$1 billion. However, IFC appears to have absented itself from the action.

This briefing sets out: (1) the nature and purpose of IFC's investment in Africo, including the adequacy of its due diligence and how it reacted to the take-over of the company by Gertler at the time; (2) the anti-bribery and corruption stance adopted by IFC; (3) the consequences of the corrupt transaction for shareholders and what happened to IFC's shares in Africo; (4) the significance of the Africo Owners' action and IFC's apparent lack of engagement; (5) the contrasting position adopted by IFC in pursuing other losses it had incurred in Congo, but with no apparent

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<sup>9</sup> <[https://www.ifc.org/wps/wcm/connect/corp\\_ext\\_content/ifc\\_external\\_corporate\\_site/about+ifc\\_new](https://www.ifc.org/wps/wcm/connect/corp_ext_content/ifc_external_corporate_site/about+ifc_new)>.

<sup>10</sup> <[https://www.ifc.org/wps/wcm/connect/Topics\\_Ext\\_Content/IFC\\_External\\_Corporate\\_Site/AC\\_Home/](https://www.ifc.org/wps/wcm/connect/Topics_Ext_Content/IFC_External_Corporate_Site/AC_Home/)>.

consideration of Congolese victims of corruption; (6) the real harm caused by corruption to people's lives in mining communities in Congo; (7) recent revisions of IFC policies and advice around due diligence and corruption and; (8) questions for IFC about its investment in Africo and its apparent failure to support victims in seeking redress, which RAID put to IFC in April and May 2019, including IFC's response. This final section includes preliminary recommendations to IFC on how it might improve governance, due diligence and better support the victims of corruption.

## 4. The nature and purpose of IFC's investment in Africo

### *The initial investment*

In November 2007, IFC invested in Africo through a private placement of CAD\$4 million (circa US\$ 3.87 million) in return for 1,731,602 common shares.<sup>11</sup> This represented a direct holding in the company of around 6%.<sup>12</sup> IFC also had an option to buy up to the same number of shares again at an agreed price.<sup>13</sup> Indeed, IFC expected to invest CAD\$8 million in Africo.<sup>14</sup>

### *IFC objectives*

At the time of its investment in Africo, IFC was working to expand its activities in Africa's poorest countries and those emerging from conflict, with Congo identified as a priority under IFC's Conflict and Affected States (CASA) Programme.<sup>15</sup> IFC sought to ensure Congo became 'a more hospitable investment destination for those companies willing to apply best practices and encourage widespread, positive development impact' by, *inter alia*, improving the investment climate and investing in mining as a key economic sector:<sup>16</sup>

'As a mineral rich economy, the mining sector remains fundamental to DRC's economic progress. Together with the World Bank Group, IFC is actively working with private companies to develop the country's mining potential and ensure that local communities benefit from the country's mining activity.'

Investment in Africo fitted into IFC's early equity program for sub-Saharan Africa, designed 'to partner with junior mining companies with good management and help them address environmental and social issues maybe four or five years before they begin developing mines'.<sup>17</sup> In the context of Congo *per se*, IFC stated that it would support companies whose mining licenses and

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<sup>11</sup> Africo, Press Release, 28 November 2007, 'Africo completes C\$4.0 million equity financing with IFC,' <<http://www.newswire.ca/news-releases/africo-completes-c40-million-equity-financing-with-ifc-534843131.html>>. See also IFC Press Release, 21 November 2007, 'IFC Invests in Kalukundi Mining Project to Support Revitalization of Democratic Republic of Congo,'

<<https://ifcextapps.ifc.org/ifcext/pressroom/ifcpressroom.nsf/0/45DC795FB44E40FC8525739A00606D87?OpenDocument>>. The \$US equivalent is based on the Bank of Canada's average monthly exchange rate for November 2007 of CAD\$1 = US\$0.967119.

<sup>12</sup> According to Africo's Annual Information Form to 31 December 2007, the company had issued 27,211,705 common shares. In addition, IFC also had a small indirect holding in Africo by virtue of its US\$5 million investment in a South African private equity fund, the New Africa Mining Fund (NAMF) which was developed primarily to assist black economic-empowerment groups in establishing junior mining projects. In August 2008, NAMF held a 10% holding in Africo, when IFC's investment in NAMF was US\$5 million out of US\$77.8 million total commitments.

<sup>13</sup> The option was to purchase a further 1,731,602 shares at Cdn\$2.89 each. See Africo, Press Release, 28 November 2007, *op cit*.

<sup>14</sup> IFC, Summary of Proposed Investment, <<https://disclosures.ifc.org/#/projectDetail/SPI/26209>>. IFC board had actually approved equity investment of up to \$16.2 million.

<sup>15</sup> IFC's Conflict Affected States in Africa (CASA) initiative, launched in 2008, is a five-year program that will help design and implement integrated strategies specially targeted to support economic recovery in conflict affected countries. Available at: <[http://www.ifc.org/ifcext/africa.nsf/Content/CASA\\_Home](http://www.ifc.org/ifcext/africa.nsf/Content/CASA_Home)>.

<sup>16</sup> IFC, Press Release, 17 April 2009, 'IFC Demonstrates Commitment, Plans Increased Support to DRC,' <<https://ifcext.ifc.org/IFCExt/pressroom/IFCPressRoom.nsf/0/B4A873B414F23B2B8525759B00570252?OpenDocument>>.

<sup>17</sup> IFC 'Early Equity for Long Term Returns' available at: <[https://www.ifc.org/wps/wcm/connect/news\\_ext\\_content/ifc\\_external\\_corporate\\_site/news+and+events/news/kiwara\\_early\\_equity](https://www.ifc.org/wps/wcm/connect/news_ext_content/ifc_external_corporate_site/news+and+events/news/kiwara_early_equity)>.

joint-venture agreements had been acquired appropriately; who represented a fair and balanced sharing of project rents; and were committed to implementing projects in line with Congo's Mining Code and other applicable local legislation and international practice. In addition to the Africo project, in 2005 the IFC board also approved a 7.5% holding in the Kingamyambo Musonoi Tailings (KMT) project, majority owned by another Canadian mining company, First Quantum Minerals.<sup>18</sup> Engagement at an early stage was meant to help mitigate risk going forward, but it soon became apparent that IFC's due diligence underestimated project risks in Congo. Both of IFC's Congo investments were ultimately to founder because of Gertler's interventions.

It is important to recognise that IFC, as part of the World Bank Group, is a vanguard investor, leading the way in riskier countries and sectors. It can play this role because it purports to carry out thorough due diligence that goes beyond profit, attaching conditions to its investments to address any risks identified. By investing, IFC therefore sends a signal to the rest of the market that a joint venture project has been vetted and meets IFC standards, which in turn attracts other investors to join, thereby raising the market value of the venture. The corollary, of course, is that if IFC's due diligence falls short, and it has underestimated the risks, the increased value of an asset makes it a tempting target for corruption.

### *IFC due diligence*

When IFC invested in Africo, IFC's due diligence was governed in part by its 2006 *Policy on Social and Environmental Sustainability*.<sup>19</sup> The Sustainability Policy provided that IFC would conduct a social and environmental review of projects under consideration to assess associated social and environmental risks, the client's commitment and capacity to manage those risks, and the role of third parties in achieving the Performance Standards (defining IFC clients' responsibilities for managing certain risks, including environmental and social). This review would constitute an 'important factor' in IFC's decision to finance a project and would form a basis for conditions placed by IFC on any financing extended. The Sustainability Policy also linked social and environmental responsibility to the value of the business, stating that such responsibility 'can enhance clients' competitive advantage and create value for all parties involved'. And it set out various steps by which IFC would engage in ongoing monitoring of its clients' projects.

The Sustainability Policy further provided for additional terms specific to extractive industry projects. It stated that IFC would assess the 'governance risks to expected benefits', and that where the balance was not appropriate, IFC would not invest in the project. The Sustainability Policy also committed IFC to promoting transparency of revenue payments to host governments.

### *IFC understates the risks*

To meet its Sustainability Policy when conducting due diligence on its proposed Africo investment, IFC should have assessed not only environmental and social risks, but, as a project in the extractive

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<sup>18</sup> In 2005/6, IFC initially invested (<https://disclosures.ifc.org/#/projectDetail/SPI/11703>) in the KMT project with Adastra Minerals, before the latter was acquired by First Quantum. Alongside IFC's 7.5% holding, First Quantum (via its subsidiary Congo Mineral Developments Limited) held 65% of KMT, Gécamines 12.5%, the DRC Government 5%, and the Industrial Development Corporation of South Africa 10%. A second tranche was due for approval by IFC in June 2009 (<https://disclosures.ifc.org/#/projectDetail/SPI/24920>), but the project was suspended after the DRC government stripped FQM of its mining licence.

<sup>19</sup> International Finance Corporation's Policy on Social and Environmental Sustainability Policy, 30 April 2006, available at <<https://www.ifc.org/wps/wcm/connect/608f3a804942f69aaa86fe4f5ddda76e/SustainabilityPolicy.pdf?MOD=AJPERES>>.

sector, should have given proper consideration to governance risks. Such a review should have informed IFC's decision to invest and the conditions IFC would attach to its financing.

On the one hand, it is difficult to determine the extent to which due diligence on governance risks associated with Kalukundi was undertaken because IFC does not disclose these assessments. On the other hand, a wealth of analysis, including from the World Bank, was available at the time that pointed to extremely high governance risks in the Congo mining sector. In this context, IFC's due diligence can only have underestimated these risks or else the risks were known, but downplayed.

There was widespread recognition among international donors that assets and mineral reserves belonging to the state mining company's (La Générale des Carrières et des Mines, 'Gécamines') had not been subject to prior independent evaluation before being privatised.<sup>20</sup> By the time IFC was considering investing in mining companies in Congo, there had already been a number of highly critical reports, including by World Bank-backed consultants, into the legitimacy, financial basis and economic fairness of wartime and post-war mining contracts (see box below).

Yet, despite the recommendations by consultants and a special parliamentary committee to cancel or revise existing contracts and halt new negotiations, Congo's Transitional Government bypassed structures aimed at fairness and legitimacy.<sup>21</sup> With a complete lack of transparency, mines and processing facilities were systematically sold off to private groups. In mid-2005, the government approved three joint venture contracts covering, respectively, (i) the key Kamoto, (ii) Kamoto Oliveira Virgule (KOV) and (iii) Kwatebala, Goma and Kavifwafwalu deposits, which accounted for, at the time, between 50 and 75 per cent of Congo's copper and cobalt reserves.<sup>22</sup> Gertler had co-founded a new company, Global Enterprise Corporate GEC, and he was the sole signatory for GEC in the joint venture agreement with Gécamines for the KOV concession.<sup>23</sup>

According to the World Bank, 'The legal and financial/economic studies [by consultants Ernst & Young/Duncan & Allen – see box] were under way in 2005 when the Government authorized the signature (July 2005) of certain partnership agreements without waiting for the results of the studies.'<sup>24</sup> A confidential memo sent in September 2005 from the World Bank's principal mining specialist to the Bank's Country Director for Congo noted 'serious concerns we have regarding the terms and conditions of the contracts, the manner in which they have been negotiated, and their potentially negative implications in respect of maximizing the value of mineral assets'.<sup>25</sup>

### Repeated warnings over the award of mining concessions in Congo

The new Mining Code, which came into force with World Bank support in 2002, (and the Mining Law

<sup>20</sup> Craig Andrews, Principal Mining Specialist, COCPO (oil, gas and mining policy division of the World Bank), Office Memorandum to Pedro Alba, Country Director DRC, 8 September 2005, *Contracts between Gécamines and Private Companies*.

<sup>21</sup> As early as March 2003, the Transitional Government, influenced by vested interests, bypassed COPIREP and set up the Steering Committee for the Restructuring of Gécamines (CPRG).

<sup>22</sup> Estimation of IPIS based on: Katanga Mining Limited, 'Katanga Announces Higher Grade Reserves'; Global Enterprises Corporation Ltd, *Technical Report*, 26 June 2006 (incorporated in Nikanor Prospectus, originally available at: <<http://www.nikanor.co.uk/downloads/Prospectus.pdf>> [link no longer active]); Kalala Budimbwa, *Valorisation de la Gécamines engagées dans les contrats: Chemaf, KMT Tenké Fungurumé, KCC; GEC; et nécessité de révision de ces contrats pour protéger les intérêts de la République, Kinshasa, septembre 2006*.

<sup>23</sup> *Convention de joint venture entre la Générale des Carrières et des Mines et Global Enterprise Corporate Ltd*.

<sup>24</sup> World Bank, 'Democratic Republic of Congo: Growth with Governance In the Mining Sector', note 53, p. 50.

<sup>25</sup> WB Office Memorandum, From: Craig Andrews – Principal Mining Specialist – to: Pedro Alba – Country Director for DRC. Subject: Contracts between Gécamines and Private Companies. Internal memo (e-mail), 8 Sept. 2005. The Craig Andrews memo was leaked to the Financial Times, which published an article on a review of the JV contracts between Gécamines and K-F, GEC and Lundin Holdings/Phelps Dodge. See Dino Mahtani, 'Transparency fears lead to review of Congo contracts', in: *Financial Times*, 3 January 2007, available at: <[http://www.ft.com/cms/s/c918d3a2-9a8a-11db-bbd2-0000779e2340\\_i\\_rssPage=abb716b0-2f7a-11da-8b51-00000e2511c8.html](http://www.ft.com/cms/s/c918d3a2-9a8a-11db-bbd2-0000779e2340_i_rssPage=abb716b0-2f7a-11da-8b51-00000e2511c8.html)>.

of March 2003) was supposed to ensure full transparency around the award of contracts and 'a fair distribution of revenues among Government, mining companies and affected communities'.<sup>26</sup> The World Bank supported a committee to reform public enterprises (*Comité de pilotage de Réforme des Entreprises Publiques*, COPIREP) including Gécamines, the state-owned copper and cobalt conglomerate.<sup>27</sup> In September 2002, IMC Consulting Group Ltd was appointed by the World Bank on behalf of the Congolese Government to conduct an audit and define a new business plan for Gécamines. IMC recommended that all ongoing negotiations with private partners should immediately be halted and that steps should be taken for a wholesale renegotiation of the joint venture agreements.<sup>28</sup>

In August 2004, the World Bank and COPIREP commissioned new audits of Gécamines and its joint venture contracts.<sup>29</sup> The financial audits, by Ernst & Young, found poor accounting practices and impropriety. The legal audits, by Duncan & Allen, found failures to revoke licences before their reassignment, JVCs that did not conform to the law, and poorly defined concession areas. The legal consultants concluded: 'It seems that Gécamines has alienated the majority of its mining rights without ensuring that it received just compensation in return. There was not an objective evaluation (either by an independent expert or Gécamines) of GCM's contributions to the partnership. As a result the real value of these contributions (assets) is unknown.'<sup>30</sup> A special parliamentary committee reached a similar conclusion, recommending the cancellation or renegotiation for war-time contracts and a moratorium on the signing of new contracts.<sup>31</sup>

In April 2007, the *Commission de Revisitation des Contrats Miniers* (MCRC) was set up to examine the partnership contracts 'with a view to correcting any imbalances and related faults.'<sup>32</sup> In February 2008, an international coalition of non-governmental organisations warned that new deals were being struck behind closed doors, outside of the opaque and incomplete review process.<sup>33</sup> The Commission eventually recommended renegotiation of two-thirds of the contracts and the cancellation of the remainder, but the final negotiations were handled *in camera* by 'a specially constituted panel' of senior government officials, criticised at the time by the World Bank because 'the possibility exists of corrupting influences or inappropriate behavior within the panel itself and/or the negotiating team.'<sup>34</sup> The final phase of negotiations left many apparently seriously flawed contracts untouched, raising doubts about the impartiality and integrity of the whole process.

<sup>26</sup> World Bank, *Democratic Republic of Congo: Economic and Sector Work: Reforming Public Enterprises through Improved Governance*, Report No. 28048-ZR, 10 March 2004, paragraph 78, available at: <[http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2004/03/24/000012009\\_20040324105453/Rendered/PDF/280480ZR.pdf](http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2004/03/24/000012009_20040324105453/Rendered/PDF/280480ZR.pdf)> [link no longer active].

<sup>27</sup> The *Comité de pilotage de réforme des entreprises publiques – COPIREP* – was established by Decree n°136/2002 of 30 October 2002. It was a condition for the World Bank's Economic Recovery Project, which approved \$450 million in credits for the DRC in June 2002. COPIREP was responsible for the restructuring of all of the Congo's state-owned enterprises. Its remit initially excluded Gécamines.

<sup>28</sup> IMC's findings were presented to the high-level inter-ministerial Economic and Financial Commission (ECOFIN). See IMC Group Consulting Ltd, *Restructuration de la Gécamines, Kinshasa, le 26 septembre 2003*. The preliminary findings were fleshed out and consolidated in a later report: IMC Group Consulting Ltd., *Restructuration de la Gécamines, Projet No. M5670C – Phase 2, février 2004*.

<sup>29</sup> *Africa Mining Intelligence*, No. 94, 13 October 2004, 'Gécamines new advisers'.

<sup>30</sup> Duncan & Allen, *Projet d'Evaluation Juridique des Accords de Partenariats de la Gécamines (Contrat N31/COPIREP/SE/02/2005): Rapport Final, 6 avril 2006*, available at: <<http://www.congoone.net/PDF/DUNCANALLEN.pdf>>, paragraph 1.1.3: 'It seems that Gécamines has alienated the majority of its mining rights without ensuring for itself just recompense. There has not been an objective evaluation (neither by an independent expert nor by GCM) of GCM's contribution to the partnerships. As a result, the value of its contribution is not known.' ('*Il semble que la Gécamines a aliéné la plupart de ses droits miniers sans s'assurer d'une juste compensation en retour. Il n'y a pas eu d'évaluation objective (ni par un expert indépendant ni par la GCM) des apports [sic] de la GCM aux partenariats. Par conséquent, on ignore la juste valeur de ces apports.*') See also paragraph 4.1.1.5.

<sup>31</sup> République Démocratique du Congo, *Assemblée Nationale, Commission spéciale chargée de l'examen de la validité des conventions à caractère économique et financier conclues pendant les guerres de 1996 – 1997 et de 1998, Rapport des travaux, Ière Partie, Fait à Kinshasa, le 26 juin 2005* (also known as the Lutundula Commission), available at: <<http://congominer.org/system/attachments/assets/000/000/209/original/Lutundula-2006-ReportComple.pdf?1430928066>>.

<sup>32</sup> *Arrêté ministériel* no 2745/cab.min/Mines/01, 20 April 2007.

<sup>33</sup> RAID, Global Witness et al., 4 February 2008, 'NGOs fear that DRC mining contract review process has been hijacked,' available at: <<https://www.globalwitness.org/en-gb/archive/ngos-fear-drc-mining-contract-review-process-has-been-hijacked/>>.

<sup>34</sup> World Bank, 'Democratic Republic of Congo: Growth with Governance In the Mining Sector Technical Assistance Project', *Report No. 43402-ZR*, May 2008, p.48, <<https://siteresources.worldbank.org/INTOGMC/Resources/336099-1156955107170/drcgrowthgovernanceenglish.pdf>>.

Moreover, another body set up to validate other mining titles foundered amidst allegations of impropriety.<sup>35</sup>

Following 2006 elections, the new Congolese government, headed by President Joseph Kabila, undertook to revisit the war and post-war contracts. IFC appears to have put its faith in the resulting inter-ministerial Commission de Revisitation des Contrats Miniers, set up in April 2007.

Later that year, when the Commission decided that the Kalukundi contract would need to be renegotiated, this did not deter IFC.<sup>36</sup> Not only were unresolved issues surrounding the provenance and ownership of Kalukundi well known before IFC signed off on its investment, the track-record of the Congolese government's interference in the award of contracts had also been long established, but not remedied. The fact that IFC persisted with its investment sent a signal that because the venture had passed its due diligence tests, this would provide reassurance to investors to set against this risk.

As part of its investment process, IFC publishes a Summary of Proposed Investment (SPI) before presenting a project to its Board of Directors for consideration. This information is only released after due diligence has been carried out and once IFC has assured itself that the company can be expected to undertake the project in manner consistent with IFC's Performance Standards.<sup>37</sup>

The Africo SPI, published in July 2007, simply stated that: 'The project is secured under an Exploitation or Mining License, issued under the DRC Mining Code of 2003.'<sup>38</sup> In the section devoted to an assessment of governance risks, IFC refers to Congolese President Joseph Kabila's decree establishing a multi-stakeholder National Extractive Industries Transparency Initiative (EITI) Committee and DRC Mining Code's provisions on the payment of royalties. Yet the US Treasury criticised IFC's Kalukundi proposal because it 'did not explicitly consider the extent to which the country has functioning systems for accurately accounting for payments to the government by companies involved in the extraction and export of the natural resource...or the verification of government receipts against company payments.'<sup>39</sup> Even more significantly, the SPI provided no detailed information about the non-transparent circumstances in which the original Kalukundi licence had been obtained during the war and the ongoing dispute over the ownership of the concession. The IFC failure to expose these risks, instead concluding that the project passed its governance assessment, lulled investors into a false sense of security and made Kalukundi a more attractive proposition when it came to Gertler's intervention to take over the concession.

### *The escalating ownership crisis: IFC's response*

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<sup>35</sup> The Mine Law of 2002 established the *Commission de validation des titres miniers* (Validation Commission for Mining Titles) to adjudicate mining title disputes. However, the work of the Commission fell into disrepute. According to the World Bank, 'it is alleged that the commission is not limiting its work to the mining titles established in the master list but accepting to arbitrate titles which are claimed in conflict by various operators. This opens the possibility that certain operators will instigate proceedings simply as a means to encumber mining titles and extract payments from legitimate title holders.' (see World Bank, 'Democratic Republic of Congo: Growth with Governance In the Mining Sector', note 49, p. 49). In August 2007 a decree was issued halting the work of the Validation Commission and nullifying its decisions made after the original closing date for review of February 2007.

<sup>36</sup> *Tableau d'évaluation et de classification des contrats :Rapport des Travaux de la Commission de Revisitation des Contrats Miniers*, Kinshasa, October 2007.

<sup>37</sup> At the time disclosure of the SIP, IFC's 2006 Policy on Disclosure of Information was in effect, which has now been superseded by the 2012 Access to Information Policy. Broadly similar provisions are made for the pre-approval disclosure of Summary Investment Information.

<sup>38</sup> <<https://disclosures.ifc.org/#/projectDetail/SPI/26209>>.

<sup>39</sup> US Department of the Treasury, Report on IFI Projects that Support Extractive Industries, Introduction and Executive Summary, 1 July 2008, <<https://www.treasury.gov/press-center/press-releases/Pages/hp1220.aspx>>.

The acquisition of Kalukundi had its roots in the Congolese conflict. Enterprises Swanepoel, a Congolese civil engineering and construction company, had been given title to the concession by the Congolese government in the midst of renewed hostilities, some time around 2001 (the original contract is missing). None of the mines-for-infrastructure deals entered into by Gécamines at the time were properly evaluated nor did Gécamines maintain proper records, including the actual costs of the road repair programme.<sup>40</sup> Africo acquired an initial 24% holding in Kalukundi from the H&J Swanepoel Family Trust SPRL in 2004, before increasing this to 48% in 2006 and 100% in 2007.<sup>41</sup> At the time Africo initially acquired H&J Swanepoel, it was itself a private company.<sup>42</sup>

When IFC began considering an investment in Africo in mid-2007, in accordance with its due diligence requirements, it must have been aware of a Africo's prospectus, produced in April 2007 for Africo's public listing on the Toronto Stock Exchange. The prospectus states:<sup>43</sup>

### *No Assurance of Titles*

Although the Corporation [Africo] has investigated its title to the Kalukundi Property, there can be no assurance that it holds valid title or that its title will not be challenged or that any challenge may prove successful. The mineral title records in the DRC are incomplete, may not fully reflect the transfer history and may not disclose agreements, charges and claims that could impact on title to the Kalukundi Property. Likewise, there can be no assurance that the Corporation holds valid title to the shares of H&J and, indirectly, its interest in Swanmines, and there is little that the Corporation can do to investigate these titles. Accordingly, there can be no assurance that its title to the shares in H&J and indirectly, in Swanmines, will not be challenged. Any such challenge, even if ultimately unsuccessful, may have a material adverse impact on the Corporation and the value of the Shares.

Although it would have been difficult to predict the final form this challenge was to take, such a warning should have prompted IFC to undertake further due diligence.

Africo issued a press release on 23 February 2007, stating that a former employee, Alessandro Berardone, had, *ex parte* and without any proper notice being given to the company, obtained a judgement against Africo for US\$3 million in damages for early termination of his fixed-term

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<sup>40</sup> The original agreement was missing from Gécamines' archives at the time of the 2002 World Bank legal audit. However, Rubicon (the company from which Africo was derived), in its Management Information Circular, 8 August 2006 report, p. K-3, refers to a later amended contract: 'the Contract (as amended) for the Establishment of a Company between La Générale des Carrières et des Mines ("GCM") and The Enterprise H&J Swanepoel Famille Trust sprl ("H&J") for the Mining of the Kalukundi Deposits dated February 2001 (the "Swanmines Agreement")'. Available at: <https://sedar.com/GetFile.do?lang=EN&docClass=10&issuerNo=00009365&issuerType=03&projectNo=00963855&docId=1761036>.

<sup>41</sup> See, respectively, Africo Resources Limited, Consolidated Financial Statements, December 31, 2004, 4. Investments, which describe how, during 2004, Africo acquired a 24% interest in H&J Swanepoel Family Trust s.p.r.l.; Consolidated Financial Statements, December 31, 2005, 4. Investments, which describe a further increase in Africo's share of H&J from 24% to 36% ([https://www.sec.gov/Archives/edgar/data/1057791/000105779106000021/ex99\\_8.htm](https://www.sec.gov/Archives/edgar/data/1057791/000105779106000021/ex99_8.htm)); and Interim Consolidated Financial Statements, First quarter ended March 31, 2006, 5. Subsequent events, which describe in May 2006 a further increase in Africo's share of H&J from 36% to 48% ([https://www.sec.gov/Archives/edgar/data/1057791/000105779106000021/ex99\\_9.htm](https://www.sec.gov/Archives/edgar/data/1057791/000105779106000021/ex99_9.htm)). On 30 March 2007, Africo completed the acquisition of the remaining 52% of H&J shares (see Africo Resources Ltd, Preliminary Short Form Prospectus April 2007, available at: <http://www.sedar.com/GetFile.do?lang=EN&docClass=9&issuerNo=00024685&fileName=/csfsprod/data79/filings/01085625/00000001/n%3A\ZHR\12250pdf\PrelimSFP\PrelimSFPProspectus.pdf>).

<sup>42</sup> Africo Resources Limited was originally a private company, incorporated in British Columbia. In 2004, Africo was partly owned by Rubicon Minerals, also incorporated in British Columbia and listed on the Toronto Stock Exchange. In preparation for Africo becoming a public company, Rubicon was reorganised into three public companies, including CopperCo Corp into which Rubicon's almost 40% holding in Africo was transferred, alongside the holdings in Africo of non-Rubicon shareholders. CopperCo was subsequently re-named Africo Resources Limited, to be floated on the Toronto Stock Exchange. See Rubicon Minerals Corporation, Management Information Circular, op. cit., 8 August 2006, The Arrangement, p.35 ff.

<sup>43</sup> Preliminary Short Form Prospectus April 2007, op. cit., p.7.



employment contract.<sup>44</sup> Africo immediately contested the judgement as ‘frivolous, illegal and unenforceable’, continuing to complete its acquisition of the H&J Swanepoel Family Trust, giving it a 75% holding in Swanmines Sprl, with the 25% balance held in joint venture with Gécamines.<sup>45</sup> Swanmines held the mining licences in the Kalukundi project. However, shortly after this, on 27 April 2007, the significance of the Berardone judgement came to light, in that another Congolese court had accepted an assertion that a Congolese entity called Akam Mining SPRL owned 75% of Kalukundi.<sup>46</sup> To bring into effect the Berardone judgement, the bailiff of the DRC Court seized Africo’s share certificates in Swanmines and auctioned them. Akam apparently purchased those share certificates for US\$600,000, which the Court apparently paid to Berardone in settlement of the US\$3million award. The DOJ would later describe how the court ruling had been ‘orchestrated’ by a close aide to President Kabila. Again, Africo denied the Akam claim and began its own legal proceedings and subsequently demonstrated that the seized share certificates must have been counterfeits as these suggested an ownership structure that did not exist.<sup>47</sup>

In the midst of the cross-cutting court actions, IFC released its SPI on 23 July 2007, noting only how ‘Recent legal challenges to ARL’s rights in the project confirms the need for the company to team up with developmental finance institutions with a long term commitment in the DRC, to provide some political risk mitigation on the development of the project.’<sup>48</sup> When IFC announced on 21 November that it had signed an investment agreement with Africo, it brushed aside the dispute over ownership.<sup>49</sup> ‘IFC expects that Africo’s ongoing legal dispute with Akam Mining will be resolved in the courts of the Democratic Republic of Congo in accordance with appropriate legal principles.’

Africo’s ownership dispute with Akam was never resolved through the courts, which invariably delayed judgement, increasing the uncertainty for Africo. Instead, an entity called Camrose Resources agreed a private placement of CAD\$100 million with Africo in April 2008, the terms of which confirmed, *inter alia*, ownership of Kalukundi by Africo’s Swanmines’s and the dropping of Akam’s claims.<sup>50</sup> As the result of the transaction, Camrose acquired not only a 63% controlling interest in Africo, but also an option to increase this holding. Furthermore, Africo committed to buying the adjacent Mashitu property owned by COMIDE, a Camrose affiliate, in exchange for additional Africo shares at a fixed price, even though Mashitu’s value had not been established.<sup>51</sup> Depending on this final value, it was therefore unknown how many more shares in Africo Camrose

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<sup>44</sup> Africo Resources, News Release, 23 February 2007, available at:

<<https://sedar.com/GetFile.do?lang=EN&docClass=8&issuerNo=00024685&issuerType=03&projectNo=01055106&docId=1893697>>.

<sup>45</sup> Africo Resources, Preliminary Short Form Prospectus, 19<sup>th</sup> April 2007, p.3: ‘On March 30, 2007, the Corporation (indirectly through Kisankala) completed the acquisition of the remaining 52% of the shares of H&J that it did not previously own. As a result, the Corporation indirectly owns 75% of the shares of Swanmines, the holder of the exploitation permit for the Kalukundi Property.’ (Available at:

<<https://sedar.com/GetFile.do?lang=EN&docClass=9&issuerNo=00024685&issuerType=03&projectNo=01085625&docId=1938148>>)

<sup>46</sup> Africo Resources, News Release, 27 April 2007, available at:

<<https://sedar.com/GetFile.do?lang=EN&docClass=9&issuerNo=00024685&issuerType=03&projectNo=01085625&docId=1938148>>

<sup>47</sup> Rather, H&J owned a stake in Swanmines and Africo, through two Canadian subsidiaries, held H&J.

<sup>48</sup> <<https://disclosures.ifc.org/#/projectDetail/SPI/26209>>.

<sup>49</sup> IFC, ‘IFC Invests in Kalukundi Mining Project to Support Revitalization of Democratic Republic of Congo,’ op. cit.

<sup>50</sup> Africo Resources Ltd, ‘Africo Resources announces CAD\$100 million private placement to develop the Kalukundi project,’ news release, 21 April 2008, available at:

<<https://sedar.com/GetFile.do?lang=EN&docClass=8&issuerNo=00024685&issuerType=03&projectNo=01250858&docId=2177122>>. See also Management Information Circular, 14 May 2008, setting out the terms of the transaction and the recommendations of the board to shareholders, available at: <<https://sedar.com/GetFile.do?lang=EN&docClass=10&issuerNo=00024685&issuerType=03&projectNo=01270248&docId=2207467>>.

Africo announced on 12 June 2008 that shareholders had approved the deal, which was completed on 24 July. See, respectively, Africo news releases: ‘Africo shareholders approve \$100M private placement and associated Camrose transactions,’

<<https://sedar.com/GetFile.do?lang=EN&docClass=8&issuerNo=00024685&issuerType=03&projectNo=01282181&docId=2226128>> and; ‘Africo Resources completes CAD\$100 million private placement with Camrose Resources Limited,’

<<https://sedar.com/GetFile.do?lang=EN&docClass=8&issuerNo=00024685&issuerType=03&projectNo=01295619&docId=2244411>>.

<sup>51</sup> Management Information Circular, 14 May 2008, op. cit. ‘Transfer Agreement’, pp. 9 – 10. See also ‘Africo shareholders approve \$100M private placement and associated Camrose transactions’, op. cit.

would ultimately acquire. It is believed that if the merger had been executed as planned, Camrose would have owned approximately 96% of Africo.

The deal to ensure that Kalukundi remained with Africo came at a high price. The accompanying announcement made it clear that Camrose, incorporated and registered in the British Virgin Islands, was itself owned by a Gertler family trust.<sup>52</sup> Furthermore, while the news release suggested that Camrose would shortly complete its purchase of Akam – the key to resolving the dispute over title – it soon emerged in the press that Akam’s ownership had changed hands and that the company already belonged to Kigala International Limited (Kigala).<sup>53</sup> The sole shareholder in Kigala was Camrose. Hence, by June 2008, it was publicly known that Gertler had, in effect, engineered the Akam claim, although details of how public officials and magistrates had been bribed to achieve this would only emerge later.

In July/August 2009, RAID visited Kalukundi to assess the human rights impacts of the project. The following month, RAID and Amnesty International contacted IFC to confirm the status of the Africo project and was informed that it was still ‘active’. During October and November 2009, Amnesty made several attempts to arrange a telephone conference with relevant IFC staff to discuss its findings from Kalukundi, following up with a letter.<sup>54</sup> On 24 February 2010, IFC finally responded, informing Amnesty that ‘Africo was no longer an IFC client,’ explaining that ‘a change of ownership caused IFC to exit the investment’.<sup>55</sup>

The timeline shows that IFC approved, signed and invested in Africo in 2007 – in full knowledge that Africo’s ownership dispute was far from settled – and that it remained fully invested in Africo as Camrose’s private placement was announced in April 2008 and then approved by Africo shareholders in June 2008. RAID has asked IFC how it voted, but it has declined to answer, referring more generally to ‘non-public information’, which it is unable to disclose.<sup>56</sup>

The World Bank Group states, in its fight against corruption, that it has ‘a proactive policy of anticipating and avoiding risks in its own projects’ and ‘subjects all potential projects to rigorous scrutiny and works with clients to reduce possible corruption risks that have been identified.’<sup>57</sup> Furthermore, IFC’s Sustainability Policy, explicitly recognised the need for the assessment of governance risks in the extractives sector. The World Bank had already expressed its concern over the fairness and legitimacy of mining contracts and the opaque way in which these were awarded in Congo. While IFC cannot have known about the corrupt scheme by which Camrose acquired its interest in Africo, a UN expert panel, examining how the illegal exploitation of resources fuelled the Congolese war, had already accused Gertler of exchanging conflict diamonds for money, weapons and military training while forging his close relationship with President Kabila and his inner circle.<sup>58</sup> By mid 2008, it was already apparent that Gertler’s Camrose owned Kigala and had contrived the Akam dispute to use as leverage to push through Camrose’s takeover of Africo. Yet, based on

<sup>52</sup> Ibid., Africo news release 21 April 2007, op. cit.

<sup>53</sup> Barry Sergeant, ‘Africa’s greatest little story – copper/cobalt saga continues’, *Moneyweb*, 12 June 2008, <<https://www.moneyweb.co.za/archive/africas-greatest-little-story/>>. A company circular concerning a later deal to acquire shares in Camrose confirmed that Kigala Multinational (cf. ‘International’, but believed to be the same entity), was ‘99.9 per cent. owned by the Camrose Group Company Kigala Multinational Limited (“Kigala”)’. See ENRC, *Circular to ENRC Shareholders*, 7 December 2012, p.3, numbered paragraph 4.

<sup>54</sup> Amnesty International, letter to IFC, 11 December 2009. On file at RAID.

<sup>55</sup> IFC letter to Amnesty International, 24 February 2010. On file at RAID.

<sup>56</sup> Exchange of letters between RAID and IFC, April and May 2019, reproduced as an annex to this report.

<sup>57</sup> <<http://www.worldbank.org/en/topic/governance/brief/anti-corruption>>.

<sup>58</sup> UN Security Council, *Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of Congo*, S/2001/357, 12 April 2001, paragraphs 150 – 2. See also the Panel’s report S/2001/1072, 13 November 2001, paragraphs 67 – 9 and S/2003/1027, 23 October 2003, confidential Section 5, paragraphs 32 – 5.

RAID's research, IFC remained invested in Africo with Gertler in control for more than a year until September 2009, when IFC quietly sold its shares and withdrew from Africo, without any public announcement (please see below, *What happened to IFC's shares*, for further details).

## 5. IFC's anti-corruption stance

IFC recognises that corruption damages policies and programs that aim to reduce poverty, so attacking corruption is critical to the achievement of IFC's overarching mission to promote sustainable private sector investment in developing countries to improve people's lives.<sup>59</sup>

Accordingly, 'IFC has always expected its staff and clients to maintain the highest standards of ethical behavior and compliance with the law'.<sup>60</sup> IFC prides itself as being at the forefront of development institutions in guarding against fraud and corruption in the projects it supports.<sup>61</sup> IFC has drawn up definitions and interpretations of sanctionable practices, including corruption, coercion and collusion in the context of IFC operations.<sup>62</sup> The World Bank Group, including IFC as its private sector arm, seeks to prevent corrupt bidders by promoting openness around contracts and has also called for increased disclosure around beneficial ownership.<sup>63</sup>

Furthermore, by stating how it considers 'corruption a major challenge to its twin goals of ending extreme poverty by 2030 and boosting shared prosperity for the poorest 40 percent of people in developing countries', the World Bank Group immediately signals a concern for real victims in countries like Congo.<sup>64</sup>

The Bank's president joined leaders from 40 countries at the 2016 Anti-Corruption Summit in the United Kingdom, committing to a range of steps to confront corruption.<sup>65</sup> These steps included the enhancement of transparency to reduce corruption and the recovery of stolen assets.<sup>66</sup> The Bank, as joint partner in the Stolen Asset Recovery Initiative (StAR), was instrumental in helping to organise the Global Forum on Asset Recovery in December 2017, again emphasising that the deterrence of corruption must be accompanied by measures to provide redress.<sup>67</sup> At the October 2018 International Anti-Corruption Conference in Copenhagen, Denmark, the World Bank Group built upon its commitments, *inter alia*, stating: 'We will promote access to justice initiatives that ensure all are able to have their concerns of corruption heard and acted upon.'<sup>68</sup>

The Bank has its own Sanctions System, under the Integrity Vice Presidency, to investigate allegations of fraud and corruption in World Bank-funded projects, including those investments financed by IFC.<sup>69</sup> Cases are first considered by the Bank's Suspension and Debarment Officer (IFC has its own dedicated officer within the team), while contested cases are reviewed by the Sanctions

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<sup>59</sup> <[https://www.ifc.org/wps/wcm/connect/Topics\\_Ext\\_Content/IFC\\_External\\_Corporate\\_Site/AC\\_Home/](https://www.ifc.org/wps/wcm/connect/Topics_Ext_Content/IFC_External_Corporate_Site/AC_Home/)>.

<sup>60</sup> Ibid.

<sup>61</sup> Ibid.

<sup>62</sup> <[https://www.ifc.org/wps/wcm/connect/a9e5a10049fe898dafa2bf02f96b8a3d/Definitions\\_Interpretive\\_Guidelines.pdf?MOD=AJPERES](https://www.ifc.org/wps/wcm/connect/a9e5a10049fe898dafa2bf02f96b8a3d/Definitions_Interpretive_Guidelines.pdf?MOD=AJPERES)>.

<sup>63</sup> *Update on World Bank Commitments following the UK Anti-Corruption Summit in May 2016*,

<<http://www.worldbank.org/en/topic/governance/brief/update-on-world-bank-group-commitments-following-the-uk-anti-corruption-summit-may-2016>>.

<sup>64</sup> <<http://www.worldbank.org/en/topic/governance/brief/anti-corruption>>.

<sup>65</sup> <<https://www.gov.uk/government/topical-events/anti-corruption-summit-london-2016>>.

<sup>66</sup> *Update on World Bank Commitments following the UK Anti-Corruption Summit*, op. cit.

<sup>67</sup> <<https://star.worldbank.org/about-us/global-forum-asset-recovery-gfar>>.

<sup>68</sup> New Commitments undertaken by the World Bank at the High-Level Meeting of the 18th International Anti-Corruption Conference, Copenhagen, Denmark, October 2018, available at: <<http://www.worldbank.org/en/topic/governance/brief/update-on-world-bank-group-commitments-following-the-uk-anti-corruption-summit-may-2016>>

<sup>69</sup> <<http://www.worldbank.org/en/about/unit/integrity-vice-presidency>>.

Board, made up of seven independent members.<sup>70</sup> The Sanctions System was operational at the time of IFC's investment in Africo.

When an IFC project partner, whether a firm or individual, either admits or is found to have engaged in corruption, the base-line sanction is debarment from World Bank Group projects (usually for three years), with conditional release.<sup>71</sup> However, there are three elements to the Bank's Sanctions System that, RAID advocates, increase the onus upon IFC to account for the decisions it made over its Africo investment, which has seen the victims of corruption abandoned:

- **Firstly**, the Bank encourages complaints, including from victims, which underlines a commitment to investigating alleged corruption.
- **Secondly**, the Bank publishes the results of investigations and lists those who are sanctioned. Hence there is a commitment to accountability and deterrence.
- **Thirdly**, the Sanctions System does make provision for restitution and other remedies 'where there is a quantifiable amount to be restored to the client country or project'.<sup>72</sup> IFC Sanctions Procedures state:<sup>73</sup>

**Restitution or Remedy. The sanctioned party is required to make restitution to a party or parties, or take actions to remedy the harm done by its misconduct.**

This must raise the possibility of seeking restitution or remedy within IFC's sanctions regime. IFC is not explicitly identified as the only party for restitution and the provision refers to "parties", which, RAID would advocate, must include Congolese mining communities identified as beneficiaries of the projects before they were hijacked by corruption.

All these elements are pertinent when it comes to considering the role played by IFC after the DOJ identified the corrupt takeover of Africo.

## 6. The corrupt transaction and what happened to IFC's shares in Africo

In September 2016, the DOJ released its Statement of Facts in the Och-Ziff case, which describes how Och-Ziff's 'DRC Partner' (Gertler) went about obtaining assets belonging to 'a Canadian mining company', identified as Africo Resources Limited.<sup>74</sup> While the DOJ did not name Gertler, the Congolese politicians, or certain of the entities in the 'DRC bribery scheme', all are readily identifiable from the details provided, as documented by RAID in its January 2017 report *'Bribery in its Purest Form': Och-Ziff, asset laundering and the London connection*.<sup>75</sup>

Based on the DOJ's account, but putting identities to those concerned, the FCPA action confirmed:

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<sup>70</sup> An overview of the World Bank Group process is available at:

<http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/ORGANIZATION/ORGUNITS/EXTOFFEVASUS/0,,menuPK:3601066~pagePK:64168427~piPK:64168435~theSitePK:3601046,00.html>. IFC has its own dedicated page on sanctionable practices, including combatting corruption: [https://www.ifc.org/wps/wcm/connect/topics\\_ext\\_content/ifc\\_external\\_corporate\\_site/ac\\_home/sanctionable\\_practices](https://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/ac_home/sanctionable_practices).

<sup>71</sup> World Bank Sanctioning Guidelines, <http://siteresources.worldbank.org/EXTOFFEVASUS/Resources/WorldBankSanctioningGuidelines.pdf>.

<sup>72</sup> Ibid., ii. Range of Sanctions, F. Restitution and other Remedies.

<sup>73</sup> IFC Sanctions Procedures, 9.01(e), available at: [https://www.ifc.org/wps/wcm/connect/9e546b3f-0f5c-4ca2-81d1-e5d90a5bc337/Sanctions\\_Procedures+IFC.pdf?MOD=AJPERES&CVID=jHnQTxV](https://www.ifc.org/wps/wcm/connect/9e546b3f-0f5c-4ca2-81d1-e5d90a5bc337/Sanctions_Procedures+IFC.pdf?MOD=AJPERES&CVID=jHnQTxV).

<sup>74</sup> PA, Statement of Facts, 23 ff.

<sup>75</sup> Available at: [http://www.raid-uk.org/sites/default/files/oz\\_bribery\\_in\\_its\\_purest\\_form\\_full\\_report\\_rev.pdf](http://www.raid-uk.org/sites/default/files/oz_bribery_in_its_purest_form_full_report_rev.pdf).

- President Kabila’s close adviser, Augustin Katumba Mwanke, had orchestrated the taking of Africo’s interest in Kalukundi and had made it available to Gertler;<sup>76</sup>
- On or about 7 April and 10 April 2008, Gertler arranged, respectively, for \$2.2 million and \$2.8 million to be delivered to Katumba Mwanke;<sup>77</sup>
- Och-Ziff had provided Gertler with \$15.75 million ‘purportedly to acquire Akam’, which had obtained the judgement against Africo, and to ‘pay legal expenses’;<sup>78</sup>
- Under the heading ‘Bribes Resolve Africo and Akam Dispute in DRC’, Gertler arranged to pay ‘\$500,000 to DRC officials, including judges, who were involved in the Africo court case to corruptly influence the outcome of those proceedings to the benefit of Och-Ziff and DRC Partner’;<sup>79</sup>
- Gertler, responding to a text message from an associate who was arranging the payments, had stated: ‘We can’t accept a mid result.. . Africo must be screwd and finished totally!!!!’;<sup>80</sup>
- Gertler was informed on 5 June 2008 by his associate that ‘[lawyer] has met attorney general and the magistrat[e] that has to write the opinion, he also had contact with the 3 judges of supreme court. they got clear instructions to rewrite the opinion and to make sure that akam wins...’;<sup>81</sup>
- On or about 18 June 2008, Gertler arranged for \$2.5 million to be delivered to Katumba Mwanke.<sup>82</sup>

It is apparent that this last payment followed Africo’s announcement on 12 June 2008 that Camrose’s private placement to purchase the majority of the Africo’s shares – with the threat of losing the Akam dispute hanging over shareholders – had been approved.<sup>83</sup> The DOJ confirms that a tranche of approximately \$100 million from Och-Ziff was made available to Camrose for this placement, allowing Gertler to gain control of Africo.<sup>84</sup> The Africo placement was completed on 24 July 2008.<sup>85</sup> Moreover, at about the same date, Och-Ziff made a further \$9 million available to Gertler.<sup>86</sup> According to the DOJ, the Och-Ziff employees concerned ‘knew that the operating expenses for Company B’s [Camrose’s] business plan included paying bribes to high-level DRC officials.’<sup>87</sup>

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<sup>76</sup> The Statement of Facts does not elaborate on how Katumba Mwanke’s orchestrated the sale of Africo’s holding in Kalukundi to Akam to bring into effect the Berardone judgement. It is clear, however, that bribes were paid ‘to ensure that Africo did not obtain a favorable court ruling in its case against Akam that could have affected the outcome of the Africa shareholder vote.’ (PA, Statement of Facts, 31). The Africo Owners, in seeking to establish their status as victims in the sentencing of OZ Africa, argue that the DOJ has shifted its position (USA v. OZ Africa Management GP LLC, op. cit., Africo Owners, Letter to the court, 16 February 2018 (filed 20 February 2018 as Document 26). Whereas the Statement of Facts refers to a single conspiracy to obtain and retain mineral assets, the Africo Owners state: ‘the DOJ asserts, for the first time, that there were actually two separate and distinct conspiracies involving the mining rights at Kalukundi: the first by Gertler and his associates to corruptly take Kalukundi through the corruption of DRC lower court judges and government officials, and the second by Gertler, Och-Ziff, Och-Ziff Africa, and others to bribe DRC Supreme Court judges and the same government officials to allow them to retain the Kalukundi mine.’ According to the DOJ, ‘while Africo may have been a victim of the first conspiracy, Och-Ziff Africa was not a participant in that crime and thus cannot be ordered to pay restitution for the harms that resulted.’ (*idem*) The Africo Owners also argue that ‘Akam was, in fact, one of the defendant’s coconspirators and that its corrupt actions were entirely foreseeable by the defendant.’ (Africo Owners, Letter to the court, 19 July 2018 (filed same day as Document 49).

<sup>77</sup> PA, Statement of Facts, 29.

<sup>78</sup> PA, Statement of Facts, 30.

<sup>79</sup> PA, Statement of Facts, 32.

<sup>80</sup> PA, Statement of Facts, 33.

<sup>81</sup> PA, Statement of Facts, 34.

<sup>82</sup> PA, Statement of Facts, 36.

<sup>83</sup> Africo Resources Limited, ‘Africo shareholders approve \$100M private placement and associated Camrose transactions’, 12 June 2008, available at: <http://www.newswire.ca/news-releases/africo-shareholders-approve-100m-private-placement-and-associated-camrose-transactions-536293911.html>

<sup>84</sup> PA, Statement of Facts, 38.

<sup>85</sup> Africo Resources Limited, ‘Africo Resources completes CAD\$100 million private placement with Camrose Resources Limited to develop the Kalukundi project and re-establish its ownership of Swanmines’, op. cit.

<sup>86</sup> PA, Statement of Facts, 40.

<sup>87</sup> *Ibid.*

The US authorities go on to describe how Camrose and its assets, including Kalukundi, were sold on to a London-listed mining company, again readily identified as Eurasian Natural Resources Corporation (ENRC). Not only had Camrose acquired Africo, it had also added other concessions, including the Kolwezi project, stripped from First Quantum (see below), to its Congolese mining assets. Again, the corrupt transactions by which First Quantum's mines were acquired are confirmed by the DOJ. ENRC acquired Camrose in two tranches, buying approximately half the company in 2010 and the balance in 2012. ENRC ultimately paid a total of US\$725 million for Camrose and its holdings in Congolese mines, which had originally been purchased by Gertler entities for US\$162 million, netting Gertler's offshore companies a return of almost 450 per cent.<sup>88</sup>

It is also apparent, as confirmed by the DOJ, that US\$50 million from ENRC was for Gertler 'to 'use on the ground' to corruptly acquire mining assets.<sup>89</sup> Furthermore, ENRC guaranteed repayment of the original loan made by Och-Ziff to Camrose, which had been used by Gertler to take control of Africo.<sup>90</sup>

It should also be noted that Africo remained listed on the Toronto Stock Exchange, albeit with very low liquidity in shares. Once Och-Ziff had confirmed that it was being investigated under the FCPA, and given the prospect of imminent public action by the US authorities, Eurasian Resources Group (formerly ENRC plc, renamed after it went private in 2013) moved quickly to bring the whole of Africo in-house. In May 2016, ERG proposed to purchase, via Camrose, the balance of holdings (~37%) in Africo that it did not already own.<sup>91</sup> This arrangement was approved by remaining shareholders in July 2016, delisting the company and taking it into private ownership under ERG.<sup>92</sup>

### *The impact upon existing shareholders*

'As a result of the bribery scheme implemented by Och-Ziff, Och-Ziff Africa, and their co-conspirators, the Africo Owners: (1) had their primary asset stolen; (2) were prevented from regaining their stolen asset because the conspirators bribed DRC Supreme Court judges; (3) were forced to accept a takeover that diluted and devalued their shares in order to regain even a portion of their stolen interests as well as forfeit control of Africo and the development of the mine to the conspirators; and (4) had their shares further devalued as the conspirators combined Africo with other corruptly acquired assets, while the Kalukundi mine lay dormant and undeveloped.'

#### *Letter to the Court from Counsel representing the Africo Owners, 16 February 2018*

On the day of its Toronto Stock Exchange listing, Africo shares were priced at CAD\$5.00. On 8 February 2007, before the Berardone judgement and subsequent Akam dispute came to light, Africo's shares traded at a high of CAD\$4.75.<sup>93</sup> Africo's share price hit a low point because of the decisions of the Congolese courts in accepting Akam's assertion of ownership of Kalukundi: when

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<sup>88</sup> ENRC paid a total of US\$725 million for Camrose, made up of a first tranche of US\$175 million in cash for 50.5% of Camrose on 20 August 2010 and a second tranche of £575 million in cash for the remaining 49.5% on 23 December 2012. Gertler entities had paid a US\$3.5 million signing bonus for COMIDE (according to a document, available at <http://congomines.org/system/attachments/assets/000/000/331/original/PV-Dec-2008-COMIDE.pdf?1430928488>), dated 15 December 2008), US\$60 million for Kolwezi, and CAD\$100 million (US\$98.9 million, using Bank of Canada exchange rate for 24 July 2008) for the holding in Africo.

<sup>89</sup> PA, Statement of Facts, 47.

<sup>90</sup> PA, Statement of Facts, 27 ff., 47.

<sup>91</sup> Africo Resources Ltd., 'Africo Resources Ltd. Enters into Definitive Agreement with Camrose Resources Limited for Going Private Transaction', 13 May 2016, available at: <<http://www.marketwired.com/press-release/africo-resources-ltd-enters-into-definitive-agreement-with-camrose-resources-limited-tsx-arl-2124766.htm>>.

<sup>92</sup> Africo Resources Ltd., 'Africo Completes Going Private Transaction', 6 July 2016, available at: <<http://www.marketwired.com/press-release/africo-completes-going-private-transaction-tsx-arl-2140304.htm>>.

<sup>93</sup> All historical share price information from <<http://www.investorpoint.com/stock/ARL%3ACA-Africo+Resources+Ltd./price-history/?page=93&startDay=15&startMonth=11&startYear=2006&endDay=29&endMonth=10&endYear=2018&perPage=25>>

the Congolese courts stymied the progress of Africo in reasserting its rights, Africo's share price fell to a low of CAD\$0.82 on 23 August 2007.

When it came to Gertler's proposition, existing shareholders were faced with a stark choice: either accept that Gertler-controlled entities would acquire a majority interest in Africo on highly favourable terms, massively diluting existing holdings and gaining control of the Kalukundi deposit; or, as the Africo board put it in its recommendation to shareholders, 'if the Camrose Transactions are not approved, there is a material risk that Africo will be unable to re-acquire and develop the Kalukundi Property and may in that event cease to be a going concern'.<sup>94</sup>

On completion of the deal, 40,000,000 shares were issued to Camrose at a price of CAD\$2.50 per share and a further 5,400,000 shares accrued to Camrose for drawing up an agreement with Akam to confirm Africo's ownership of Kalukundi.<sup>95</sup> As of 31 December 2007, 27,211,705 common shares of Africo were issued and outstanding, but by the same date in 2008, after the Camrose transaction, the number of shares had increased to 72,615,172.<sup>96</sup> The holdings of existing shareholders underwent significant dilution. In IFC's case, its holding in Africo went from around 6% to just over 2%.<sup>97</sup>

### *What happened to IFC's shares*

IFC was very low-key about its eventual withdrawal from Africo. Unlike the announcement of its investment, there was no press release drawing attention to IFC's divestment. When IFC informed Amnesty in February 2010 that it had withdrawn from the project because of 'a change in ownership', it provided no details. However, tucked away in Africo's financial statements for 2009 – 2010 is a note stating:<sup>98</sup>

'On November 3, 2009, the Company repurchased 1,731,000 of its common shares from a Director of the Company at a price of CDN \$0.76 per share. The subject shares had been purchased by the Director on September 22, 2009 from a third party through the facilities of the TSX at a price of CDN \$0.75 per share. As the cost of the repurchased shares is less than their assigned value of \$3,167,730, the difference between the cash consideration paid by the Company and the assigned value has been credited to contributed surplus in the amount of \$1,936,102 (Note 7b). The repurchased shares were immediately cancelled.'

While there is no reference to IFC *per se*, the number of shares corresponds almost exactly with its original holding. Furthermore, IFC's investment in Africo appears in IFC's annual financial statements to the end of June 2009, but is no longer listed in the investment portfolio for 2010.<sup>99</sup> If these are indeed IFC's shares, it is apparent that IFC lost \$2.7 million on its original investment. However, there is a wider significance to IFC's loss, both in terms of a much higher 'but if' restitution sum (which, as set out below, is the basis upon which the Africo Owners are calculating their losses, assuming the concession had been developed as planned) and the deterrent value of any fine against Och-Ziff, which increases when losses to victims are established.

<sup>94</sup> Management Information Circular, 14 May 2008, op. cit., p.12.

<sup>95</sup> 'Africo Resources completes CAD\$100 million private placement with Camrose Resources Limited,' op. cit.

<sup>96</sup> Figures for shares issued taken, respectively, from Africo's Annual Information Forms to 31 December 2007 and to 31 December 2008.

<sup>97</sup> Based on a IFC's holding of 1,731,602 shares ex 72,615,172 issued.

<sup>98</sup> Consolidated Financial Statements For the years ended December 31, 2010 and 2009, 7. Shareholders' equity, p.15, available at: <https://sedar.com/GetFile.do?lang=EN&docClass=5&issuerNo=00024685&issuerType=03&projectNo=01720682&docId=2851584>.

<sup>99</sup> See Project Commitments, sub-Saharan Africa, respectively, IFC Annual Reports 2009 and 2010, Volume 2. IFC Financials, Projects, and Portfolio.

## 7. The wider significance of the Africo Owners as victims

In February 2018, the Africo Owners wrote to the judge presiding over the sentencing of OZ Africa, claiming they ‘were harmed by the defendant’s outrageous criminal conduct and are entitled to restitution under the Mandatory Victims Restitution Act...(the “MVRA”)’.<sup>100</sup> The shareholders’ counsel asked the Court to intervene directly ‘to make our clients whole through an Order of Restitution, and hold the defendant accountable for the significant harms caused by its crimes when it is sentenced.’ The Africo Owners approached the Court directly when it became apparent that the DOJ was, for its own reasons, not supportive of their victim status.<sup>101</sup>

According to their letter, the Africo Owners comprised more than fifty former holders of 64% of equity in the company in or around April 2008, at the time of the bribery scheme: entities and individuals, including Africo’s founders, former board members, managers and other employees.

RAID understands that IFC is not among the group, although clearly it was a high-profile and easily identifiable investor in Africo with a holding of around 6% (prior to any dilution). The expectation is that IFC would have been asked to join the action.

Given that ‘[t]he World Bank Group has a zero-tolerance policy toward corruption in its projects,’ it follows that IFC would be expected to abide by this ethos, from due diligence, through to exposing corruption where it is found to have occurred, to supporting compensation for victims.<sup>102</sup> There should be a strong onus on IFC, with its development-led agenda, to seek restitution so that any recovered funds can be re-invested, ideally to the benefit of the Congolese people. Furthermore, given its anti-corruption stance, which extends both to justice for victims and even restitution *per se*, IFC, by joining such an action would send out a strong message to discourage those seeking to exploit the natural wealth of post-conflict countries or fragile states, like the Congo. Indeed, the disincentive is potentially more meaningful in the Och-Ziff case, and its significance materially increased, if the New York Court can be persuaded to recognise the claims of victims.

The Africo Owners commissioned an independent expert report from SRK Consulting, a mining specialist, to value Kalukundi, both at the time of its loss to Gertler in 2008 and at present value as an undeveloped property.<sup>103</sup> Furthermore, the value of Kalukundi and their loss was also calculated

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<sup>100</sup> United States v. OZ Africa Management GP, LLC, No. 1:16-cr-00515-NGG, Letter from Counsel for Africo Owners to the Court, 16 February 2018 (Document 26 in the case records).

<sup>101</sup> According to the Africo Owners, the DOJ initially accepted them as victims, but later backtracked when it became apparent, because the original DPA and Plea Agreement did not make proper provision for victim restitution (no amount is specified), that Och-Ziff would reject any restitution payment or else withdraw the OZ Africa guilty plea if the Court ordered restitution, leading to the prospect of a full trial. Furthermore, the \$213 million monetary penalty imposed on Och-Ziff, to also cover any fine arising from the sentencing of OZ Africa, had not been placed in escrow, but rather had already been deposited for government use. (Document 26, op. cit.). The DOJ relied upon arguments, *inter alia*, that there had been two conspiracies (the taking of the assets and then their retention) and that it was ‘unaware of any evidence establishing a causal connection between the initial taking of Kalakundi [sic] from Africo and the actions of the defendant or its conspirators’. (USA v. OZ Africa Management GP LLC, op. cit., U.S. Department of Justice, Letter to the court, 2 March 2018 (filed same day as Document 39))

<sup>102</sup> <<http://www.worldbank.org/en/topic/governance/brief/anti-corruption>>.

<sup>103</sup> Letter from Counsel for Africo Owners to the Court, 16 February 2018, op. cit. The detailed valuation remains confidential to the court. However, a technical report and a feasibility study in 2006 had valued Kalukundi at US\$1.4 billion (based on gross revenue over ten years from copper (US\$1.25/lb) and cobalt (US\$12/lb) deposits). (See Kalukundi Project, *Technical Report*, prepared by RSG Global on behalf of Africo Resources Limited, June 2006, 23.15.3 Financial Outcomes, pp. 108 ff, available at: <https://sedar.com/GetFile.do?lang=EN&docClass=13&issuerNo=00024685&issuerType=03&projectNo=01031600&docId=1859594>>); see also Africo Resources Ltd., *Investor Fact Sheet*, September 2008, which values Kalukundi at US\$1.47 billion, derived from the previous feasibility study (<[https://web.archive.org/web/20110909040353/http://www.africoresources.com/ir/files/factsheets/Investor\\_fs\\_sep08.pdf](https://web.archive.org/web/20110909040353/http://www.africoresources.com/ir/files/factsheets/Investor_fs_sep08.pdf)>). Since then, further exploration in 2012 significantly increased the estimated mineral reserves and the price of cobalt (which previously was to contribute about two-thirds of gross revenue) has also risen steeply (US\$25/lb, as of February 2019). (See Africo Resources Ltd., Annual information Form to 31 December 2012,



on the basis that ‘the corrupt takeover never occurred, presuming that the mine was developed in accordance with Africo’s plan that was underway prior to the defendant’s criminal acts.’ The Africo Owners advocated this approach was consistent with the MVRA, which is designed to put the victims back in the financial position they would have been in if it was not for the criminal act in question. Although the detailed valuation report remains confidential to the Court, the Africo Owners state in their letter to the judge that OZ Africa ‘should pay as much as \$600 million in restitution’.<sup>104</sup>

Extrapolating from the Africo Owners’ figure, and assuming it is soundly based, the maximum amount owed to IFC in restitution could be over US\$50 million, once its share options are also taken into consideration.<sup>105</sup>

Given the scale of the corruption carried out in one of the world’s poorest countries by one of the richest hedge funds in the world, the Och-Ziff settlement has been criticised for the lack of criminal sanction against individuals at the firm or against the Och-Ziff parent. OZ Africa is a hollow shell company with limited assets and is the only entity to have pleaded guilty to a criminal charge, despite the fact that senior executives at the hedge fund were well aware of the illegal conduct. Furthermore, as part of Och-Ziff’s deferred prosecution agreement, the US\$213 million monetary penalty agreed by the parent was to be applied toward any eventual fine against OZ Africa at sentencing. In fact, this agreed penalty was below the recommended US\$266 million lower amount under sentencing guidelines and well below the \$533 million maximum.<sup>106</sup> Indeed, the penalty even falls short of the almost US\$222 million ‘value of the benefit’/pecuniary gain Och-Ziff received through participation in the corrupt schemes.<sup>107</sup> Although there is passing reference to restitution in the Plea Agreement, no specific restitution amount is called for and the victims of the corruption are not identified.<sup>108</sup>

Returning to the need to punish the perpetrators of corruption as a disincentive to others contemplating such criminal acts, the existence of victims potentially alters the level of fines imposed on OZ Africa. In the Plea Agreement, the maximum fine is calculated as the greater of either the fine derived from the offence level calculation or twice the gross pecuniary gain.<sup>109</sup> If, however there are victims, the calculation of the fine would take into consideration twice the gross pecuniary loss caused to the victims, if this was the higher amount. If the Africo Owners loss was calculated to be US\$400 - \$600 million, then the corresponding maximum fine increases to around US\$1 billion (prior to any restitution award).<sup>110</sup> Clearly, anything approaching this amount dwarfs the US\$213 monetary penalty agreed by Och-Ziff with the DOJ.

## 8. The corrupt acquisition of First Quantum’s Kolwezi mine: IFC’s contrasting position in pursuing its losses

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Developments in 2011 and 2012, pp. 19 ff.,

<<https://sedar.com/GetFile.do?lang=EN&docClass=1&issuerNo=00024685&issuerType=03&projectNo=02030032&docId=3290047>>).

<sup>104</sup> Document 26, op. cit., footnote 15.

<sup>105</sup> Based on the understanding that the restitution figure of up to \$600 million is due to all Africo shareholders, then IFC’s 6% equates to \$36 million, but it also had an option to buy the same amount of shares again: see *intra*, footnote 13.

<sup>106</sup> *DPA*, Payment of Monetary Penalty, paragraph 7, p.7.

<sup>107</sup> *Ibid.*, 7(c): the pecuniary gain is given as \$221,933,010.

<sup>108</sup> *PA*, paragraph 12, p.8.

<sup>109</sup> *PA*, Penalty, paragraph 17, p.11.

<sup>110</sup> A range of US\$400 - \$600 million range depending upon how many former shareholders join the Africo Owners’ claim: \$600 million equates to all of them, \$400 million to two-thirds (which is around the proportion currently represented in the claim).

In Congo, in addition to the Africo project, IFC invested, as noted, in First Quantum's KMT or Kolwezi project. It was apparent, even at the time, that the conclusions of the Commission de Revisitation des Contrats Miniers were open to political manipulation (see above, 'Repeated warnings over the award of mining concessions in Congo'). First Quantum resisted the pressure to renegotiate and its KMT project was cancelled in August 2009.<sup>111</sup>

Within a matter of months, the KMT assets, stripped from First Quantum, were sold for US\$60 million to the Highwind Group, itself owned by Gertler's Camrose Resources.<sup>112</sup> Just seven months later in August 2010, amidst a storm of controversy, ENRC paid almost three times this amount – US\$175 million – for only half of Camrose.<sup>113</sup> As noted above, ENRC ultimately paid US\$725 million for the whole of Camrose, to include both Africo and KMT, plus COMIDE. After removing the Africo component, the influential Africa Progress Panel, established to promote equitable and sustainable development for Africa, calculated: 'Taking into consideration other assets wrapped up in the Camrose purchase, ENRC effectively paid \$685.75 million for Kolwezi and associated concessions, which were originally purchased...for \$63.5 million – a return of just under 1,000 per cent for the offshore companies concerned'.<sup>114</sup> To attract a buyer for Camrose, the DOJ describes how Och-Ziff 'worked with DRC Partner [Gertler] to obtain additional...assets known as Kolwezi Tailings.... Och-Ziff knew that Kolwezi Tailings had been stripped by the DRC government from a mining company immediately before being obtained by a group of companies controlled by DRC Partner and the DRC government.'<sup>115</sup> The DOJ confirms that throughout the period of the acquisition of Kolwezi Tailings, Gertler continued to make corrupt payments to Katumba Mwanke.<sup>116</sup> From the details provided by the DOJ, these bribes amounted to US\$3 million.<sup>117</sup> Furthermore, the DOJ refers to ENRC's 2010 acquisition of its half-share in Camrose, 'including \$50 million in cash,' adding that Och-Ziff employees 'were informed by a coconspirator that the \$50 million was for DRC Partner to "use on the ground" to corruptly acquire Kolwezi Tailings.'<sup>118</sup>

IFC's reaction to the stripping and onward sale of KMT is very different to the position it adopted in the case of Africo. IFC remained invested in Africo after its acquisition by Gertler's Camrose, and ultimately recovered at least a proportion of its original investment when it sold its shares. In the case of KMT, IFC saw the loss of its investment when First Quantum's assets were expropriated. As early as November 2009, IFC therefore joined with First Quantum to commence international arbitration proceedings to defend rights to the concession.<sup>119</sup> To further increase the pressure on the Congolese government, IFC announced in February 2010 that it would not make new commitments in Congo until the dispute over the cancellation of First Quantum's KMT mining

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<sup>111</sup> First Quantum Minerals Limited, 'First Quantum Minerals Announces Commencement Of International Arbitration Regarding The Cancellation Of The Kolwezi Project', 1 February 2010, available at: <[https://s1.q4cdn.com/857957299/files/doc\\_news/NR-10-08-InternationalArbitration.pdf](https://s1.q4cdn.com/857957299/files/doc_news/NR-10-08-InternationalArbitration.pdf)>; 'First Quantum Minerals Provides RDC Legal Update', 30 March 2010, available at: <[https://s1.q4cdn.com/857957299/files/doc\\_news/NR-10-15.pdf](https://s1.q4cdn.com/857957299/files/doc_news/NR-10-15.pdf)>.

<sup>112</sup> The Highwind contract with Gécamines refers to a 'signature bonus' of \$60 million. See *Contrat d'association entre La République Démocratique du Congo, Le Groupe Gécamines et le Groupe Highwind Properties Limited*, 30 January 2010, p.21, available at: <[http://mines-rdc.cd/fr/documents/contrat\\_gcm\\_highwind.pdf](http://mines-rdc.cd/fr/documents/contrat_gcm_highwind.pdf)>.

<sup>113</sup> 'Acquisition of 50.5% of the Shares of Camrose Resources Limited', op. cit. ENRC paid US\$50 million in cash and issued promissory notes totalling US\$125 million, to mature between 9 months and 24 months later.

<sup>114</sup> *Africa Progress Report 2013*, Box 9, The Kolwezi project, p.58.

<sup>115</sup> PA, Statement of Facts, 45.

<sup>116</sup> PA, Statement of Facts, 46.

<sup>117</sup> PA, Statement of Facts, 46: 'Throughout the period of DRC Partner's acquisition of Kolwezi Tailings..., DRC Partner continued to make corrupt payments to DRC Official 2. For example, on or about December 23, 2009, DRC Partner delivered \$1 million to DRC Official 2; on or about January 5, 2010, DRC Partner delivered \$2 million to DRC Official 2.'

<sup>118</sup> PA, Statement of Facts, 47.

<sup>119</sup> 'First Quantum prepares for arbitration in DRC Kolwezi stand-off', *Metal Bulletin*, 11 November 2009, available at: <<http://www.metalbulletin.com/Article/2336226/First-Quantum-prepares-for-arbitration-in-DRC-Kolwezi-stand-off.html>>.

project was resolved.<sup>120</sup> First Quantum, together with IFC and IDC, finally reached a US\$1.25 billion out of court settlement in January 2012.<sup>121</sup> Although IFC made no public announcement about this settlement, RAID, through examining First Quantum's accounts, has learnt that IFC was repaid US\$6 million.<sup>122</sup> IFC original investment had been US\$4.5 million.<sup>123</sup>

While in the Africo case IFC eventually withdrew its investment, and while in the KMT case IFC saw its investment effectively cancelled, RAID's concern over IFC's responsibilities to the community-level victims of corruption remains.

- **Firstly**, while IFC, alongside First Quantum, was prepared to pursue action to recover its loss as an investor, it has not sought to present itself as a victim of corruption in the sentencing of OZ Africa. At a minimum, IFC should explain why it has not done so, given that it could have drawn attention to the victims of corruption in Congo, with the potential to channel any restitution to future IFC projects in Congo.
- **Secondly**, IFC made no announcement that it had recovered funds from the out of court settlement with the Congolese Government and other parties, including ENRC, when it could have used this as an opportunity to underline IFC's commitment to taking action against corruption and to renew its efforts to support the victims of corruption in Congo. It is not apparent that IFC gave any consideration to the community-level victims of the abandoned KMT project when pursuing settlement.
- **Thirdly**, restitution for the Congolese victims of corruption remains a real prospect while investigations into corrupt mining deals in Congo continue. In the UK, for example, the Serious Fraud Office is conducting a criminal investigation into ENRC 'focused on allegations of fraud, bribery and corruption around the acquisition of substantial mineral assets.'<sup>124</sup> IFC is well-placed to set out for the authorities the community-level consequences and harm caused by the abandonment of IFC-backed social and economic development at KMT when the concession was stripped and flipped to ENRC.

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<sup>120</sup> Michael J. Kavanagh, 'World Bank's IFC halts Congo Investments Until Dispute Resolved', *Bloomberg*, 23 February 2010, available at: <<http://www.bloomberg.com/apps/news?pid=newsarchive&sid=ar1fyUAoQWOk>> [link no longer active].

<sup>121</sup> In September 2010, First Quantum, through its subsidiary Congo Minerals Developments Ltd. (CMD), filed a claim in BVI in relation to the Kolwezi tailings project against a number of ENRC subsidiaries, claiming inducement of breach of contract and interference with contractual relations and property rights. See First Quantum Minerals Ltd., 'First Quantum Minerals commences legal proceedings against ENRC subsidiaries', *News Release 10-32*, 15 September 2010, available at: <[https://s1.q4cdn.com/857957299/files/doc\\_news/NR10-32.pdf](https://s1.q4cdn.com/857957299/files/doc_news/NR10-32.pdf)>. Under the settlement, First Quantum was to be paid US\$1.25 billion and ENRC was to acquire First Quantum's DRC property and assets. See First Quantum Minerals Ltd., 'First Quantum Reaches Agreement With ENRC to Dispose of First Quantum's Residual DRC Assets and to Settle All Claims in Relation to First Quantum's DRC Operations', *Press Release*, 5 January 2012, available at: <<http://www.first-quantum.com/Media-Centre/Press-Releases/Press-Release-Details/2012/First-Quantum-Reaches-Agreement-With-ENRC-to-Dispose-of-First-Quantums-Residual-DRC-Assets-and-to-Settle-All-Claims-in-Relati/default.aspx>>; ENRC plc, 'Agreement signed with First Quantum Minerals Ltd. to acquire their residual assets and settle all claims in relation to their Democratic Republic of Congo operations', *RNS 0633V*, 5 January 2012, available at: <<https://www.investegate.co.uk/eurasian-natural-res--enrc-rns/acquisition-and-legal-settlement/201201051227400633V/>>.

<sup>122</sup> According to First Quantum's accounts, IDC and IFC were repaid a total of US\$14 million, which, with respective holdings in KMT of 10% and 7.5%, equates to US\$8 million to IDC and US\$6 million to IFC.

<sup>123</sup> <<https://disclosures.ifc.org/#/projectDetail/SPI/24920>>.

<sup>124</sup> <<https://www.sfo.gov.uk/cases/enrc/>>.

## Action at the International Chamber of Commerce (ICC) International Court of Arbitration

First Quantum was informed on 21 August 2009, following a meeting of the Council of Ministers on 4 August 2009, that its Kolwezi Project mining contract was to be revoked or cancelled.<sup>125</sup> First Quantum's Congo Minerals Developments Limited (CMD) subsidiary declined to return KMT's exploitation permit, prompting its unilateral cancellation by the Congolese Mining Registry on 25 August 2009 and the issuing of a new exploitation permit to Gécamines.<sup>126</sup> In response, CMD and KMT filed local proceedings in Congo 'to seek protective relief pending resolution by international arbitration.'<sup>127</sup>

On 16 September 2009, First Quantum announced that it had suspended construction at its Kolwezi Project following an order by the General Prosecutor of Katanga on 15 September 2009 to seal KMT's facilities.<sup>128</sup> First Quantum disputed the legality of the order, but found it necessary to file notices of *force majeure* under the DRC Mining Code and Contract of Association.<sup>129</sup>

In November 2009, a local court found, without any evidence presented, that fraud was committed in the constitution of KMT and for this reason ruled that KMT did not exist in law. The court awarded the equivalent of US\$3 million in compensation to Gécamines and the Congolese Government.<sup>130</sup> First Quantum stated that CMD had received a letter on 11 January 2010 from Gécamines cancelling the Contract of Association.<sup>131</sup> A higher appeal court not only upheld the original judgment, but also accepted increased damages of \$US12 billion against First Quantum subsidiaries.<sup>132</sup>

On 1 February 2010, First Quantum announced that it had, along with its partners the IFC and IDC of South Africa, commenced arbitration at the International Chamber of Commerce (ICC) International Court of Arbitration in Paris, France against Gécamines and the Democratic Republic of Congo.<sup>133</sup> The Company viewed arbitration as necessary to protect the investment of CMD, IFC and IDC, including seeking interim orders to protect and preserve the KMT site.<sup>134</sup>

On 19 August 2010, the ICC tribunal issued two temporary orders in relation to the Kolwezi Project, pending its consideration of the claimant's request for interim measures.<sup>135</sup> The first order prohibited Congo and Gécamines from taking any action to transfer or allow the transfer of the Kolwezi tailings exploitation permit covering the Kolwezi Project. The second prohibited enforcement of the Appeal Court of Kinshasa judgment ordering CMD and KMT to pay more than US\$12 billion to Gécamines, the Mining Registry and the Congolese government.

<sup>125</sup> First Quantum Minerals Ltd., News Release 09-24, 28 August 2009, 'First Quantum Minerals provides update on the Kolwezi Mining contract revisitation', available at: <[https://s1.q4cdn.com/857957299/files/doc\\_news/2009-08-28\\_NR.pdf](https://s1.q4cdn.com/857957299/files/doc_news/2009-08-28_NR.pdf)>.

<sup>126</sup> 'First Quantum Minerals reports operational and financial results for the three and nine months ended September 30, 2009', available at: <[https://s1.q4cdn.com/857957299/files/doc\\_news/NR\\_09-30.pdf](https://s1.q4cdn.com/857957299/files/doc_news/NR_09-30.pdf)>.

<sup>127</sup> *Ibid.* On 26 August and 3 September 2009, KMT and CMD initiated three proceedings before the Tribunal de Grande Instance High Court (the Local Court) in Kinshasa seeking provisional measures to preserve their rights and to secure the KMT Project site. See First Quantum Minerals Ltd., News Release 10-12, 16 March 2010, 'First Quantum Minerals reports operational and financial results for the three months and year ended December 31, 2009', p.13, available at: <[https://s1.q4cdn.com/857957299/files/doc\\_news/NR10-12.pdf](https://s1.q4cdn.com/857957299/files/doc_news/NR10-12.pdf)>.

<sup>128</sup> First Quantum Minerals Ltd., News Release 09-26, 16 September 2009, 'First Quantum Minerals suspends construction at Kolwezi Project', available at: <<https://www.first-quantum.com/Media-Centre/Press-Releases/Press-Release-Details/2009/First-Quantum-Minerals-Suspends-Construction-at-Kolwezi-Project/default.aspx>>. See also 'First Quantum Minerals reports operational and financial results for the three and nine months ended September 30, 2009' op. cit.

<sup>129</sup> *Ibid.*

<sup>130</sup> 'First Quantum Minerals reports operational and financial results for the three months and year ended December 31, 2009', op. cit., p. 13. See also 'First Quantum Minerals provides RDC legal update', op. cit.

<sup>131</sup> 'First Quantum Minerals announces commencement of international arbitration regarding the cancellation of the Kolwezi Project', op. cit.

<sup>132</sup> First Quantum Minerals Ltd., News Release 10-18, 10 May 2010, 'First Quantum Minerals reports operational and financial results for the three months ended March 31, 2010', pp.13 – 14, available at: <[https://s1.q4cdn.com/857957299/files/doc\\_news/NR10-18-May10.pdf](https://s1.q4cdn.com/857957299/files/doc_news/NR10-18-May10.pdf)>.

<sup>133</sup> 'First Quantum Minerals announces commencement of international arbitration regarding the cancellation of the Kolwezi Project', op. cit.

<sup>134</sup> *Ibid.*

<sup>135</sup> As reported by First Quantum Minerals Ltd., News Release 10-28, 21 August 2010, 'First Quantum Minerals provides update on legal proceedings in the Democratic Republic of Congo', available at: <[https://s1.q4cdn.com/857957299/files/doc\\_news/2010-08-21\\_NR.pdf](https://s1.q4cdn.com/857957299/files/doc_news/2010-08-21_NR.pdf)>.

On 12 October 2010, the ICC Tribunal ruled on the interim measures sought by CMD and its project partners, maintaining its temporary order preventing Congo and Gécamines directly or indirectly enforcing the 10 March 2010 decision of the Congolese Court of Appeal, to include the US\$12 billion damages judgment.<sup>136</sup> According to First Quantum, '[t]his ruling impacts the ongoing efforts by the DRC to enforce the Court judgment through the appointment of a Liquidator and means that the DRC cannot liquidate First Quantum's assets in the country in payment of the damages claim.'<sup>137</sup> The ICC Tribunal made no rulings on the merits of the case and a hearing was scheduled for early 2012.

However, with the ICC arbitration pending, the Congolese government and other parties, including ENRC Congo BV, reached a US\$1.25 billion out of court settlement in January 2012 with First Quantum and its subsidiaries.<sup>138</sup> The settlement is also clear that it applies to IFC and IDC.<sup>139</sup> The settlement resolved not only the ICC action, but also other claims and counter-claims under other legal proceedings.<sup>140</sup>

In a note to quarterly accounts, First Quantum confirmed that IFC and IDC had been paid US\$14 million out of the settlement received noting, inter alia, that IFC and IDC 'have also settled all disputes'.<sup>141</sup>

## 9. The real harm caused by corruption to mining communities in Congo

While planned developments at Kalukundi associated with IFC's performance standards all ended with the latter's inevitable withdrawal, they remain a valid benchmark against which to assess the impact of corruption upon the local communities. This extends the concept of restitution beyond the interests of shareholders.

IFC's equity investment was to be used to fund the continued exploration of the Kalukundi property, including feasibility studies, environmental and social impact assessments and their upgrading to international standards.<sup>142</sup> The total cost of the Kalukundi project was estimated at \$235 million, which included \$166.6 million in capital investment for its construction.

According to IFC's SPI, the Kalukundi project was expected to generate total payments to the Congolese government (taxes and royalties) of approximately \$200 million, \$125 million in dividends to Gécamines and payments to suppliers and employees of approximately \$800 million of dollars. It was anticipated to employ between 500-600 people, of which approximately 80% should have been Congolese nationals. The Kalukundi project had an optimum project life of 10 years, and

<sup>136</sup> As reported by First Quantum Minerals Ltd., News Release 10-37, 27 October 2010, 'First Quantum Minerals granted interim measures orders in international arbitration regarding the Kolwezi Project', available at:

<[https://s1.q4cdn.com/857957299/files/doc\\_news/NR-10-37-Interim-Measures.pdf](https://s1.q4cdn.com/857957299/files/doc_news/NR-10-37-Interim-Measures.pdf)>.

<sup>137</sup> *Ibid.*

<sup>138</sup> *Investment and Settlement Agreement*, 1 March 2012, available at: <<https://www.mines-rdc.cd/resourcecontracts/contract/ocds-591adf-6622537612/download/pdf>>. Under the settlement, First Quantum, IFC and IDC were to be paid US\$1.25 billion and ENRC was to acquire First Quantum's DRC property and assets. See 'First Quantum Reaches Agreement With ENRC to Dispose of First Quantum's Residual DRC Assets and to Settle All Claims in Relation to First Quantum's DRC Operations', op. cit.; ENRC plc, 'Agreement signed with First Quantum Minerals Ltd. to acquire their residual assets and settle all claims in relation to their Democratic Republic of Congo operations', op. cit.

<sup>139</sup> *Investment and Settlement Agreement*, 2. Settlement of disputes and mutual releases of claims: '...FQM shall procure that its relevant Affiliates and (where relevant) IFC and IDC shall...enter into the settlement agreements and execute the claim withdrawal letters relevant to each of them...'

<sup>140</sup> For details of these other claims and counter-claims settled, see *ibid.*, Introduction, paragraphs A – I. A summary and analysis of actions following cancellation of First Quantum's mining permits in Congo, which went beyond the initial cancellation of the KMT permit, can be found in RAID, *Questions of compliance: The Conduct of the Central African Mining & Exploration Company (CAMEC) plc and its Nominated Adviser, Seymour Pierce Limited*, Annexe 3, pp. 115 ff., available at: <<http://www.raid-uk.org/sites/default/files/aim-submission.pdf>>.

<sup>141</sup> First Quantum Minerals Ltd., Consolidated Financial Statements, Second Quarter – June 30, 2012, Notes to Consolidated Financial Statements, 11 Settlement of RDC claims and sale of assets, p.12, <[https://s1.q4cdn.com/857957299/files/doc\\_financials/2012Q2.pdf](https://s1.q4cdn.com/857957299/files/doc_financials/2012Q2.pdf)>.

<sup>142</sup> IFC's Summary of Proposed Investment (SPI) for Africo Resources Limited, available at: <<https://disclosures.ifc.org/#/projectDetail/SPI/26209>>.

according to IFC, construction of the processing plant was to start in late 2006, followed by commissioning prior to beginning production in 2008.

IFC's involvement in the Kalukundi project increased the environmental, social and resettlement standards to be implemented by the mine. Africo was planning to relocate Kisankala village, allocating a budget of approximately \$2.5 million for construction and social development. At IFC's request, Africo compiled in June 2007 a more comprehensive Resettlement Action Plan (RAP) to comply with IFC Performance Standard 5 on Land Acquisition & Involuntary Resettlement. A primary school and clinic were to be built in the new relocated village, with enough boreholes to supply the entire population of the village with clean water. All permanent households were to receive 150% of the value of their current assets.<sup>143</sup> Prior to development of the mine, Africo was also required to conduct an Environment and Social Impact Assessment (ESIA) that complied with IFC Performance Standards.<sup>144</sup>

IFC was to assist Africo to leverage additional funds through partnership with aid agencies to establish an integrated community development program (ICDP). The ICDP was meant to incorporate a literacy programme for women as well as education and health initiatives to increase school enrolment for children and to counter the spread of HIV/AIDS and malaria. IFC was also committed to working with Africo to ensure that the DRC Mining Code provisions concerning the reverting of royalties to the area impacted by the mining project were implemented and supported by capacity building at the provincial and district government levels.<sup>145</sup>

The way in which Camrose established its holdings in both Kalukundi and Kolwezi, and ENRC's willingness to buy such dubiously acquired assets, caused considerable controversy. ENRC had little choice but to delist from London, thereby impacting its reputation and losing access to market capital. IFC withdrew from the projects. As a direct consequence of both these events, it is apparent from annual filings that ERG's Africo subsidiary could not raise funds to develop Kalukundi, or other projects that it had acquired in Congo, let alone fund the community development projects once envisaged by IFC. Between 2009 - 2015, other than a drilling program to map mineral resources, Africo reported 'significantly scaled back activities on the Kalukundi Property' referring to how '(s)ignificant additional debt and/or equity funding is required to bring the Kalukundi Property into production.'<sup>146</sup> In 2012, plans for production were drawn up with Gécamines, but stalled because Africo could not agree a joint venture with COMIDE. Africo conceded 'based on the trading price of Africo's shares, it is unlikely that the Company will be able to fund the development of its Kalukundi project without third party financial backing.'<sup>147</sup> By the time ERG bought out the balance of Africo shares and took the company private in 2016, Kalukundi remained undeveloped and starved of finance.

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<sup>143</sup> Kalukundi Project's Resettlement Action Plan for Kisankala Village, 2007.

<sup>144</sup> IFC's Environmental and Social Review Summary (ESRS), available at: <<https://disclosures.ifc.org/#/projectDetail/ESRS/26209>>. IFC stated: 'An Environmental Adjustment Plan (EAP) - the DRC legislative equivalent of a mining ESIA - was completed in 2006 for the next (mine development) phase.... IFC completed a gap analysis on the EAP and identified that it does not fully cover all the provisions of the IFC Performance Standards [PS] on Environmental and Social Sustainability. Therefore, ARL [Africo] has commissioned a suitably experienced independent environmental consultancy to update the existing EAP into a comprehensive, IFC/PS - compliant ESIA... before project development proceeds.'

<sup>145</sup> IFC's Environmental and Social Review Summary (ESRS), available at: <<https://disclosures.ifc.org/#/projectDetail/ESRS/26209>> and IFC's SPI, op. cit.

<sup>146</sup> See Africo's Annual Information Forms, under sections 'Management Update' and 'Risk Factors', available at <<https://www.sedar.com/DisplayCompanyDocuments.do?lang=EN&issuerNo=00024685>>. All AIFs from 2009 - 2016 refer in almost identical terms to significantly scaled back activities and the need for project finance.

<sup>147</sup> Africo, Annual Information Form, 20 March 2013, p.22.

In May 2013, RAID submitted a complaint about ENRC's conduct to the UK government office (National Contact Point, NCP) responsible for assessing compliance with the OECD Guidelines for Multinational Enterprises. In its February 2016 final statement, the UK NCP agreed that 'ENRC's investment in August 2010 and its further acquisition in December 2012 do not appear to have advanced the mining projects'.<sup>148</sup> The NCP concluded that ENRC has 'not taken adequate steps to address impacts on the communities' and has 'not met obligations under the OECD Guidelines,' noting that it 'has seen no information to suggest that ENRC has assessed or taken account of the effect of delay on the communities. Because of this, the UK NCP finds that ENRC has not met its obligations to contribute to development and encourage capacity building.'

Kisankala village was never relocated following Camrose's acquisition of its majority holding in Africo. The NCP concluded: 'If resettlement had proceeded, it appears likely that the adverse impacts now affecting the community could have been avoided'. The village was left with few facilities and its close proximity to the mine attracts artisanal miners. As a consequence, confrontations with mine security are common, which often leads to artisanal miners sustaining injuries and their arrest and detention. According to the NCP, 'artisanal miners continue to try to mine the site because it is not being developed by the concession holder, and other employment opportunities are limited.' As a direct result of the suspension of the mine's activities, local employment at the mine is very low. According to Africo's annual filings for the period 2009 – 2015, the company employed between just 3 – 9 Congolese nationals on a full or part-time basis.<sup>149</sup>

Prior to 2017, ERG's Camrose subsidiary failed to deliver development projects that had been planned under IFC's stewardship. Africo had built a well in the village in 2007, but this remained Kisankala's only source of clean water. Just seven taps served a population of approximately 2,500, with queues and long delays at peak times and no supply in the afternoon and at night while the cisterns are refilled. The village had a basic primary school built of concrete and a handmade clay structure for the secondary school. Neither school had benches. Overcrowded primary classes exceeded 80 pupils, while secondary school students were constantly at risk of the structure collapsing on them. Kisankala residents were also left without any healthcare support beyond small private dispensaries. The closest hospital is more than 50km from Kisankala.

In 2017, following its acquisition of the remaining shares in Africo, ERG finally started implementing some of the initial development projects planned by IFC a decade earlier. Before this date, communication between the mine and Kisankala had been almost non-existent. In October 2018, RAID visited the village and noticed some improvements. Seven more taps had been added to the existing well and the company had sunk a new borehole with a solar-powered pump. It also constructed a third school building, refurbished the existing ones and equipped them with benches. However, with an increasing school population, there is still insufficient capacity. Illustrative of the low priority ERG places on social responsibility, the school has new, but unusable, toilets because these were never plumbed into a water system.

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<sup>148</sup> The NCP sets out its position on the extent of ENRC's control over subsidiaries: 'From December 2012 onwards, ENRC wholly owned Camrose and Comide, and can be regarded as directly controlling the actions of these companies. Whilst ENRC did not wholly own Africo/Swanmines, it acquired a controlling interest in Africo, and positions on Africo's Board, making it a business partner with significant leverage over decision-making and day to day operations, although it is not clear that ENRC directly controlled actions of the companies.' (RAID & ENRC: Final Statement, February 2016, paragraph 48, available at: <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/506285/BIS-16-156-raid-and-enrc-final-statement-after-complaint.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/506285/BIS-16-156-raid-and-enrc-final-statement-after-complaint.pdf)>).

<sup>149</sup> See Africo's Annual Information Forms 2010 - 2016, under section 'Employees'.

Finally, in 2017, following the as recommendation by the UK NCP to enhance community facilities and in line with the original IFC development plan, ERG equipped a previously empty clinic at Kisankala, staffing it with two doctors. However, only the mine's employees and their families, the chief and his entourage, and fee-paying pupils have access to it.<sup>150</sup> As a result, regular residents and families who cannot afford to send their children to school are denied primary healthcare. Women have to give birth in an unsafe environment, denied access to doctors who would otherwise be on-hand to provide medical support.

## 10. Revision of IFC policy documents

In 2012, IFC published an updated *Policy on Environmental and Social Sustainability*, replacing the 2006 version.<sup>151</sup> The 2012 Policy contains several material changes. These include more onerous due diligence on IFC's part prior to investing in a project, which places less weight on the client's own assessments and more on independent inspection and verification by IFC. The 2012 Policy also provides for greater independent supervision of the client's business activities than was required by the 2006 version.

The updates embodied in the 2012 policy reflect a recognition by the IFC that greater independent scrutiny of projects than provided for in the 2006 version is necessary prior to taking the decision to invest. However, like the 2006 Policy, the 2012 version contains no express reference to corruption. The only indication in either document that IFC reviews projects for corruption risks is its commitment to assess the 'governance risks to expected benefits'. Yet there are no details regarding what are considered governance risks, nor information as to how they will be assessed or what risks would be considered prohibitive for investment.

In 2017, IFC went some way to rectifying that omission, publishing a document entitled *Unique Markets, Responsible Investing: IFC's Integrity Due Diligence Process*.<sup>152</sup> This document does address corruption specifically, defining 'integrity risk' to include 'corruption, fraud, money laundering, tax evasion, lack of transparency and undue political influence'. It provides that IFC's integrity due diligence applies to 'all IFC engagements', is 'comprehensive' and extends to '[e]ntities and individuals whose role in a project could potentially have a material adverse impact on IFC's reputation'. It further provides that IFC will monitor the project on an ongoing basis, and where risks are identified, it may refuse the opportunity or implement mitigating measures to ensure it is covered for loss should the risk materialize.

However, while *Unique Markets, Responsible Investing* provides a set of steps IFC is to take to ensure it does not become involved in corrupt companies or transactions and to mitigate the risk of loss from corruption where it is involved, the document's status is unclear. It is not described as a

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<sup>150</sup> Confirmed by RAID in a visit to Kisankala clinic, 25 - 26 October 2018.

<sup>151</sup> International Finance Corporation's Policy on Environmental and Social Sustainability, 1 January 2012, available at <[https://www.ifc.org/wps/wcm/connect/7141585d-c6fa-490b-a812-2ba87245115b/SP\\_English\\_2012.pdf?MOD=AJPERES&CVID=kiIrw0g](https://www.ifc.org/wps/wcm/connect/7141585d-c6fa-490b-a812-2ba87245115b/SP_English_2012.pdf?MOD=AJPERES&CVID=kiIrw0g)>; the revised Policy was published following an 18-month consultation process intended to 'learn from experiences of implementation of the Performance Standards and to adapt them as necessary to reflect the evolution in good practice for sustainability and risk mitigation over the preceding years' (IFC's Sustainability Framework: From Policy Update to Implementation, December 2012, available at <[https://www.ifc.org/wps/wcm/connect/topics\\_ext\\_content/ifc\\_external\\_corporate\\_site/sustainability-at-ifc/publications/publications\\_loe\\_sf\\_update\\_implementation](https://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/sustainability-at-ifc/publications/publications_loe_sf_update_implementation)>).

<sup>152</sup> Unique Markets, Responsible Investing: IFC's Integrity Due Diligence Process, 2017, available at <[https://www.ifc.org/wps/wcm/connect/d46153fa-6ee7-4f97-84e0-bb7e47209167/IFC+Integrity+Due+Diligence+Process\\_2-13-2018.pdf?MOD=AJPERES](https://www.ifc.org/wps/wcm/connect/d46153fa-6ee7-4f97-84e0-bb7e47209167/IFC+Integrity+Due+Diligence+Process_2-13-2018.pdf?MOD=AJPERES)> [[link no longer active](#)].



policy, nor is the source of its authority apparent. Accordingly, it remains uncertain what reliance may be placed on it or the extent to which it governs implementation at the project level.

## 11. Questions for IFC and RAID's recommendations

Repercussions from the massive criminal conspiracy, of which the corrupt takeover of Africo was one part, continue to this day. Glencore plc, the London-listed mining and commodities giant, still holds assets in Congo secured by Gertler, and has recently been subpoenaed by the US authorities under the FCPA.<sup>153</sup> In the UK, ENRC quit the London Stock Exchange amid a storm of controversy because of its purchase of assets stripped by Gertler from its competitors, and is under investigation by the Serious Fraud Office. In December 2017, Gertler was placed under US sanctions after being identified as a corrupt actor 'who has amassed his fortune through hundreds of millions of dollars' worth of opaque and corrupt mining and oil deals' using 'his close friendship with DRC President Joseph Kabila to act as a middleman for mining asset sales in the DRC, requiring some multinational companies to go through Gertler to do business with the Congolese state.'<sup>154</sup> In June 2018, the US authorities added a further 14 entities to the original 19 companies and one associate identified as having ties to Gertler.<sup>155</sup>

While IFC could not have known about particular corrupt acts at the time, key accountability issues concern the adequacy of IFC's due diligence, its reaction to Gertler's participation in the venture, and whether it has failed to support Congolese victims of corruption seek justice. In this regard, RAID has put a number of questions to IFC in an exchange during April/May 2019 (reproduced in the annex to this report). The principal results of this exchange were:

- In respect of due diligence, including on governance risks, IFC 'decided to accept the concession risk based on the various legal actions the Company was taking in DRC courts to defend its rights' and also considered 'the governance and revenue transparency challenges in the mining sector' and initiatives by the World Bank Group and others 'to improve that sector.' However, IFC declined to publish its risk assessment or say whether lessons learnt from its Congolese projects fed into IFC policy revisions or what considerations it took into account during the period of Gertler's control of Africo before selling its shares.
- On IFC launching its own investigation into corruption, it referred to the requirement to submit any allegations of Sanctionable Practice regarding an IFC-financed project to the Integrity Vice-Presidency before stating that such action was limited to misconduct 'committed by parties contractually bound to the IFC'. Initially, IFC said that allegations of misconduct relating to the Kolwezi project 'are attributable to third parties with no such relationship to IFC and to whom WBG sanctions' system would not apply.' However, when RAID questioned this conclusion, IFC suggested that we contact INT for clarification and report any concerns over misconduct to that office.

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<sup>153</sup> Glencore plc, 'Subpoena from United States Department of Justice,' 3 July 2018, available at: <<https://www.glencore.com/media-and-insights/news/Subpoena-from-United-States-Department-of-Justice>>.

<sup>154</sup> U.S. Department of the Treasury, 21 December 2017, 'United States Sanctions Human Rights Abusers and Corrupt Actors Across the Globe', available at: <<https://home.treasury.gov/news/press-releases/sm0243>>.

<sup>155</sup> U.S. Department of the Treasury, 15 June 2018, 'Treasury Sanctions Fourteen Entities Affiliated with Corrupt Businessman Dan Gertler Under Global Magnitsky', available at: <<https://home.treasury.gov/news/press-releases/sm0417>>.

- IFC did not answer questions on how it voted on the June 2008 Camrose transactions by which Gertler was to gain control of Africo, the arrangement made to dispose of IFC shares in Africo, whether it sold these shares to an Africo director in September 2009, saying only that difficulty in exiting the investment after the change of control ‘was largely due to the illiquidity of the shares’.
- Regarding compensation, IFC said:

‘the shareholder claims and related law enforcement actions occurred several years after IFC sold its shares and transferred its legal rights in the Company to a third party. Accordingly, IFC had no entitlement to join the shareholder action.’

RAID put to IFC our understanding that those who own shares at the time a corrupt act was committed have entitlement to potential restitution as victims. When shares are sold in the market, as was done with the Africo shares, this “right to restitution” does not automatically accrue to the new owner. IFC declined to answer whether it assigned its rights of restitution to another party.

## *Recommendations*

### IFC policy and practice

- IFC should draw up a separate policy on addressing corruption that: sets out IFC’s commitments in respect of tackling corruption and its role and responsibilities in this regard; gives more prominence to anti-corruption measures as part of sector specific provision on governance and disclosure; and refers to the Bank’s Sanctions System.
- IFC recognises that corruption disproportionately and adversely impacts the lives of the poor, so IFC should ensure that it does all that it can to secure compensation for the victims of corruption. A new IFC policy on corruption should set out an obligation to ensure that it will pursue compensation when a project is adversely impacted by corruption and will, as a principle, ensure that funds recovered or an equivalent sum, will be returned to benefit victims in affected countries.
- IFC recognizes the importance of assessing governance risks yet there is no explicit performance standard on this issue. While companies are encouraged to disclose payments to government in line with the requirements of EITI, this is insufficient. IFC should draw up a new performance standard on governance and anti-corruption, part of which should set out the specific steps to be undertaken in identifying and mitigating against governance risks, including corruption.
- IFC should revise its Policy on Environmental and Social Sustainability to ensure that it recognises the adverse environmental, social and human rights impacts caused by corruption. Explicit reference should be made to further detail provided in any new IFC policy to address corruption and to a new performance standard on governance.
- IFC should ensure it has greater oversight of deals or decisions that give rise to risks of corruption through specific contractual conditions.
- IFC should increase transparency by disclosing provisions in a contract that relate to the management of governance and corruption risks and by providing a public due diligence report prior to the IFC board’s decision to approve an investment.

### Redress and IFC's Congolese projects

- Given that the taking of the Kalukundi concession was part of a corruption scheme of exceptional scale with serious adverse repercussions for the affected mining communities and the poor, IFC should publish its due diligence prior to the decision to invest in the project.
- IFC, working as necessary with other members of the World Bank Group, should develop contingency plans to assist affected communities whose lives and livelihoods have already been disrupted in cases where, as with Kalukundi, the development of a project has been severely delayed or suspended because of corruption.
- IFC should explain why it has not joined, or retained the right to join, the legal action by former Africo shareholders to seek restitution in the sentencing of the Och-Ziff subsidiary that pleaded guilty under the FCPA.
- IFC should explain the circumstances and terms on which any assignment of restitution rights occurred and whose interests this served.
- The Integrity Vice Presidency should investigate those IFC-backed mining projects in Congo – the Kalukundi project and the Kolwezi project – in which the US authorities have identified corruption, with a view to publishing findings and taking action under the Sanctions System to combat corruption.
- Any entity, company or individual identified as participating in corruption in IFC's Congolese projects should be sanctioned accordingly, to include debarment and the payment of restitution.

## Annex – Correspondence between RAID and IFC



Rights and Accountability in Development

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3 April 2019

Mr Ethiopis Tafara,  
Vice President and General Counsel, Legal, Compliance Risk and Sustainability  
International Finance Corporation  
2121 Pennsylvania Avenue,  
NW Washington,  
DC 20433  
USA

***Via email to: [etafara@ifc.org](mailto:etafara@ifc.org)***

Dear Mr Tafara,

I am writing to you in relation to an unsuccessful investment made by IFC in a mining project in the Democratic Republic of Congo between 2007 and 2009. The project in which IFC invested, Africo Resources Ltd's Kalukundi copper and cobalt project, has recently been identified by United States judicial authorities as a target in a wider corruption scheme. Although the investment was made by IFC over ten years ago, the repercussions of the corruption are both current and material, especially since the sentencing of the perpetrators and compensation for the victims is not yet concluded.

RAID is a UK registered charity that documents corporate human rights abuses in Africa and works with victims to hold companies to account. Our goal is to strengthen domestic and international regulation of companies and bring justice for victims of corporate abuse. We have published extensively on the mining sector in Congo. More information can be found on our website at [www.raid-uk.org](http://www.raid-uk.org).

RAID is preparing a report for publication about IFC's role in this investment, including its position on victim compensation. I would be most grateful if you are able to provide the additional information and clarification we seek, which you will find in the questions attached.

We believe the story of IFC's investment in Congo's Kalukundi mining project, the manner in which it failed due to corruption, the impact on local Congolese communities and IFC's decision not to act to recover its losses is important. Understanding how investment decisions are made when there is a high governance risk will not only help avoid any future repetition and aid the World Bank Group in its fight against corruption, but it will also strengthen the case for victim compensation.

The Kalukundi mining project is a copper and cobalt mine near Kolwezi, in Lualaba province in southern Congo. This project was majority owned by Africo Resources, a Canadian mining company. In November 2007, IFC invested \$4 million Canadian dollars into the project, which represented a 6% holding, and held an option to buy further shares. At the time, IFC was a key seed investor in the project and it was one of IFC's first investments aimed at encouraging economic growth and poverty alleviation in Congo following many years of conflict.

Rights and Accountability in Development (RAID) | UK Charity No. 1150846 | UK Company No. 04895859  
Studio 204, Screen Works, 22 Highbury Grove, London, N5 2EF, UK | Website: [www.raid-uk.org](http://www.raid-uk.org)

In the interests of balanced and fair reporting, we strive to reflect all perspectives in our research and publications and we believe the views of IFC are of critical importance. We would be happy to receive any information to the questions raised, as well as any other information you believe might be relevant. I can assure you that IFC's response will be taken into account in our forthcoming report. In light of our publishing schedule, we would be grateful to receive your response by April 30.

Please send any information to me at RAID on [woudena@raid-uk.org](mailto:woudena@raid-uk.org) or to our office address in London. If you require any further clarifications or have questions, please do not hesitate to contact me.

I look forward to hearing from you.

Yours sincerely,



Anneke Van Woudenberg  
Executive Director

Cc: Sérgio Pimenta, Vice President, Middle East and Africa  
Pascale Helene Dubois, Integrity Vice President

### Questions from RAID to the International Finance Corporation

To: IFC

From: RAID

Date: 3 April 2019

Subject: Investment in the Kalukundi and Kolwezi mining projects

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We would welcome clarification on the following points:

1. What lessons does IFC believe can be learnt from its investments in both the Kalukundi and Kolwezi projects?
2. Did IFC's experience of its unsuccessful Congolese investments inform 2012 revisions to the *Policy on Environmental and Social Sustainability*?
3. Please could IFC explain its position on seeking compensation for local victims when projects are affected by corruption?
4. In respect of both the Kalukundi and Kolwezi projects, what steps has IFC taken, or will it be taking, to investigate and seek redress for the corruption?
5. Could IFC confirm if it contacted the Integrity Vice Presidency, either before or after the findings of the US authorities in the Och-Ziff case, about the IFC-backed Kalukundi and Kolwezi projects to launch investigations and/or to take action under the Sanctions System to combat corruption? If not, why not? If yes, what was the outcome?
6. What conditions, if any, did IFC attach to its investment in Africo to mitigate the risk of corruption?
7. Is IFC satisfied that its due diligence, including on governance risks, was satisfactory prior to investing in the Africo project?
8. For the purpose of learning and transparency, will IFC publish the full risk assessment it conducted on Africo?
9. What considerations did IFC take into account during the period of Gertler's control of Africo before selling its shares?
10. What arrangements were made by IFC to dispose of its Africo shares?
11. Could IFC confirm it sold its shares in Africo to an Africo Director in September 2009?
12. How much did IFC receive from the sale of its Africo shares and what was the amount of any loss on the investment?
13. RAID can find no record of an IFC public statement or explanation at the time of the sale of its Africo shares. If there was a statement, please could you share it with us? If there was none, could IFC clarify why no statement or explanation was provided?
14. If IFC declined to join the Africo Owners' action to establish victim status in the sentencing of OZ Africa, what were the reasons for not participating?
15. Given that IFC's shareholding appears to have been bought by an Africo director, from whom Africo repurchased the shares in November 2009, could IFC confirm whether as former shareholders, the share claim has been assigned to anyone other than IFC for the purpose of the Africo Owners' claim for restitution?

Washington, D.C.

May 1, 2019

**Via Electronic Mail**

Ms. Anneke Van Woudenberg  
Executive Director  
Rights and Accountability in Development (RAID)  
[woudena@raid-uk.org](mailto:woudena@raid-uk.org)

Dear Ms. Van Woudenberg,

Thank you for your April 3, 2019 letter.

IFC's involvement in the Kalukundi project in the Democratic Republic of Congo (DRC) consisted of a US\$4 million equity investment IFC made in 2007 in Africo Resources Ltd, a junior mining exploration company which was listed in the Toronto Stock Exchange (Company). As your letter correctly states, IFC's involvement in the project lasted for approximately two years.

The legal claims against the Kalakundi concession started before IFC's investment in the Company. As part of IFC's due diligence for its investment in Africo, IFC reviewed the claims and decided to accept the concession risk based on the various legal actions the Company was taking in DRC courts to defend its rights. IFC also considered as part of its due diligence the governance and revenue transparency challenges in the mining sector in the DRC and potential engagements the World Bank Group (WBG) and other multilateral development banks could undertake with the DRC government to improve that sector. Following its investment, IFC continued to monitor the cases through the Company.

In 2008, the Company proceeded with an equity sale to Camrose Resources Limited. In 2009, IFC decided to end its involvement in the project through the sale of IFC's investment in the Company.

IFC included standard provisions in its legal contracts with the Company regarding Sanctionable Practices, which include fraud and corruption. Under the WBG sanctions and debarment system, IFC is required to submit to the WBG Integrity Vice Presidency (INT) any allegations of Sanctionable Practices it receives regarding an IFC-financed project. As the WBG's independent investigative arm, INT evaluates the allegations of wrongdoing and

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may open a formal investigation. Based on the outcome of the investigation, the WBG's independent sanctions system will consider whether sanctionable misconduct was committed through a two-tiered sanctions review, whereupon a sanction may be imposed, including debarment of an entity or individual from future WBG financing. Please note however, that in respect to IFC projects, the ability of the WBG to investigate and sanction misconduct is limited to Sanctionable Practices committed by parties contractually bound to the IFC, principally through the different investment agreements. In this particular case, the allegations of misconduct are attributable to third parties with no such relationship to IFC and to whom WBG sanctions' system would not apply.

Regarding compensation, as your letter points out, the shareholder claims and related law enforcement actions occurred several years after IFC sold its shares and transferred its legal rights in the Company to a third party. Accordingly, IFC had no entitlement to join the shareholder action.

We appreciate the opportunity to provide IFC's input and hope the information we have shared is useful.

Sincerely,

Ethiopia Tafara  
Vice President and General Counsel  
Legal, Compliance Risk and Sustainability





16 May 2019

Mr Ethiopis Tafara,  
Vice President and General Counsel, Legal, Compliance Risk and Sustainability  
International Finance Corporation  
2121 Pennsylvania Avenue,  
NW Washington, DC 20433  
USA

***Via email to: [etafara@ifc.org](mailto:etafara@ifc.org)***

Dear Mr Tafara,

Thank you very much for your response to RAID on 1 May 2019. While your letter provided some useful information, it did not address a number of the key questions we raised.

I would like to revert back to you on three matters which are crucial for our reporting. I would be very grateful for any clarification you can provide.

1. Did IFC vote for or against the “Camrose Transactions Resolutions” on 12 June 2008? Please could you explain the reasoning for whatever decision was taken.
2. In your letter, you note that “IFC had no entitlement to join the shareholder action” because IFC, having sold its shares, was a former shareholder and had transferred its legal rights to a third party. It is our understanding that those who own shares at the time the corrupt act was committed have entitlement to potential restitution as victims. When shares are sold in the market, as was done with the Africo shares, this “right to restitution” does not automatically accrue to the new owner. Could you please confirm if IFC assigned its rights of restitution to another party? If yes, when, to whom and why?
3. When Camrose/Gertler acquired the majority of Africo shares in 2008, IFC remained an investor till September 2009. It is our understanding that Africo was an IFC Counterparty and that Gertler/Camrose controlled that Counterparty and could also fall under the definition of “any other entity or individual alleged to have engaged with that IFC Counterparty in a Sanctionable Practice in connection with such IFC Project...” (IFC Sanctions Procedures). Could you please therefore clarify why the WBG sanctions system would not apply or is IFC powerless when it comes to exposing and seeking redress for the corruption in this case?

As noted in our previous correspondence, we would be happy to receive any information to the questions raised, as well as any other information you believe might be relevant. I would be grateful to receive IFC’s response by 30 May 2019, which will be taken into account in our forthcoming report.

Please send any information to me at RAID on [woudena@raid-uk.org](mailto:woudena@raid-uk.org) or to our office address in London. If you require any further clarifications or have questions, please do not hesitate to contact me.

I look forward to hearing from you.

Yours sincerely,

Anneke Van Woudenberg  
Executive Director

Cc: Sérgio Pimenta, Vice President, Middle East and Africa  
Pascale Helene Dubois, Integrity Vice President

ETHIOPIS TAFARA  
Vice President and General Counsel  
Legal, Compliance Risk & Sustainability

May 31, 2019

Ms. Anneke Van Woudenberg  
Executive Director  
Rights and Accountability in Development (RAID)  
[woudena@raid-uk.org](mailto:woudena@raid-uk.org)

Dear Ms. Van Woudenberg,

Thank you for your May 16, 2019 letter. We sought to address your questions as much as possible, being mindful that some related to non-public information, internal deliberations, and discussions between IFC and private parties, which we are not able to disclose.<sup>1</sup>

Financing early stage projects such as Kalukundi in emerging markets has heightened risks. IFC delivers its private sector development mission in the markets it is mandated to operate without government guarantees, and resorts to the tools available to it to protect against project risks, including due diligence and portfolio monitoring processes regarding integrity issues prior to and during its investments. Separate and apart from those integrity checks, as explained in our previous correspondence the World Bank Group (WBG) has an independent investigative arm in the Integrity Vice-Presidency (INT).

The Africo Resources Limited change of control led to IFC exiting the project by selling its equity interests in full, several years before the law enforcement actions you referred to. The difficulty in exiting the investment, between the change of control and actual sale of IFC shares was largely due to the illiquidity of the shares.

As regards your question about the application of IFC Sanctions Procedures, to clarify, the definition of "Respondent" in Section 1.02(a) of the Procedures are applicable to entities or individuals, other than the IFC Counterparty, alleged to have engaged with an IFC Counterparty in a Sanctionable Practice in connection with an IFC Project. For further information or

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<sup>1</sup> See IFC Access to Information Policy

clarifications on the application of the WBG Sanctions System, you may wish to contact INT. Regarding your specific concerns in connection with the project, you may also report to INT as the WBG independent investigative arm, responsible for looking into specific allegation of misconduct.<sup>2</sup> We will also pass on your concerns to INT.

We appreciate the opportunity to provide IFC's further input. We have no further comments at this stage.

Sincerely,

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<sup>2</sup>[https://www.ifc.org/wps/wcm/connect/Topics\\_Ext\\_Content/IFC\\_External\\_Corporate\\_Site/AC\\_Home/How\\_to\\_Report\\_Fraud\\_Corruption/](https://www.ifc.org/wps/wcm/connect/Topics_Ext_Content/IFC_External_Corporate_Site/AC_Home/How_to_Report_Fraud_Corruption/)