

# Risky Business

The Lundin Group's involvement in the Tenke Fungurume Mining project in the Democratic Republic of Congo

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# Editorial

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**Caption photo Front Page:** “TFM pays a compensation of \$360 for almost 1ha of abandoned land and 1ha of new (but unusable) land. But in the eyes of the resettled people of Fungurume, this is far from sufficient” (Photo IPIS)



**Diakonia** is a Swedish non-governmental development aid organisation. Diakonia gives support to and works together with 400 partner organisations in 30 countries around the world. Diakonia is primarily engaged in long term development work on social and economic structures that affect the life of poor people. Website: [www.diakonia.se](http://www.diakonia.se)



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# Executive Summary

After a decade of war and political turmoil, the tide seems to be turning for the DR Congo. The country is now engaged in reconstructing a society that was destroyed by decades of dictatorship and a global power play. Activities are taking off in the mining sector as well.

The DR Congo belongs to the category of resource rich countries, with a number of important reserves such as diamond, gold, copper and cobalt. Mining projects that were once frozen for years, due to wars and turmoil, are starting up or planning to. Especially in the Copper Province of Katanga, certain frenzy exists among foreign mining companies rushing for copper and cobalt to profit from today's soaring mineral prices on the world market.

The Tenke Fungurume Mining project, run by Tenke Fungurume Mining s.a.r.l. (TFM), is one of the biggest projects in Katanga and plans to extract copper and cobalt in 2009. Particularly important is that its reserves contain an exceptionally high degree of copper and cobalt ore. TFM was created in December 1996, when a Joint Venture was formed between the Lundin group's Lundin Holdings (55%) and the Congolese parastatal mining company, Gécamines (45%). In 2005, a third owner, Phelps Dodge from the US, joined the capital structure. It took lengthy negotiations for these three to reach an agreement on their obligations and rights. Ultimately, Phelps Dodge's stake reached 57.75%, the Lundin Group's Tenke Mining Corporation received 24.75% whereas Gécamines got the remaining 17.5%. Last year, Freeport McMoRan from the United States (US) acquired Phelps Dodge, and together they formed the biggest publicly traded copper and gold company in the world.

Currently, Swedish-related capital has an important stake in this project, directly through the second largest shareholder of the project – Swedish/Canadian Lundin Mining - and indirectly via Swedish pension funds. Many of the Swedish public pension funds own shares in Lundin Mining and Freeport McMoRan Copper and Gold Inc. The latest figures show a common ownership valued around US \$88 million (617 million Swedish crowns).

## *The history of the Tenke Fungurume deposits:*

The Tenke Fungurume Mining Company (TFM) is named after the villages where the ore deposits are located. Although attempts were made to start a new mine already in the 1970s, there has never been any industrialized mining activity (although there has been artisanal mining) in Tenke and Fungurume. Consequently, TFM is known as a greenfield investment.

In 1996, Gécamines selected Lundin Holdings as a partner after the government had called for bids. Lundin Holdings' US \$250 million offer as a transfer fee probably played a central role in its selection as a partner. The deal was questioned in several World Bank funded reports, such as the one written by International Mining Consultants Group (IMC) in 2003. IMC found the deal very problematic and some of the terms to be to the disadvantage of the DR Congo. It also found the reserves that were transferred to Lundin Holdings far too big, given the size of the project. IMC recommended that all Gécamines' partnerships, including TFM's, should be renegotiated.

Lundin Holdings signed the deal with parastatal mining company Gécamines, but President Mobutu's approval was also needed. Adolf Lundin, the founder of the Lundin Group of Companies, met with Mobutu in his home in France in 1996. A few years later, Adolf Lundin admitted that he had offered a donation to the president's "elections campaign". He claimed that no money was paid in the end, since Mobutu never reminded him of his offer, but no one knows if the offer played a role for choosing Lundin as the private partner in the TFM project. Unlike some other mining companies, Lundin Mining still does not have any general prohibition against contributions to political parties, election campaigns or candidates. Instead, the company's code of conduct requires that the Board of Directors or a commission authorized by the Board approve such contributions.

It commonly happens that Congolese politicians establish close relationships with foreign mining companies and take up functions on management or director level. Both local and international organisa-

tions report about corruption on all levels within the mining sector. Rumours about contributions to political parties or candidates for election are common, but difficult to prove most of the time. Only recently, did the Congolese state adopt a law that regulates the financing of political parties. However, it says nothing about contributions from companies. Consequently, there is an imminent risk when negotiating over mining contracts that financial contributions from companies will decide the outcome, instead of capability or estimated benefit for the country and its people.

The Lundin Group denies having paid any sum of money to political parties, election campaigns or candidates while doing business in the DR Congo.

#### *Allegations of bribery:*

Only two months before the creation of TFM, a rebellion had started in East Congo against President Joseph Mobutu. Laurent-Désiré Kabila led this rebellion and overthrew Mobutu in May 1997. In this highly instable environment, Lundin Holdings got its deal confirmed with the new leader. In spring 1997, Lundin Holdings/Tenke Mining Corp. paid a first instalment of US \$50 million to the DR Congo, as agreed in the contract. In 2005, the Lutundula Commission, created to investigate all contracts signed during the war, stated that half of the sum was paid to a bank account held by a company called Comiex Ltd., in which Laurent-Désiré Kabila held a significant interest. The Lundin Groups' Tenke Mining Corporation, which operated the TFM project when the allegations were put forth, denies having paid any sum of money to Kabila.

#### *No mining for more than ten years:*

The situation became more complex in 1998 when Rwanda and Uganda launched a new war to topple their former ally in Kinshasa, president Kabila. In February 1999, TFM and Lundin Holdings announced that they were unable to continue their work due to these circumstances by declaring *Force Majeure*. Information and the events that followed indicate that Lundin Holdings also lacked the money needed to proceed with the project. Only in 2005, was the *Force Majeure* finally lifted. Because of the events, some of the DR Congo's richest mineral assets laid untouched for almost ten more years.

#### *New partners and the amended contract of 2005:*

Despite the war and the *Force Majeure* status, the Lundin Group went to search for industrial partners. Major mining companies such as Phelps Dodge from the US showed an interest in entering the project, but demanded new terms for the TFM contracts. Once again, negotiations took place behind closed doors with Congolese politicians, of which vice-president Jean-Pierre Bemba was the most prominent one. These politicians wanted to move fast, before the democratic elections were to take place in 2006 and before audits funded by the World Bank would present their conclusions.

The foreign companies aimed at a reduction of the transfer fee, of Gécamines' share in the project and of the initial mineral output of TFM. The negotiations took place against the background of the restructuring of the mining sector in the DR Congo. Under the auspices of the World Bank, a new Mining Code had been introduced and the public mining sector was drastically restructured. Consultants, sponsored by the World Bank, advised not to conclude new mining deals in the mean time, but Congolese politicians together with their counterparts at several foreign mining companies ignored this advice. In September 2005, their bargaining behind closed doors led to a new contract for TFM. Phelps Dodge became the project operator while the Lundin Group's Tenke Mining Corporation became the second largest shareholder.

The haste was questioned by the World Bank's own mining specialist who concluded that the deal had not been preceded by any "thorough analysis, appraisal or valuation of the [mineral] assets" involved. In an internal memo, he also noted the lack of transparency.

Lundin Mining on the other side describes the amendment process as transparent, well thought through and in respect of the highest use of Katanga's mineral assets. According to the company, the amend-

ments of the contract, including the introduction of corporate income tax, import and export duties that Lundin Holdings had not been obliged to pay before “were widely felt to be more fiscally sustainable for the DRC.”

#### *The project today:*

After ten years of inactivity, the TFM project finally started in 2006. The first copper and cobalt ore is estimated for production in 2009. Mining will start at the so-called Kwatebala Hill, which will be developed into an open pit mine. The project life is put at 41 years. The total investment needed was first calculated at US \$650 million, but was increased in October 2007 to US \$900 million.

TFM has performed an extensive study of the social and environmental impacts of the new mining activities that will take place. Several social programs were thoroughly discussed with the local population during community meetings. Schools have been built and small-scale enterprises have been initiated. A social fund will be created for development projects with 0.3% of TFM’s net sales revenue. In addition, TFM has promised around 2,000 jobs during the preparation phase (estimated until the end of 2008) and some 1,100 permanent jobs once the production takes off.

TFM Mining states that the mining project will contribute significantly to the economy and to the rebuilding of the DR Congo by being one of the largest taxpayers, employers and catalysts for infrastructure rebuilding in the region.

Field interviews conducted by IPIS in October 2007 showed that the development program conducted by TFM encounters serious problems. Three villages were relocated to make room for the new mining activities. In October 2007, many resettled families that had been promised new houses were still sheltering under plastic sheeting, waiting for their new houses to be built. Resettled people also complain about insufficient compensation and inability to farm the land that has been given to them on new sites. In January 2008, thousands of people took to the streets in the Fungurume village accusing one of TFM’s subcontractors of offering jobs to “outsiders” instead of locals.

#### *The review of contracts:*

In 2007, one of the newly elected government’s first acts was to create an inter-ministerial commission to review the existing mining contracts in the DR Congo. When the commission handed over its report in November 2007, there were rumours that TFM was in the category of contracts that needed renegotiation. However, the government denies that such conclusions were made and claims that the leaked document is false, while postponing their own announcement of the results.

Non-governmental organisations asked international lenders to respect a moratorium while the review commission would be at work. Three lenders nevertheless accorded funding to TFM during 2007. The Overseas Private Investment Corporation (OPIC) of the US decided to provide TFM with more than US \$250 million in financing. The European Investment Bank (EIB) accorded a €100 million financing and the African Development Bank came up with another US \$100 million.

The outcome of the review process was highly unsure in the final stages of this report. However, after intensive lobbying and after President Kabila’s visit to Freeport McMoRan in the US, the company seems to have obtained guarantees from Congolese authorities that the TFM contract will remain untouched.

# Contents

<b>1.</b>	<b>Introduction</b>	<b>7</b>
	<b>Risky business</b>	<b>7</b>
	<b>Swedish connection to the project</b>	<b>9</b>
	<b>Methodology</b>	<b>10</b>
<b>2.</b>	<b>Acquiring one of the world's most valuable mining assets</b>	<b>12</b>
	<b>Selection procedure</b>	<b>14</b>
	<b>Why did Lundin get the contract?</b>	<b>16</b>
	<b>History's legacy</b>	<b>18</b>
	<b>Kabila takes power</b>	<b>19</b>
	<b>Ten years without production</b>	<b>21</b>
	<b>In search of a helping hand</b>	<b>23</b>
	<b>Rushing negotiations</b>	<b>25</b>
<b>3.</b>	<b>Project scope</b>	<b>30</b>
	<b>Financial Restructuring</b>	<b>32</b>
<b>4.</b>	<b>TFM's development programs</b>	<b>33</b>
	<b>Resettlement</b>	<b>34</b>
	<b>New jobs and loss of livelihood</b>	<b>35</b>
	<b>Community development</b>	<b>37</b>
	<b>The Social fund</b>	<b>39</b>
	<b>Fungurume: Meeting the people</b>	<b>40</b>
<b>5.</b>	<b>To a new contract?</b>	<b>44</b>
<b>6.</b>	<b>Conclusions</b>	<b>48</b>
<b>7.</b>	<b>List of Sources</b>	<b>49</b>
<b>8.</b>	<b>Acronyms</b>	<b>53</b>
<b>9.</b>	<b>Timeline</b>	<b>54</b>



# 1. Introduction

Most industrial companies today acknowledge the fact that ethical risks and dilemmas often coincide with production and investments in developing countries. Some countries or regions are regarded as particularly risky, because of reasons such as ongoing conflicts, widespread corruption, et cetera. At the same time, those countries are often the ones that need international investments and presence the most. Responsible and sustainable business practices could contribute to improvements and change. In this report, SwedWatch and IPIS investigate the Lundin Group's involvement in one of the world's largest copper and cobalt projects, Tenke Fungurume in the DR Congo. The DR Congo is one of the poorest countries in the world, ravaged by wars and conflicts during most of its history. It is also in desperate need of investments and, more importantly, responsible and sustainable ones. The history of the project, as well as the ongoing operations, very much reflects the dilemmas and risks that business operations confront in high-risk countries like the DR Congo.

## Risky business

### Abstract

*Over the years, the Lundin Group has been building much of its success on guts. One of its business concepts is not to shun risky environment. On the contrary, the entrepreneurs of the group have been present in regions that others have kept away from, such as Apartheid South Africa, wartime Sudan and the DR Congo.*

The foundation of the Lundin Group was laid out during the 1970s and 80s. Currently, the group consists of 15 companies. The combination of companies and their names have changed over time, but what does remain is an essential part of the Lundin family's business concept; to invest in large projects, often

located in countries where many others do not want or do not dare to go, because the economic, political and ethical risks are considered to be too high.<sup>1</sup> However, the Group's founder, Swedish national Adolf Lundin, claimed that the risks were always carefully calculated.

"No guts, no glory" was his favourite motto and the title of a book depicting his career and the history of the Lundin Group of companies.<sup>2</sup> The book gives several examples where Lundin's companies have entered risky regions and countries, often when others have refrained from doing so. Over the years, the group has been investing in exploration and exploitation projects of oil, gas and minerals in countries such as repressive Libya and Iran, Western Sahara (currently occupied by Morocco) and war-torn Sudan. The Swedish media has questioned the Lundin Group's Vostok Nafta's ties to Russian oil and gas company Gazprom and Lundin Oil's activities in southern Sudan from 1998 to 2003, but company representatives have always strongly defended their presence and investments. Detailed below are a few examples of the Lundin Group's business involvements in various countries that have been questioned.



*Within the TFMining concession, major road works continue.  
(Photo IPIS)*

<sup>1</sup> In a biography about Adolf H. Lundin, the founder himself as well as people who are or have been close to the company group, point out this part of the Lundin Group's business concept. See for example Eriksson R, Adolf H Lundin, Stockholm 2003, p. 103, 151-152, 187 and 256.

<sup>2</sup> Eriksson R, *Adolf H Lundin: Med olja i ådrorna och guld i blick*, Stockholm 2003. The English title is "No Guts No Glory: A Portrait of Sweden's Oil and Mining Entrepreneur".

**South Africa during apartheid:** The Lundin Group established itself in South Africa when many states urged for economic sanctions and some companies decided to divest or leave the country because of its racist politics and structures. In the 1980s, Adolf Lundin took control of East Daggafontein Mines in the Rand district. Two decades later the Lundin Group's founder claimed that the investment only had positive effects:

“East Daggafontein and what we did in South Africa is probably what I am most proud of! We provided more than 400 black people that came from a very poor part of the country with jobs. At the same time we were making big money from the gold we extracted from the old slag piles [of East Daggafontein]”.<sup>3</sup>

**Russia:** The Lundin Group waited longer before entering the newly established states after the fall of the Soviet Union. It bought shares in several Russian oil companies during 1995 and 1996, which finally became the investment company Vostok Nafta Investment Ltd, a Bermuda-registered company listed on the OMX Nordic Exchange Stockholm.<sup>4</sup> At times, shares in Putin's Gazprom, which is accused of damaging the environment and purchasing Russian media enterprises in order to silence them, built up more than 90 % of Vostok Nafta's portfolio.<sup>5</sup>

**Sudan:** Between 1997 and 2003, Lundin Oil operated an oil and gas concession in Block 5A in war-torn southern Sudan. Human rights organisations accused Lundin Oil of indirectly contributing to human rights violations in the area, while Lundin argued that it helped Sudan “out of its misery”<sup>6</sup>. Lundin decided to pull back when fighting had begun on the company concession. Rebels were climbing equipment and company staff found themselves in the middle of shootings.<sup>7</sup>

Since 2006, the Lundin group is back in Sudan again, this time not as an operator, but as a shareholder of a project in Block 5B operated by White Nile Petroleum Operating Company. In November 2007, the company reported that drilling was delayed because the peace agreement had not been as successful as predicted.<sup>8</sup>

**DR Congo:** Adolf Lundin approached a US geologist to help him find the world's largest copper asset. This expert directed him to Tenke Fungurume. In 1996, Mr. Lundin's dream was realised after chaotic negotiations with the state mining company, Gécamines, and Congo's notorious dictator Mobutu. The Lundin Group acquired a 55 % stake in one of the world's largest known copper and cobalt reserves with the creation of the Tenke Fungurume Mining project. Mobutu headed one of the world's most corrupt regimes at the time. The contracts were signed just a few months after a rebellion had broken out in the country.<sup>9</sup>

The Tenke Fungurume Mining project is the focus of this report. Currently the concessions in Tenke and Fungurume are exploited by a joint venture called Tenke Fungurume Mining Corp. s.a.r.l of which Freeport McMoRan Copper & Gold Inc. holds 57,75 % of the shares and Lundin Mining 24,75 %. The Congolese state-mining company Gécamines holds the remaining 17,5%.

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<sup>3</sup> Eriksson R, Adolf H Lundin: Med olja i ådrorna och guld i blick, Stockholm 2003, p. 176 and chapter 11. In spite of the many cries for sanctions during the 1980s none were made obligatory since South Africa's key trade associates (the US, Great Britain and France) were blocking such decisions.

<sup>4</sup> Ibidem, Chapter 14.

<sup>5</sup> Svenska Dagbladet, Gazprom närmar sig ett systematiskt brott, January 8, 2007. In March 2007 the company announced that a new company was to be constructed, Vostok Gas Ltd, which would include the Gazprom shares. Currently the Lundin family directly or indirectly controls around 30% of Vostok Gas. Mainly Swedish private investors own the rest of the shares. The company is listed on the OMX Nordic Exchange Stockholm. Vostok Nafta still exists and it focuses on investments in Russia and the other CIS states. For more information, see <http://www.vostokgas.com> and <http://www.vostoknafta.com>.

<sup>6</sup> Adolf Lundin quoted in Dagens Industri, March 22, 2001. For information about the Sudan case, see for example Human Rights Watch, Lundin: Willfully Blind to Devastation in Block 5A, November 2003 and Christian Aid, The Scorched Earth: Oil and war in Sudan, March 2002. Lundin Petroleum's arguments and views are presented in Lundin Petroleum, Oil and Conflict: Lundin Petroleum's experience in Sudan, November 24, 2003.

<sup>7</sup> Eriksson R, Adolf H Lundin: Med olja i ådrorna och guld i blick, Stockholm 2003, p. 15-22.

<sup>8</sup> Dagens Industri, Trubbel i Sudan försenar Lundin, November 15, 2007.

<sup>9</sup> Eriksson R, Adolf H Lundin: Med olja i ådrorna och guld i blick, Stockholm 2003, chapter 15.



Holdings of TFM			
Company name	in 1996 (%)	in 2005 (%)	in 2007 (%)
Gécamines (DRC state owned)	45	17,5	17,5
Companies of the Lundin Group* (Sweden/Canada)	55 (Lundin Holdings)	24,75 (Tenke Mining Corporation)	24,75 (Lundin Mining)
Phelps Dodge (USA)		57.75	
Freeport McMoRan** (USA)			57.75
<p>* Over time, Lundin Holdings, the Lundin Group's Tenke Mining Corporation and Lundin Mining have had holdings in the TFM joint venture</p> <p>** In March 2007, Freeport McMoRan Copper &amp; Gold Inc. acquired Phelps Dodge and consequently became the operator of the Tenke Fungurume Mining project in the DR Congo</p>			

## Swedish connection to the project

### Abstract

*Beginning in 2009, one of the world's largest known copper and cobalt reserves will begin mining. It is located at the Tenke and Fungurume villages in the DR Congo. Swedish capital has an important stake in this project, directly through the second largest shareholder of the project, Lundin Mining, and indirectly via Swedish pension funds.*

### Ownership structure of Lundin Mining

Lundin Mining lists on the Stockholm and Toronto Stock Exchange as well as the American Stock Exchange. The company's headquarters are located in Vancouver, but the executive and operational office is based in Stockholm. Currently Adolf Lundin's oldest son, Lukas H. Lundin, is the company chairman and up until January 2008, Swedish national Karl Axel Waplan was the company's President and CEO. According to the latest annual report the Lundin family currently owns 11.5 % of Lundin Mining. In the beginning of 2007, the Lundin family owned close to 19% of Tenke Mining Corporation that used to hold 24.75% of the shares of Tenke Fungurume Mining in the DR Congo but merged with Lundin Mining in 2007.<sup>10</sup> Other large shareholders are British Threadneedle Investment Funds and Swedish funds such as Robur Funds, Skandia Liv and Skandia Funds.<sup>11</sup>

Name	holdings in Lundin Mining	Percentage (%)
Estate of Adolf H. Lundin	32 766 030	11,5
Robur Funds	8 066 400	2,83
Threadneedle Investment Funds	3 008 304	1,06
Skandia Liv	2 381 250	0,84
Skandia Funds	2 347 869	0,82
Andra AP-fonden	2 055 825	0,72
Others:	234 174 387	82,22
Source: Lundin Mining's Annual Report 2006.		

<sup>10</sup> In the beginning of 2008, Adolf Lundin held at least 18.63% of the shares of Tenke Mining Corporation: 14% via Ellegrove Capital and 5% via Abalone Capital. Both companies are fully owned by the Lundin family and registered in Barbados. This ownership scheme is corroborated by information from Raw Materials Data, Stockholm. Two other Lundin owned companies – Lorito Holdings and Zebra Holdings – later on increase the family's stake in Tenke Mining Corp. See: Docx Ward, Studie omtrent de financiering en aandeelhoudersstructuur van de mijnbouwprojecten te Tenke Fungurume, KOV en Kamoto in Katanga, DR Congo, 4 December 2006, IPIS, p. 30.

<sup>11</sup> Lundin Mining's Annual Report 2006, p. 5, 32 and 33. Available at, [www.lundinmining.com/i/pdf/2006AnnualReport.Pdf](http://www.lundinmining.com/i/pdf/2006AnnualReport.Pdf) .

## Swedish public pension funds

Several of the Swedish public pension funds own shares in Lundin Mining and Freeport McMoRan Copper and Gold Inc., the two biggest shareholders of TFM at present. The latest figures show a common ownership valued to around US \$88 million (617 million Swedish crowns) as presented in the boxes below.<sup>12</sup>

### LUNDIN MINING CORP:

Swedish Pension Fund	Number of Shares	Market Value (SEK/USD)
API *	1 406 562	117 064 180 / 16 653 500
API **	685 275	173 375 000 / 24 673 000
API ***	1 070 240	89 097 000 / 12 675 0000
AP7/Premiesparfonden ****	675 927	56 270 923 / 8 562 200
AP7/Premievalsfonden *****	20 546	1 170 455 / 178 100
Total:	3 858 550	436 977 558 / 62 741 800
* Holdings June 30, 2007, www.ap1.se. ** Holdings December 31, 2006, www.ap2.se. *** Holdings June 30, 2007, www.ap3.se. **** Holdings October 1, 2007, www.ap7.se. ***** Ibidem		

### FREEPORT MACMORAN COPPER & GOLD INC.

Swedish Pension Fund	Number of Shares	Market Value (SEK/USD)
API*	126 346	71 733 693 / 10 218 474
API **	36 652	13 977 621 / 1 989 130
API ***	51 650	29 333 000 / 4 172 900
API ****	114 905	65 000 000 / 9247 000
Total:	329 553	180 044 314 / 25 627 504
* Holdings June 30, 2007, www.ap1.se. ** Holdings December 31, 2006, www.ap2.se. *** Holdings June 30, 2007, www.ap3.se. **** Holdings June 30, 2007, www.ap4.se.		

## Methodology

During the fall of 2007, Raf Custers, an IPIS researcher investigated the Tenke Fungurume Project on behalf of the Swedish organisations SwedWatch and Diakonia. Raf Custers, a former journalist, has covered issues related to the DR Congo since 1998, and is currently working for the Belgian research organisation IPIS. His fieldwork took place in October 2007, first in Kinshasa, the capital and political centre of the DR Congo, and then in the Katanga province, where the Tenke and Fungurume concessions are located.

The aim was both to investigate the socio-economic effects of the project at present and to look into past allegations put forth by the UN Panel of Experts in 2002 and by the parliamentary Lutundula Commission that published its report in 2005 regarding all financial and economic contracts sealed during DR Congo's last wars (1996-1997 and 1998-2003). The Panel's accusations concerned bribes and questionable tax reductions, in a country where the majority of the population live on less than a dollar per day. The Lutundula Commission concluded in its final report in 2005 that Lundin Holdings was one of many companies that had negotiated very unbalanced mining contracts that benefit the companies involved more than the DR Congo.

<sup>12</sup> Forex's rates for the dates mentioned in the footnotes have been used to calculate the market value in USD, [www.forex.se](http://www.forex.se).

During the research a wide range of actors were interviewed; people within the Congolese business community, local non governmental organizations (NGOs), representatives of Phelps Dodge/Freeport McMoRan (the operator of the project), consultants engaged in the company's development programs, scientists and Congolese politicians and officials. Interviews were conducted with people directly affected by the project and specifically with the local populations in Tenke and Fungurume. About 95 people attended the interviews of which about 20 people were the most vocal.

Two weeks before the publication of this report, in February 2007, Diakonia visited Tenke and Fungurume in Katanga to meet with local populations and human rights organisations. During this trip, Diakonia also proposed a meeting with TFM, but the operator of the project, Freeport McMoRan, responded that they did not have the possibility to meet during the proposed time.

During the research, IPIS and SwedWatch have gone through most of the written materials that exist about the current project and its history; company information and reports published by the UN Panel of Experts and the Lutundula Report mentioned above. Analysis made by World Bank funded consultants such as International Mining Consultants Group (IMC) and the law firm Duncan & Allen have constituted important sources when describing the contract Lundin Holdings sealed with the Mobutu regime in 1996 as well as the amendments agreed to by the transitional government in 2005. A biography about Adolf Lundin, "No Guts No Glory", written by Swedish journalist Robert Eriksson, has acted as a valuable source for information about the company group and the history of the Tenke Fungurume Mining project. Robert Eriksson used to work as a journalist for the Swedish financial newspaper *Finanstidning*. He became responsible for Investor Relations at Lundin Mining. Currently, he is based in London working as Lundin Mining's head of communication to international investors.

Interviews were conducted with representatives of both Freeport McMoRan and Lundin Mining. The companies were given the opportunity to read and comment on the report before publication.

The need for fair and balanced mining contracts is currently being discussed in the DR Congo as well as in other countries on the African continent. More research is needed in order to conclude if the terms of the TFM contract of 2005 are fair and balanced or not, and if the contract is constructed in such a way that it sufficiently takes the DR Congo's best interest into consideration.

## 2. Acquiring one of the world's most valuable mining assets

### Abstract

When Congo (Zaire at that time) started to privatize its mining industry in the 1990s, Tenke Fungurume Mining (TFM) was one of the first Joint Ventures established between state owned mining company Gécamines and private investors. In this case, Lundin Holdings was selected as the private partner of the project. Later, the terms of the partnership were analyzed and questioned in several World Bank funded reports.

On November 30, 1996, the Congolese state owned company Gécamines<sup>13</sup> and Lundin Holdings signed the *Convention de Création*<sup>14</sup> to create a jointly owned company called Tenke Fungurume Mining Company s.a.r.l. (TFM).<sup>15</sup> On the same day, the Republic of Zaire, Gécamines and Lundin Holdings also signed a Mining Convention.



At this site, TFM plans to have its processing plant running by 2009. (Photo IPIS)

The *Convention de Création* stipulated an exchange between Lundin and Gécamines. Lundin Holdings would finance the mining project with a US \$250 million transfer fee and organize for the rest of the funding, while Gécamines would give to the Joint Venture the two large mining concessions it held at Tenke and Fungurume as well as all its technical knowledge on these deposits. Lundin Holdings received 55% of the shares of the newly created company, TFM, and Gécamines the remaining 45%.

### Facts about the TFM conventions

The key elements of the *Convention de Création* were:

- Gécamines ceded its concessions n° 198 at Tenke and n°199 at Fungurume to TFM.<sup>16</sup>
- Gécamines also ceded the mineral stocks in Fungurume, the buildings and real estate that once belonged to the former mining company *Société Minière de Tenke et de Fungurume* (SMTF) and all its knowledge on the concessions. It is important to note that Gécamines did not bring these assets as a contribution to TFM's capital (in which case it would have stayed the owner of the assets). GCM ceded its assets and by doing so lost control over them.<sup>17</sup>
- Lundin Holdings in return promised to pay a transfer fee (*prime de cession*) of US \$250 million.<sup>18</sup>
- Lundin Holdings also promised to make a Feasibility Study and to organise the needed financial construction.

<sup>13</sup> Gécamines stands for La Générale des Carrières et des Mines(GCM).

<sup>14</sup> Convention de Création de Tenke Fungurume Mining entre La Générale des Carrières et des Mines et Lundin Holdings Ltd. Unpublished document.

<sup>15</sup> S.a.r.l. stands for Société par Actions à Responsabilité Limitée.

<sup>16</sup> Convention de Création, art. 3.1. "Obligations de Gécamines".

<sup>17</sup> "Ce partenariat ne concerne pas une amodiation", in: Duncan & Allen, *Projet d'évaluation juridique des accords de partenariat de la Gécamines*, April 6, 2006. Annexe B1 Tenke Fungurume, p. 18.

<sup>18</sup> Convention de Création, art. 3.3, 'Obligations de Lundin Holdings; Prime de Cession': US \$250 million in 3 trenches (US \$50 million, US \$40 million and US \$160 million).

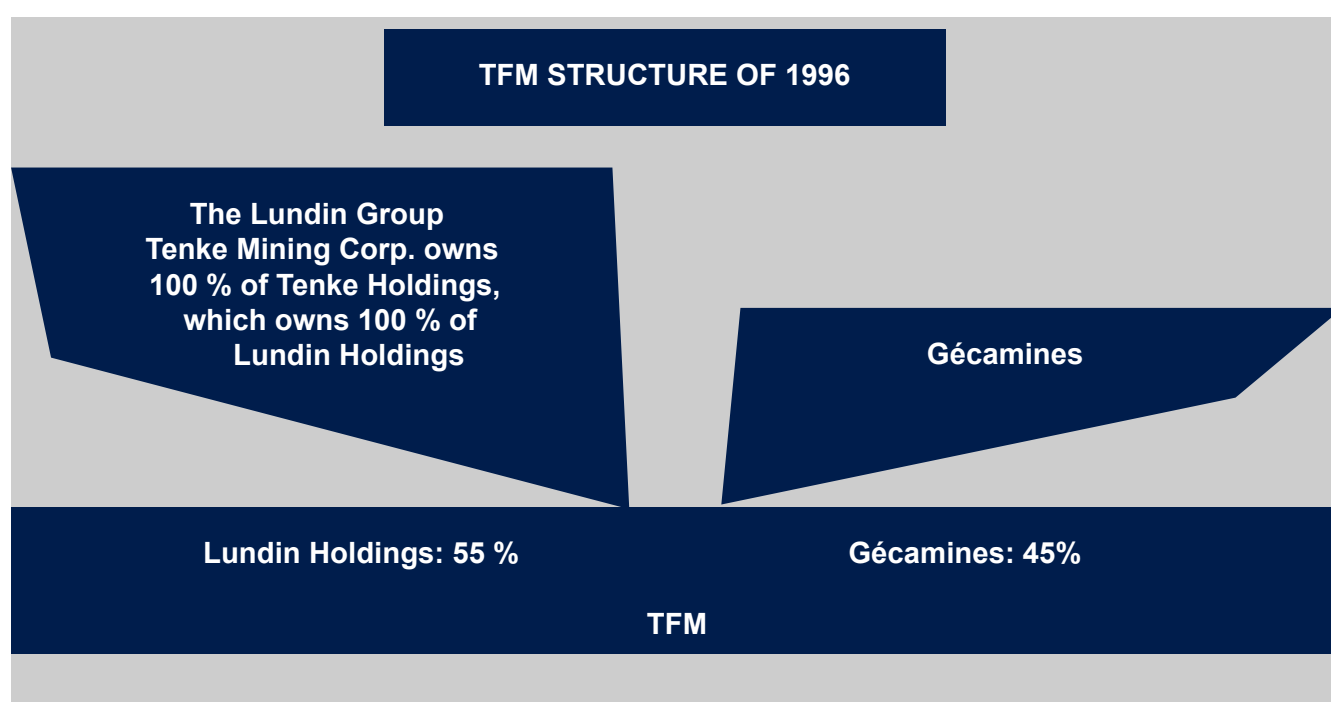
- Gécamines received 45% of the TFM shares while Lundin Holdings received 55%.
- Before any paying out of dividends, all of Lundin Holding's expenses would have to be reimbursed.<sup>19</sup>

The *Convention Minière*<sup>20</sup> stipulated the scope of the mining project. This Mining Convention also gave TFM extensive fiscal, parafiscal<sup>21</sup> and customs advantages. TFM was free to commercialize its products. The Convention exonerated TFM from export duties on products deriving from its mining activities, for a period of 16 years. Moreover, TFM would not have to pay any taxes on its land holdings. Oil and energy products also enjoyed an extremely beneficial regime of income and dividend taxes.

The *Convention de Création* also stated that TFM would sign a Consultancy Contract with Lundin Holdings, which allowed the usage of Lundin Holdings as TFM's consultant for issues related to prospecting, financing, construction, exploitation and commercialisation.<sup>22</sup> The Consultancy Contract<sup>23</sup> stipulated that Lundin Holdings was to receive:

- An additional 7% of its expenses for prospecting,
- A premium of 3% of its capital expenses, for its financial and construction assistance,
- A premium of 5% of its exploitation costs, for its assistance on exploitation and
- 1.25% of overall revenue for its assistance on commercialization.

The TFM agreements were officially sealed on December 9 and 20, 1996, when two government decrees approved the creation of TFM and the ceding of the concessions n° 198 and n° 199 to the new company.<sup>24</sup> At the time, the Zairian public was not permitted to obtain knowledge of Gécamines' and Lundin Holding's agreements.<sup>25</sup>



<sup>19</sup> Convention de Création, art. 12.1, "Distribution des bénéfices" .

<sup>20</sup> Information about the content of this convention comes from International Mining Consultants Group (IMC), La restructuration de la Gécamines, Draft Phase 2, Projet n° M5670C, November 2003. Unpublished document.

<sup>21</sup> The term parafiscal means to charge an indirect tax.

<sup>22</sup> Convention de creation de Tenke Fungurume Mining entre Gécamines et Lundin Holdings, art. 14.1. November 30, 1996.

<sup>23</sup> IMC, o.c., Annex B1, p. 8.

<sup>24</sup> Duncan & Allen did not find any copies of these decrees, o.c, Annex B1, p. 5.

<sup>25</sup> Duncan & Allen did not find any trace of a publication of the conventions by the Journal Officiel of the Zairian state. Ibidem, Annex B1, p. 6.



## Selection procedure

### Abstract

*Lundin Holdings was selected as a private partner for Tenke Fungurume Mining after it overran its competitors in a public bidding procedure. Lundin Holdings made an offer that Gécamines could not refuse: a huge financial input to reach a high production volume and a promise to start new mining activities in other parts of DR Congo then called Zaire.*

The Joint Venture between Gécamines and Lundin Holdings was created against a background of privatisations in the Zairian mining sector. This policy was promoted in Africa as a whole from the 1980s and early 90s onwards. For example, Zambia started privatising in 1989, after fierce pressure from international donors, the World Bank and the International Monetary Fund.<sup>26</sup> Zaire followed this example, although it did not go as far as its neighbor, Zambia.<sup>27</sup>

Within a few decades, Zaire's mining industry saw a steep decline in performance and revenue. On September 20, 1990, the Kamoto mine in the copper province of Katanga was confronted with a large-scale mining catastrophe with, according to some sources, up to 500 victims. Kamoto illustrates as an example, the disastrous state of the industry after some 20 years of underinvestment and diversion of funds by the Mobutist system.<sup>28</sup> In 1991, donors and Bretton Woods institutions broke with president Mobutu's regime. One reason was a (supposed) bloodbath by Mobutu's Special Forces at the University of Lubumbashi. Another reason was Mobutu's appropriation of US \$400 million from Gécamines and his refusal to allow an audit of the firm's books.<sup>29</sup>

Prime Minister Kengo Wa Dondo, who belonged to Mobutu's inner circle, laid the basis for a privatisation policy. In 1994, he embarked on a program of "prudent privatisations". This meant that Gécamines ceded its management and mining rights to Joint Ventures, in which private mining companies participated and in return brought in capital and expertise.<sup>30</sup>

Kengo Wa Dondo and his Minister of Mines introduced a number of "junior mining companies" (many of them Canadian) to the Zairian mining sector. Belgian historian Erik Kennes later observed that the last Ministers of Mines under Mobutu sold many concessions to the highest bidders, which were not always the most competent ones. This only increased the chaos in the Zairian mining sector.<sup>31</sup> The first Joint Venture agreements were signed in September 1996, with Australian Anvil Mining and with Colmet International, a company registered in the Virgin Islands.<sup>32</sup>

To form a Joint Venture for the exploitation of the deposits at Tenke and Fungurume, Zaire launched an international bidding call on December 23, 1994.<sup>33</sup> Initially, bids were asked from a limited list of ten mining companies. The names of the selected companies became known only years later.<sup>34</sup>

<sup>26</sup> For an example, see Fraser A & Lungu J, For whom the windfalls? Winners and losers in the privatisation of Zambia's copper mines, Lusaka 2007, p. 84.

<sup>27</sup> Apparently, there was some resistance against total privatisation within Gécamines because of "the Zambian scenario". See: African Energy Intelligence (AEI), n° 332, October 29, 1997.

<sup>28</sup> This system can be described as 'predatory patrimonialism'. In such a system, the presidency functions as a receptacle for the wealth yielded by the nation, and redistributes part of this wealth to buy the political, military and commercial elites' loyalty to the regime. For more information, see: Fatal Transactions-NIZA-IPIS, The State vs. the people. Governance, mining and the transitional regime in the Democratic Republic of Congo, Amsterdam 2006, p. 13.

<sup>29</sup> Reno W., art. Sovereignty and personal rule in Zaire, in: African Studies Quarterly, s.d.

<sup>30</sup> "Sous la pression des institutions financières internationales, une prudente privatisation du secteur minier fut entamée sous le gouvernement de Kengo Wa Dondo", Kennes E, art. Le secteur minier au Congo: "déconnexion" et descente aux enfers, in: L'Afrique des Grands Lacs. Annuaire 1999-2000, p. 312.

<sup>31</sup> Kennes E., o.c., p. 312.

<sup>32</sup> Ibidem.

<sup>33</sup> The Lutundula Commission's report, p. 146. For more information about the commission and its report, see the box on p.21 of this report.

<sup>34</sup> In 2005, the Congolese newspaper Le Potentiel listed these names: Iscor, Lundin Holdings, Southern Copper Corporation, BHP Minerals, Gencor, Anglo-Vaal Ltd, RTZ Corp., JCI, Anglo-American Corp. and La Source. Le Potentiel, Scandale minier au Katanga. Bradage de Tenke-Fungurume, February 23, 2005.

In May 1995, the following companies remained after the first selection had been made<sup>35</sup>:

- Anglo American Corporation of South Africa Ltd
- Gencor – BHP
- La Source Compagnie Minière
- ISCOR Ltd. and
- The Lundin Group.<sup>36</sup>

In the early 1990s, the Lundin Group's mining companies had been successful in Argentina where the group's mining companies were searching for copper and gold, but the Lundin companies were smaller than competitors such as BHP and Anglo American. After a second selection BHP, ISCOR and Lundin remained as final candidates for the conclusion of a Joint Venture with Gécamines.

Lundin may have had an advantage over Iscor from the very start of the procedure. It seems that Lundin entered into discussions with Gécamines as early as 1994.<sup>37</sup> In 1995, Lundin contracted the engineering company SNC Lavalin from Canada to study the project from a technical angle. By the end of 1995, Lundin's and SNC Lavalin's bidding strategy<sup>38</sup> was ready. They decided on a strategy and emphasized their intention for a truly big project.

The company would invest US \$1.2 to US \$1.8 billion and promised production targets of 400,000 to 500,000 tonnes of copper per year. The production targets were to be reached in stages. Moreover, Lundin Holdings promised to finance up to 30% of the first production stage and guaranteed to find the rest of the financing with banks. Probably the US \$250 million offered as TFM's transfer fee played a central role for finally choosing Lundin. In the final *Convention* a total investment of US \$1,685 billion was foreseen for an output of 100,000 tonnes of copper and 8,000 tonnes of cobalt after a maximum of 6 years and after a maximum of 16 years, a total output of 400,000 tonnes of copper and 16,000 tonnes of cobalt.

### The offer of the Lundin Group

- Starting cost US \$85 million ("financed by the Lundin Group"),
- Production of 400,000 to 500,000 tonnes of copper to be reached in stages,
- Tenure of minerals treated: initially 6.2% of copper and 0.63% of cobalt,
- Estimated cost of the feasibility study: US \$15 million,
- Feasibility study to be finished within 18 months,
- Production start: "*dès que possible*" (as soon as possible) and
- Total investment (to produce 400,000 tonnes of copper in stage 5); between US \$1.2 and US \$1.8 billion.

When a delegation met with Prime Minister Kengo Wa Dondo in July 1996, representatives of the Lundin group promised not only to start a mining exploration in Katanga, but also further north, in Haut-Zaïre. The company also informed the authorities that it was considering to start exploiting gold and diamond deposits in the country too, a change considered by the business magazine African Energy Intelligence to be "*un effort pour obtenir un avantage concurrentiel*"<sup>39</sup>. Despite all of the meetings and planning, none of the plans were put into practice.

Details of Iscor's offer are not known. The author of this report asked for details from Kumba Iron Ore<sup>40</sup>,

<sup>35</sup> Duncan & Allen, o.c., p. 3 cites a telefax from Gécamines "président directeur général" from May 26, 1995.

<sup>36</sup> In May 1996, business magazine African Energy Intelligence reported three South African companies (Iscor, Gencor and one unknown), "a European company", "the Canadian branch of the Lundin group" and BHP had been prequalified. AEI, n° 229, May 29, 1996.

<sup>37</sup> GRD Minproc, Tenke Fungurume Feasibility Study, April 12, 2007, p. 19.

<sup>38</sup> Le Groupe Lundin & SNC Lavalin, division mines et métallurgie. Présentation condensée de la stratégie de l'offre du groupe Lundin, November 7, 1995. This unpublished document, shown to the author for perusal only, is part of a dossier of the Ministry of Mines called: Gécamines. Projet de développement en commun des gisements de Tenke-Fungurume avec le groupe Lundin, September 1996.

<sup>39</sup> African Energy Intelligence, n° 303, July 24, 1996.

<sup>40</sup> ISCOR (Iron and Steel Company of South Africa) was a South African state owned company, privatised in 1989. In 2001, it was unbundled into the steel producer Iscor (that became Mittal Steel in 2005) and the mining company Kumba Resources. Later, Kumba Resources unbundled in Kumba Iron Ore (high-grade iron ore) and Exxaro (coal, mineral sands, base metals, industrial minerals). For more information, view, <http://www.kumba.co.za> and <http://www.exxaro.com>.

the South African company that now represents Iscor's mining branch.<sup>41</sup> No reply was received.

## Why did Lundin get the contract?

### Abstract

*Several audits, funded by the World Bank after 2001, concluded that the contracts sealed with Lundin Holdings in 1997 were unbalanced to the disadvantage of the DR Congo. One study explained the choice of Lundin Holdings by saying that Gécamines, the Congolese, acted hastily because it quickly wanted to receive fresh cash. However, was this the only reason for choosing Lundin Holdings? Later on, the Lundin Group's founder, Adolf Lundin, admitted that he offered Zaire's dictator, Mobutu, a contribution for his election campaign once the terms of the deal were approved.*

The TFM 'partnership' was one of the first Joint Ventures for Gécamines. Afterwards this contract has been thoroughly analyzed in several audits.

The study made by the International Mining Consultants Group (IMC)<sup>42</sup> in 2003 has served as a basis for other studies. IMC went to work shortly after the DR Congo had adopted a new Mining Code, sponsored by the World Bank, in July 2002. On September 30, 2002, the DR Congo's *Bureau Central de Coordination* (BCECO) asked IMC to study how Gécamines could be restructured. The International Development Association of the World Bank financed the study.<sup>43</sup> One of the IMC's conclusions was that a series of Joint Venture contracts were unbalanced and would have to be renegotiated. The TFM Joint Venture, in the IMC's judgment, was particularly problematic.

The IMC Report from November 2003 says the following: *"Ce partenariat est mal engagé, GCM s'y étant précipitée en 1996, sans trop de discernement et dans l'urgence, pour toucher US \$50 million puis, espérait-elle, US \$200 million rapidement. Cela était déraisonnable et a conduit GCM à accepter le reste de l'accord tout à son désavantage, et plus encore de céder des réserves beaucoup trop importantes par rapport à la dimension du projet promise par son partenaire"*<sup>44</sup>.

Moreover, IMC had problems with the financial advantages granted to Lundin Holdings— e.g. the consultancy fees. It also questioned Lundin Holding's results. The report goes on: *"Le résultat de la gestion depuis 1996 est assez inquiétant (...) US \$52million dépensés à ce jour pour une étude de faisabilité qui n'a pas été produite à GCM, bien au-delà du budget prévu"*<sup>45</sup>. *Cette somme inclue US \$13 million d'intérêts et plusieurs millions de fees et autres prestations facturées par le partenaire"*.

One of the recommendations of the IMC in 2003 was to renegotiate all of Gécamines partnerships.<sup>46</sup> The Congolese authorities then launched a tender to analyze these partnerships. In February 2005, Duncan & Allen, a prominent US law firm, was selected. It delivered its final report in April 2006.<sup>47</sup> Duncan & Allen concluded that it was unwise to grant Lundin Holdings the reimbursement of its financial costs before any dividend would be paid.<sup>48</sup> Judging with hindsight, and knowing that Lundin Holdings later on dramatically scaled down the size of the mining project and its financial input, the law firm also

<sup>41</sup> IPIS emails to Exxaro and KIO sent on November 8 and 12, 2007.

<sup>42</sup> IMC Group Consulting Ltd, Restructuration de la Gécamines, Draft Phase November 2, 2003. Unpublished document, made available to IPIS for perusal only.

<sup>43</sup> Idem, Sommaire Exécutif.

<sup>44</sup> « This partnership took off badly, as GCM had been in a hurry in 1996, without too much discernment and in an urgency to receive 50 MUS \$ and then, so it hoped, quickly another 200 MUS \$. This was unreasonable and led GCM to accept the rest of the agreement to its own disadvantage, and also to cede services that were far too important compared with the size of the project promised by its partner". IMC, o.c., Chapter Partenariats, 1.3.1.c.

<sup>45</sup> "The result of the management since 1996 is quite disturbing (...) 52 MUS \$ of expenses up to this day for a feasibility study that has not been delivered to GCM, which was far beyond the foreseen budget. This sum includes 13 MUS \$ of interests and several MUS \$ of fees and other services billed by the partner". According to the Lutundula Commission's report, only US \$15 million had been budgeted for prospecting and a feasibility study. O.c., p. 147.

<sup>46</sup> « Les partenariats seraient analysés de façon approfondie puis négociés ou renégociés par une équipe d'experts dont des experts internationaux. L'objectif serait de développer le secteur et optimiser les revenus de l'Etat, dans une approche rétablissant une relation équitable entre Etat et investisseurs ». (The partnerships should be analysed more profoundly and then negotiated or renegotiated by a team of experts with also some international experts. The goal was to develop the sector and optimise the state revenues, so that a fair relation between the state and the investors would be established »). IMC Group Consulting Ltd, La Restructuration de la Gécamines. Draft Phase 2, November 2003. Unpublished document.

<sup>47</sup> Duncan & Allen, Projet d'évaluation juridique des accords de partenariat de la Gécamines, April 6, 2006.

<sup>48</sup> Duncan & Allen, o.c. Annexe B1, p. 8.

concluded in 2006 that a reduction of the size of the concessions given to Lundin Holdings had to be part of a renegotiation.<sup>49</sup>

IMC concluded that the TFM Joint Venture was most unfavorable for Zaire, but who bears the responsibility on the Zairian state side? The name of the Minister of Mines, Mutombo Bakafwa, does not appear in documents related to the Joint Venture and has not been mentioned in later reports either.

On Gécamines' side, the person responsible for the Joint Venture was Umba Kyamitala<sup>50</sup>, then *Président Délégué Général* (PDG) of the state mining company. Despite his title, the PDG did not hold a large space for power and the Mining Minister in office and President Mobutu took final decisions.

In the book "No Guts, No Glory", one of Adolf Lundin's colleagues, Bill Rand, describes the negotiations as "chaotic". Gécamines' representatives had no experience in negotiations. When the negotiations with Gécamines were finished, they needed to repeat the same procedure with uninformed government officials in Kinshasa. On August 25, 1996, Adolf Lundin and Umba Kyamitala finally met with President Mobutu Sese Seko for the final signature and approval of the deal. The meeting took place in the dictator's home in France where he was being treated for his worsening prostate cancer. In the book, Adolf Lundin admits that he offered a donation for Mobutu's election campaign that was set for the following year. The book does not mention any sum. Three months later, on November 30, 1996, the final deal was signed. Adolf Lundin claims, however, that no money was paid in the end since Mobutu never reminded him of his offer. According to Bill Rand, they gave 15 Zairian negotiators US \$1.000 each, otherwise they would not have turned up. He says, the payment was necessary because their bankrupted employer, the ministries and the Zairian state, no longer paid any salaries.<sup>51</sup>

The President's approval was needed, but it was Umba Kyamitala that signed the *Convention de Création* together with his Délégué Général Adjoint Yawili Nyi Zongja and Adolf Lundin. Sources in the Congolese press believe that Umba Kyamitala (who died in 2000) misused his position at the top of Gécamines in the TFM dossier. Congolese journalists assumed that he gave Lundin Holdings the Joint Venture contract in 1996 before GCM's adjudication committee had officially finished the selection of the Iscor and Lundin bids. Their report has this description : *"A la surprise générale, alors que le comité d'adjudication mis en place par la GCM à cet effet s'appropriait à présenter le rapport, il s'est vu convoquer par le président délégué général (Umba Kyamitala) de l'époque qui leur a lu, pendant 1 h 30, un document déjà élaboré faisant objet de rapport final et pointant froidement Lundin comme le premier à manifester le désir de développer avec la GCM, un partenariat et que «le pas de porte» -comprenant la prime de cession, la prime d'option et la prime de production était le plus important (US \$250 million ) "*<sup>52</sup>.

After signing of the contracts, Gécamines itself seemed to fall into passivity. The IMC Report says: *"GCM qui a souvent bien analysé les défauts du partenariat, n'a assuré aucun suivi ni engagé aucune action"*<sup>53</sup>. Yet, before the deal was sealed, the technicians of Gécamines had analysed the conditions of the TFM partnership.<sup>54</sup> In their *Calcul de rentabilité et de la période de remboursement économique* (pay back period), they made the following projections. From year 1 through year 5, TFM would pay the following expenses: US \$381.26 million for advances in investment, exploration and fees, and US \$71.6 million in interest (at 9% "Lundin rate"), or a total of US \$452.87 million. From year 6 onwards, the first revenue was expected to come in. Total revenue after 27 years was then calculated at roughly US \$26 billion.

<sup>49</sup> Duncan & Allen, o.c. 4.4.1.

<sup>50</sup> Umba Kyamitala belonged to the old guard under dictator Mobutu. President Laurent-Désiré Kabila nevertheless named him Minister of Strategic Resources and Development, a position he held from June 8, 1998 until March 15, 1999.

<sup>51</sup> The events and the meeting with Mobutu are described by Bill Rand and Adolf Lundin in Eriksson R, Adolf H Lundin: Med olja i ådrorna och guld i blick, Stockholm 2003, p. 262-266.

<sup>52</sup> "To the surprise of all, and while the attribution committee put in place by GCM for this purpose was getting ready to present the report, this committee saw itself summoned by the chief executive (Umba Kyamitala) at that time, who then for one hour and a half read to them an elaborated document which was the final document, coldly pointing to Lundin as the first one to declare the desire to develop a partnership with GCM and stating that Lundin's key money – which included the transfer fee, the option bonus and the production bonus – was the most important (250 million US \$ US)". Les Grands Enjeux n°3/2005. For additional information, view: <http://www.congoforum.be/fr/economiedetail.asp?subitem=31&id=21613&economie=selected> This article is based on a report by Congolese NGO Relcof (Réseau de Lutte Contre la Corruption et la Fraude).

<sup>53</sup> « GCM, which has often well analysed the flaws of the partnership, did not do any follow up or engage in any action whatsoever ». IMC, o.c.

<sup>54</sup> Gécamines, Evaluation Financière de la Convention avec le Groupe Lundin in : Gécamines. Projet de développement en commun des gisements de Tenke-Fungurume avec le groupe Lundin. September 1996.



## Company contributions to political parties and election campaigns

Different multinational companies take different stands in their ethical policies and codes of conduct concerning contributions to political parties and election campaigns. Anglo American, one of the world's biggest extractive companies, adopted a policy in 2004 prohibiting all forms of political donations.\* However, Lundin Mining lacks such a general prohibition. The company's code of conduct instead requires the approval of the Board of Directors (or a commission authorized by the Board) if money or anything having value will be donated.\*\*

In January 2008, SwedWatch requested information about the cases where Lundin Mining's Board or authorized committees have approved or disapproved the giving of political financial means to politicians or political entities. Catarina Ihre, Head of Investor Relations at Lundin Mining, replied that board meeting protocols are not public information, but claims that Lundin Mining or other companies within the Lundin Group have never contributed to any political parties, candidates or campaigns. "We do not give any political contributions. We take a neutral political position in all countries where we operate."\*\*\*

However, as described in the text above, Adolf Lundin admitted in an interview a few years ago that he offered a donation to Mobutu's election campaign in 1996; at the very same meeting, Mobutu was asked to approve the Tenke Fungurume contract.

There is an imminent risk that political financial offers or contributions by companies favour the donor during bidding processes or in other negotiations, especially in countries characterised by a high degree of corruption and a lack of transparency like the DR Congo. When such transactions take place, there is a great risk that the offers or donations will be the deciding factor in the bidding process; instead of the company's capabilities and what is best for the country. In such an environment, there is no guarantee of fair treatment for the bidders. In 2007, the DR Congo adopted a new law regulating party financing. However, the law says nothing on company contributions.

\*Edward Bickham, Group Head of External Affairs at Anglo American, email to SwedWatch dated December 19, 2007. According to Edward Bickham, Anglo American made an exception to this policy in 2004 in relation to South Africa when a contribution to the campaign funds of all the major parties was made, as an investment in supporting the democratic process in a country where democracy remains relatively young. Bickham stresses that this was regarded as almost certainly being a one-off exception.

\*\* Lundin Mining's Code of Conduct, (D:2). The Code states that "the direct or indirect use of Corporation funds, goods or services as contributions to political parties, campaigns or candidates for election to any level of government requires the approval of the Board of Directors or a committee authorized by the Board". Moreover the code prohibits "illegal payments" (D:4).

\*\*\*Catarina Ihre, SwedWatch telephone interview, January 21, 2008.

## History's legacy

### Abstract

*In 1996, Tenke Mining Corporation of the Lundin Group became the operator of the Tenke Fungurume Mining project. When Lundin's management wanted to begin site work, it encountered a Belgian entrepreneur who ran a brick factory there. He had bought all the surface facilities from a predecessor of TFM in the 1980s and demanded a serious compensation before he would be willing to leave the concessions.*

Photographs taken shortly after World



*In the 1970ies, an international consortium started explorations at the Tenke and Fungurume mining concessions.  
(Photo from Tenke Mining Corp. website)*



War I (1914-1918) testify of some exploration activity at Tenke and Fungurume, but the first real attempt to start mining the copper reserves dates from the 1970s. In 1972, an international consortium was created for that purpose, the *Société Minière de Tenke Fungurume* (SMTF).<sup>55</sup> Apart from the Zairian state, which took 20% of the shares, the following international companies were involved:

- Amoco (USA, daughter of Standard Oil of Indiana, 28%),
  - Charter Consolidated (South Africa, daughter of Anglo American Corporation, 28%),
  - Mitsui (Japan, 14%),
  - Le Bureau de Recherche Géologique et Minier (France, 7%) and
  - Leon Tempelman and C° (USA, 3%).
- SMTF never began mining. In 1976, the project was put on hold for many reasons: costs had gotten out of hand; the world's copper prices took a deep dive; and war in Angola put the Benguela Railway, the traditional exit to the Atlantic Ocean for Katanga's minerals, out of use.

In 1984, all the surface constructions built by SMTF were sold for only US \$3 million to Belgian entrepreneur Frans Couttenier. He then started a brick factory along with a stone crushing installation that he owned in the Fungurume concession.

When Lundin first arrived at the Tenke and Fungurume mining site, the group found the Belgian entrepreneur there and his family's brick making company called Trabeka.<sup>56</sup> Lundin Holdings rented houses for its personnel from Trabeka. A conflict soon arose between the two parties when Lundin made it clear that Trabeka had to leave the premises. Trabeka wanted to continue its industrial activity and demanded a considerable financial compensation for the rest of the surface constructions.<sup>57</sup> Normally, the state company Gécamines was responsible for the building structures within the concessions it had ceded to TFM, but Gécamines found itself in a Catch-22: it could only compensate Trabeka after it had received the first installment of the transfer fee that Lundin Holdings was due to pay. Consequently, Gécamines did not show any enthusiasm to seek an arrangement with Trabeka.

According to Trabeka's owner, Adolf Lundin decided to take matters into his own hands. Mr. Lundin flew in at the Fungurume airstrip on his company jet in December 1996, where he made his way to the first meeting of the Board of the newly formed Tenke Fungurume Mining Company in Kinshasa. The board meeting took place on December 18, 1996<sup>58</sup>, but Mr. Lundin and his staff were unable to reach an agreement with Trabeka. In March 1997, Tenke Fungurume Mining (now operated by Lundin) asked for five land ownership titles/certificates ("*des titres mobiles*") from the *Conservateur des Titres Immobiliers* in Kolwezi-Lualaba.<sup>59</sup> In March 1998, Gécamines and Trabeka created a mixed commission to settle for compensation. Finally, the case was introduced before the *Tribunal de Grande Instance* in Kolwezi, where a first judgment was made in the spring of 1999. It gave Trabeka time to leave the area, but it also condemned Gécamines to the payment of indemnity for the reacquisition of Trabeka's assets.<sup>60</sup> Other court cases have followed, the latest one in 2004, and to this date, the case has not been settled.

## Kabila takes power

### Abstract

*The political situation in Zaire changed in early 1997. Laurent-Désiré Kabila chased Mobutu from power. Despite the turmoil from the events, the plans of Lundin Holdings remained unaffected. The company confirmed the TFM contracts with the new regime. Lundin Holdings paid a first transfer fee of US \$50 million. The Lutundula Commission, stating that half of this sum was paid to a private company partly owned by President Laurent-Désiré Kabila, later put allegations forth. Representatives of the Lundin Group have denied any such payments.*

<sup>55</sup> Willame J-C, Zaire, l'épopée de Inga, Paris, 1986, p. 136.

<sup>56</sup> Trabeka means Société des Traverses à Béton du Katanga.

<sup>57</sup> This reconstruction is based on interviews with Trabeka's owners, Frans Couttenier (November 10, 2007 in Brussels) and his son Walter (October 26, 2007 in Lubumbashi) and on an unpublished document (shown to the author for perusal only) made by Lundin Holdings and its legal advisors in 2006: Lundin Holdings. Livre Blanc 'Litige Trabeka'. June 30, 2006.

<sup>58</sup> Duncan & Allen, Projet d'évaluation juridique des accords de partenariat de la Gécamines. April 6, 2006. Annexe B1, p. 5.

<sup>59</sup> Lundin Holdings. Livre Blanc 'Litige Trabeka', June 30, 2006, p. 10.

<sup>60</sup> Tribunal de Grande Instance de la Ville de Kolwezi. Audience publique du mai 12, 1999. Trabeka contre TFM, conservateur des titres immobiliers de Kolwezi et Gécamines. Unpublished document.

On May 17, 1997, Laurent-Désiré Kabila, a staunch Mobutu opponent, along with his allies of the *Alliance des Forces Démocratiques de Libération* (AFDL) took power in Kinshasa and became the president of the DR Congo. AFDL's patrons were Presidents Kagame of Rwanda and Museveni of Uganda. It is widely assumed that the US at least passively approved of their plan to invade Zaire.<sup>61</sup> AFDL wanted to get rid of the Rwandan mass murderers ("génocidaires") who were terrorising the Hutu refugees and the population in Eastern Congo and who also undertook violent raids over the border into neighboring Rwanda. In September 1996, the AFDL started its activity out of the Kivus and for some time kept its headquarters in Goma, capital of the North Kivu province. In the first stage, its military strength was delivered by Rwandan and Ugandan troops.

From January 1997 onwards, it became clear that President Mobutu's reign was over. AFDL's main goal changed from finishing off the Hutu-génocidaires to finally putting an end to Mobutu's regime. The rebel alliance pointed its main columns of troops, supporters and *kadogo* soldiers (*kadogo* means child in Swahili) to Kisangani in March, to Lubumbashi in Katanga in April (where they met resistance from Mobutu's Special Forces) and finally to the capital, Kinshasa, in May 1997.

Belgian historian Erik Kennes, who has studied the politics of Laurent-Désiré Kabila, stresses that during AFDL's progress towards Kinshasa, not a single new contract was sealed. Florent Kambale Kabila Mututulo was the first Minister of Mines under President Kabila from July to December 1997.<sup>62</sup> When interviewed by IPIS in October 2007, Mr. Kambale stated that mining representatives from South Africa, the United States, Uganda, as well as others, went to meet him in March or April 1997 in Lubumbashi and that many came with "envelopes" (black money).<sup>63</sup> Mr. Kambale claims that AFDL wanted to clear everything through bank accounts, and "worked with documents, not with money", but the problem was that, as the AFDL march approached Kinshasa, former Prime Minister Kengo Wa Dondo had fled and many documents disappeared from the Ministry of Mines. The new rulers in Kinshasa were unable to judge existing contracts concluded during Mobutu's rule, including the contract with Lundin Holdings.

During this process, the Lundin Group switched sides from the Mobutu camp to the AFDL camp. The knowledge that AFDL was passively approved by the US may have played a role in this. In early 1997, Lundin's management had an office in Goma and established its first contacts with AFDL leaders. Lundin's security personnel, with former British Special Forces among them, had been dispatched to Fungurume where they lived in houses rented from Trabeka.<sup>64</sup>

In this highly unstable environment, TFM did not encounter serious problems. "We have spoken with Kabila and he seems to be on our side", Adolf Lundin announced in March 1997.<sup>65</sup> A few weeks later, the rebels took control over the Katanga province where Tenke and Fungurume are located. Shortly after this, analysts in Johannesburg claimed that Adolf Lundin and his company group were, together with American Mineral Fields, the most important financial contributors to Laurent Kabila's political movement AFDL.<sup>66</sup> The Lundin Group denies having contributed financially to AFDL or any other political movement in the country. "The Lundin Group has gone to great lengths to be politically neutral in an extremely complex political environment", writes Lundin Mining in a letter to SwedWatch and IPIS in January 2008.<sup>67</sup>

On April 28, 1997, Lundin struck a new deal with the new Minister of Mines and his new Finance colleague. The existing Convention Minière and the government decrees from December 1996 were confirmed.

<sup>61</sup> See: Gribbin R, *In the Aftermath of Genocide, The US Role in Rwanda*, Lincoln 2005. Mr. Gribbin was the US Ambassador to Rwanda at the time of AFDL's uprising against president Mobutu.

<sup>62</sup> Florent Kambale has been described as "Kabila's brother". He nevertheless was imprisoned for several months by president Kabila for undisclosed reasons.

<sup>63</sup> IPIS Interview with ex-Minister Florent Kambale, October 19, 2007 in Kinshasa.

<sup>64</sup> IPIS Interview with Walter Couttenier on October 26, 2007.

<sup>65</sup> Eriksson R, *Adolf H Lundin: Med olja i ådrorna och guld i blick*, p 266-277, Stockholm 2003.

<sup>66</sup> Ibidem.

<sup>67</sup> Letter from Lundin Mining to SwedWatch, January 28, 2008. "Lundin Mining can not comment on American Mineral Fields but the Lundin Group were absolutely not financially contributors to Kabila's or any other political movement in the DRC at any time then or now. The Lundin Group has gone to great lengths to be politically neutral in an extremely complex political environment."

In April or May 1997, Lundin Holdings paid a first amount of US \$50 million, as agreed in the contract, in return for Gécamines ceding its concessions. Whom this sum was paid to has been subject of discussion. The report compiled by the parliamentary Lutundula Commission stated in 2005, without mentioning a source, that half of the sum had been transferred to a bank account held by the company Comiex Ltd at the *Banque de Commerce, Développement et Industrie* (BCDI) in the Rwandese capital Kigali. The other US \$25 million would then have been paid to Gécamines.<sup>68</sup> Ex-minister Florent Kambale confirmed to IPIS in October 2007 that Comiex had existed but refused to give more information on this company.<sup>69</sup>

The Lundin Group's Tenke Mining Corporation, which operated TFM when the allegations were put forth, denies having paid any sum of money to Laurent Kabila. In a letter addressed to the UN Panel of Experts on the Illegal Exploitation of Natural Resources in the DRC in 2003, the company claimed that US \$50 million, the whole sum, was paid to Gécamines.<sup>70</sup>

### The Lutundula Commission

The Lutundula Commission was set up in 2004 because of the Pretoria Agreement (December 2002) which marked the end of the war. Therefore, the *composantes* (the former war enemies who now constituted the political factions) joined the commission. Its president was Christophe Lutundula, a member of the Assemblée Nationale (the chamber of commons of the Congolese parliament) with a long political curriculum during the Mobutu regime. The commission's task was to examine the validity of the conventions sealed between state and private actors during the First War (of liberation, 1996-97) and the Second War (of aggression, 1998-2003). The commission finished a first part of its report in June 2005 (the second part never followed), but the conclusions were never debated in parliament. In early 2006, the report was published online by an unknown source.<sup>71</sup>

It is truly a pity that the Lutundula Commission lacked time, means and methodology. Its budget, US \$443,327 in total from the World Bank, was seen as largely insufficient. Consequently, its reporting is not very complete. Nevertheless, as the Lutundula Report details the state of the mining sector during the wars, it is an extremely important document for Congolese society. If all its revelations would have been sustained by firm proof and verifiable sources, the DR Congo might look a bit different now.

## Ten years without production

### Abstract

*Lundin never began mining. In February 1999, the company announced that the war made every mining activity impossible and it invoked 'Force Majeure'. Information also indicates that Tenke Mining Corp. lacked the money needed to proceed since financing from international banks disappeared when the war started. The reasons for halting the project have been questioned, but the Congolese state and Gécamines did not contest the Force Majeure that was lifted only in 2005. Because of the events, some of the DR Congo's richest mineral assets were untouched for almost ten more years.*



*Tenke Fungurume Mining constructed extremely wide roads within its concessions. (Photo IPIS)*

<sup>68</sup> The Lutundula Commission's report, p. 147.

<sup>69</sup> Comiex is referred to as "*société para-étatique appartenant au président Kabila et à d'autres intérêts privés*" in : Kennes E, *Secteur minier au Congo*, o.c., p. 316. An IPIS report has called Comiex «the mining venture of Laurent Kabila» (*Network War, Introduction to Congo's privatised war economy*, October 2002). According to the British NGO Global Witness, Laurent-Désiré Kabila was the majority shareholder of Comiex-Congo, based in Kinshasa (*Branching Out, Zimbabwe's Resource Colonialism in DR Congo*, February 2002).

<sup>70</sup> Tenke Mining Corp., Reaction N° 02, May 21, 2003. In Un Panel report S/2002/1146/Add.1

<sup>71</sup> The report is available at <http://freewebs.com/congo-kinshasa/>.

In August 1998, Rwanda and Uganda launched a blitzkrieg to remove their former ally Laurent-Désiré Kabila from power in Congo. In the following months, rebel movements began, led by well-known and former top-figures from the Mobutu regime. To counter these movements, President Kabila received military support through the Southern Africa Development Community (SADC), consisting of Namibia, Angola and Zimbabwe. The blitz, which was meant to be over after ten days, became a war of trenches with a diagonal front line splitting the country in two.

In February 1999, Lundin announced that it could not continue its operations because of the ongoing war. On February 23, 1999, TFM and Lundin Holdings declared *Force Majeure*.<sup>72</sup> They said they were no longer able to continue the preparations for the mining project because of the political and military turmoil, and they suspended their commitments. TFM also officially blamed Gécamines because it had been unable to keep the concessions clear of illegal exploitation by the military.<sup>73</sup>

The actual war was not a reason to declare *Force Majeure*, as that part of Katanga did not directly suffer from war operations. TFM and Tenke Mining Corp. based its declaration of Force Majeure on two presidential decrees<sup>74</sup>, issued a month earlier, which contained security measures for the whole of the territory. There were, however, troops at TFM's concession during the war. They were part of the larger army contingents that the DR Congo's President Laurent-Désiré Kabila held in reserve behind the front line in the Katanga province. They stayed in the mining village, where Lundin's private security personnel once were housed, and they left the camp in ruins.

Years later Lundin Mining describes that 500 to 3.000 soldiers occupied the concessions at times, damaging infrastructure and causing physical harm to employees and their families. "Illegal artisanal mining problems propagated with no control by the authorities, all of which created grave social pressures on the people of the local towns of Fungurume and Tenke and loss of TFM mineral and surface assets."<sup>75</sup>

Were there also other reasons for TFM and Lundin Holdings to declare *Force Majeure* than the problematic presence of military and artisanal miners? Information indicates that Lundin Holdings lacked money and that this played a role in the decision. The contract stipulated that Lundin Holdings was to pay the second part of the transfer fee four months after the Feasibility Study was accepted by the banks.<sup>76</sup> Lundin Holdings / Tenke Mining Corporation had to pay US \$50 million to Gécamines, but lacked this sum of money.<sup>77</sup> Since the Feasibility Study was never completed and delivered, no money had to be paid. The *Force Majeure* froze Lundin Holdings' obligations as well as the operations.

The report by Duncan & Allen from April 2006 states that the clause of *Force Majeure* in the Mining Convention did not conform with international standards and could have been easily used by Lundin as a mere excuse for not fulfilling its obligations.<sup>78</sup> However, the clause of *Force Majeure* in the TFM Convention was far too general and spoke of "any sudden and unforeseeable event"<sup>79</sup>; it was easy for Lundin Holdings to use it whenever suitable.

According to Duncan & Allen, the Congolese state and Gécamines made a mistake by not contesting Lundin's declaration of *Force Majeure*. After February 1999, Gécamines and the Congolese state should have immediately sought a ruling to contest the *Force Majeure*. Duncan & Allen found that, "out of weakness they haven't done so"<sup>80</sup>. They also failed to formally notify Lundin for not having kept its obligations within the convened timing.<sup>81</sup> Zimbabwean national Billy Rautenbach, today banned from the DR

<sup>72</sup> Duncan & Allen. Annex B1. p. 9. A *Force Majeure* (Greater Force) is a clause that is common in contracts and excludes the signing parties from legal obligations during major and unforeseeable events.

<sup>73</sup> Ibidem.

<sup>74</sup> Les Décrets N° 171 et N° 172 de la RDC du janvier 2, 1999. Annexe B1, p. 9.

<sup>75</sup> Letter from Lundin Mining, January 28, 2008.

<sup>76</sup> Eriksson R, Adolf H. Lundin, *Med olja i ådrorna och guld i blick*, Stockholm 2003, p. 271-273.

<sup>77</sup> Ibidem.

<sup>78</sup> Duncan & Allen. Annex B1 p. 9.

<sup>79</sup> "Tout événement soudain ou imprévisible ou insurmontable". Cited by Duncan & Allen. Annex B1 p. 9.

<sup>80</sup> Duncan & Allen. Annex B1 p. 9.

Duncan & Allen write that Lundin Holdings was to deliver a feasibility study within 24 months after the deal had entered into force. The law firm did not find information about what date the deal did enter into force, but assumed that it was on January 1, 1997 at the latest. If this was the case, the deadline was not met and Lundin Holdings did not live up to the company's obligations. If the deadline did occur after the Force Majeure had been announced, the obligation was frozen before the deadline. According to Lundin Mining, there was no such thing as

Congo and wanted for corruption and fraud in South Africa, headed Gécamines at that time. If the *Force Majeure* would have been fought, Gécamines and the state would have had a strong legal instrument against Lundin Holdings, especially if the contract had to be renegotiated.<sup>82</sup>

The case of *Force Majeure*, declared in February 1999, was lifted in 2005. The most recent information from the company states that production will start in 2009. Because of the events, the DR Congo has not benefited from one of its most valuable mineral assets for ten years.

In January 2008, Lundin Mining gave IPIS and SwedWatch its views about the events between 1999 and 2005 when the *Force Majeure* was lifted.<sup>83</sup> According to Lundin Mining, significant investments in drilling, test work, local infrastructure and project financing had been made up until the war broke out in August 1998. The company also states that it had invested in feasibility and environmental/social studies. "TFM did their best to keep the project moving after this but as President Laurent Kabila officially declared a state of war, martial law was imposed, international bank financing disappeared and other material things occurred making it impossible for TFM to proceed", writes Lundin Mining in its letter, stressing that the *Force Majeure* was well founded.

According to the company, it made several attempts to progress the project the following years, but it was impossible to re-start the project until the government had removed "the significant military presence from the Tenke Fungurume concessions", which it did not do until the end of 2005.

The war years also caused great damages to TFM shareholders. "TFM running costs of US \$2 million per year during the war went with little value, our initial investment of US \$88 million spent by the end of 1998 sat frozen for a 5 year period at great loss of value for TFM as a single asset company. Tenke Mining Corp had to write off more than US \$100 million, and its share price plummeted to all time lows, causing dramatic losses to shareholders", writes Lundin Mining.

## In search of a helping hand

### Abstract

*Despite the war and the Force Majeure status of the Tenke Fungurume Mining project, the Lundin Group went to search for industrial partners. Major mining companies such as Australian BHP and Phelps Dodge from the US showed an interest of entering the project. Both BHP and Phelps Dodge demanded new terms for the TFM contracts.*

From 1998 onwards, Lundin Holdings/Tenke Mining Corporation (TMC) was searching for a business partner which indicates that the company lacked the financial capacity to proceed on its own. In December 1998, BHP Copper agreed to take the option to directly or indirectly acquire a 45% stake in TFM in return for providing development funding.<sup>84</sup> In 2002, BHP withdrew its option and left it to the major US mining company Phelps Dodge.

With regard to TFM, the Lutundula Commission's report states, "despite the status of *Force Majeure*, Lundin Holdings has informed Gécamines by mail that it has made buying option contracts with two new investors, BHP Billiton and Phelps Dodge"<sup>85</sup>. This meant that Lundin Holdings/TMC, on one hand, had stopped its mining activities arguing that it could not proceed due to the war and military presence. On the other hand, the company continued its financial dealings with mining giants such as Phelps Dodge

a deadline dated December 31, 1998 in any of the contractual commitments.

<sup>82</sup> The conclusions essentially reads as follows: "la renégociation en ce moment viserait soit (a) l'élimination de toute disposition en dérogation de la loi sans contrepartie soit (b) le maintien de ces dispositions dans un projet de loi approuvant la Convention Minière et la CMAR qui serait soumis au Parlement si les partenaires acceptent certaines révisions des termes – notamment en ce qui concerne la force majeure, la résiliation anticipée, le remboursement prioritaire avec intérêt des avances de LH, et l'envergure des droits miniers transférés à TFM". (« At this moment, the renegotiation would aim either at (a) the elimination of every disposition of dispensation from the law without compensation or (b) the maintaining of the dispositions in a project of law that approves the Mining Convention and the CMAR which would be submitted to Parliament if the partners accept certain revisions in these terms – and notably for the force majeure, the anticipated resiliation, the priority repayment with interest of the installments of LH and the size of the mining rights transferred to TFM »). Duncan & Allen, Rapport Final, April 6, 2006. Annexe B1, Fiche analytique de l'accord de partenariat Tenke Fungurume, p. 27.

<sup>83</sup> Letter from Lundin Mining, January 28, 2008.

<sup>84</sup> Coakley G, The mineral industry of Congo (Kinshasa) in 1998. p 3.

<sup>85</sup> The Lutundula Commission's report, Kinshasa June 26, 2005, p.148.



and BHP. According to the Lutundula Commission's report, BHP and Phelps Dodge put forward one condition for their participation: they wanted the TFM contracts renegotiated.

To this effect, negotiations took place in October 2000, June 2001, March 2002, May 2002 and March 2004. According to the Lutundula Commission's report, the companies demanded that production targets and the state mining company Gécamines' shares should be decreased. Moreover, they demanded a lowering of the payment for the concessions from US \$250 million to US \$50 million.

#### **Demands from the private companies <sup>86</sup>**

Before getting involved Lundin and Phelps Dodge had a number of demands that they wished to see implemented:

- The reduction of the production level, from 100,000 tonnes of copper and 8,600 tonnes of cobalt in the first stage to 30,000 tonnes of copper and 2,800 tonnes of cobalt per year. If for a 3 to 4 year period the market and the financing conditions then remained favorable, the production could be increased again to 130,000 tonnes of copper per year,
- The reduction of their financial input (*pas de porte*) from US \$250 million to US \$50 million; the sum already paid in 1997,
- The replacement of the *pas de porte* by a levy of 2% on the value of the yearly off-mine production,
- The reduction of Gécamines' stake in TFM's capital from 45% to 20% or else – if the government decided to impose the new stricter Mining Code,
- The replacement of Gécamines' stake with a 5% stake for the Congo state and
- An increase in the interest rate for loans and financing from the Reference Rate+2% to the Reference Rate+8%.

In the end, it appears that Lundin, BHP and Phelps Dodge wanted nothing more than a tiny production from a huge deposit. They also wanted to reduce the public control exercised through Gécamines, by radically reducing the parastatal's shares from 45 % to 17.5 %. At the same time, their intention was to increase some of their own financial benefits and reduce some of their financial obligations.

In 2002, BHP dropped its option on a stake in TFM. BHP was formally replaced by Phelps Dodge, which, from 2002 onwards, took over the operational lead of TFM from the Lundin Group's Tenke Mining Corp. During that time, Tenke Mining Corp. concentrated on allegations put forth from the United Nations (UN) Panel of Experts appointed by the Security Council.

In October 2002, Tenke Mining Corp. was accused of acting in violation of the Organization for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises in the first report of the UN Panel of Experts on the Illegal Exploitation of Natural Resources in the DRC.<sup>87</sup> On April 21, 2003, Tenke Mining Corp. met the Panel in Nairobi. There, the Panel "presented concerns that TMC/Lundin Group [Tenke Mining Corporation/ the Lundin Group] was granted exemptions from paying taxes to the central government of the DRC for a period of 10 years, and additionally that TMC/Lundin Group obtained tax advantages for each mine operated in the DRC". In its answer, Tenke Mining acknowledged that, "TMC (through Lundin Holdings and TFM) were in receipt of limited tax exemptions and certain tax advantages" without giving any details.<sup>88</sup>

The UN Panel apparently accepted Tenke Mining Corp.'s arguments and explanations. In a follow up document by the UN Panel from October 2003, both the Lundin Group and Tenke Mining Corp. found themselves in what is known as a Category-I, meaning "Resolved, no further action required"<sup>89</sup>. The Panel refrained from explaining how the decision to put companies like Tenke Mining Corp. in the category of resolved cases had been made.

<sup>86</sup> Ibidem.

<sup>87</sup> UN Panel of Experts, *Final Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo*, S/2002/1146, Annex III, October 16, 2002.

<sup>88</sup> Tenke Mining Corp. Reaction no 02. May 21, 2003. In S/2002/1146/Add.1.

<sup>89</sup> UN Panel of Experts, Report S/2003/1027, Annex I, dated the October 23, 2003.

Phelps Dodge and Tenke Mining Corp. then decided to direct all of their efforts to a new TFM deal. In May 2003, Tenke Mining wrote to the UN Panel, "Since late 1998, we have been attempting to obtain modifications to our underlying commitments whereby the remaining transfer payments and existing TFM tax exemptions are replaced by a system of long term royalties and regular corporate income tax".<sup>90</sup> In light of the new TFM contracts from 2005, one can say that Tenke Mining Corporation acknowledged some of the Panel's critiques.

Between January and September 2003, Phelps Dodge had the mining project redesigned. In September of the same year, the US company submitted a "development proposal" to Gécamines and the new Transitional government. Phelps Dodge aimed at "a smaller scale initial start (...), revised phases of the project and other modifications to initial plant size and other commercial terms to mitigate the effects on the project caused by the DRC conflict"<sup>91</sup>.

Tenke Mining Corporation and Phelps Dodge went to see the ECOFIN (economic ministerial committee) in November 2003. The committee, headed by Vice-President Jean-Pierre Bemba, authorized for the final discussions with Gécamines and the Ministry of Mines. The discussions started in spring 2004. Then, on January 16, 2004, Phelps Dodge Exploration Corporation and Tenke Holdings formally teamed up. The two companies signed a shareholders agreement whereby Phelps Dodge would become 70% owner of Lundin Holdings.<sup>92</sup>

## Rushing negotiations

### Abstract

*In 2005, Phelps Dodge became the second private partner in Tenke Fungurume Mining Company s.a.r.l. Once restructured according to the demands of both Lundin Holdings/Tenke Mining Corporation and Phelps Dodge, the Joint Venture obtained a bigger stake in TFM and a reduction of their financial and industrial obligations. The Congolese politicians discussed the amendments behind closed doors. Vice-President Jean-Pierre Bemba was the most senior official present. The politicians were sure to move fast, before the upcoming democratic elections in 2006 and before audits funded by the World Bank presented their conclusions.*

The Congolese population has bad memories of the Transition. This period started with the inauguration of the Transitional government on July 1, 2003 and ended with the general elections in 2006 and the constitution of Prime Minister Antoine Gizenga's government in January 2007.

<sup>90</sup> *Idem.*

<sup>91</sup> Tenke Mining Corp., *Annual Report 2004*, p.

<sup>92</sup> *Idem.*



A stone crushing installation (front) stands idle, while TFM has ordered to build a brand new one (back). (Photo IPIS)



Tenke Fungurume Mining has levelled the zone where it plans to build the processing plant (Photo IPIS)

The terms of the Transition were negotiated during the Inter-Congolese Dialogue. From the very beginning, this dialogue was patronised by the outside world: the US, the UK, South Africa and some other actors. Negotiations always took place outside of the DR Congo and the international community heavily influenced them. The outcome of the Dialogue was, and still is today, highly contested because it neglected the country's invasion by enemy armies and only put the former internal foes together. This tendency already appeared from the first ceasefire-agreement of July 1999, reached in Lusaka, but also formed the basis of the final agreement.

The result is a Global and Inclusive Agreement that was reached in December 2002. The Agreement stated that five warring factions were to constitute the new Transition Government of National Unity and the Transitional Parliament. As a result, the DR Congo was left with a shared presidency, with one president (Joseph Kabila) and four vice-presidents (one from the loyalist camp close to Kabila, two from the rebel movements MLC and RCD-Goma, and one from the non-armed opposition). This 1+4 formula was reproduced for all Transitional institutions. Two years after the Transition's start the Lutundula Commission concluded: "the bleeding of natural resources has amplified under the cover of immunity granted by the Constitution to the government's managers"<sup>93</sup>. Among the Congolese, who grew deeper into misery each day of the Transition, the following sarcastic conclusion became common: *Un plus Quatre égale Zéro* (1+4=0).

In 2004, just a few months after the Transitional Government was installed, Phelps Dodge had the government aligned on its proposal stating that there would be no real renegotiation of the TFM contracts from 1996. Instead, the initial contract of 1996 would be amended. Production would aim at some 40,000 tonnes of copper in the first period. An inter-ministerial committee around mid-2004 later confirms this. From there, new meetings led to a deal in December 2004. Once again, the future of one of the DR Congo's richest mineral assets was negotiated behind closed doors and without transparency.

According to the Congolese newspaper *Le Potentiel*, Vice-President Jean-Pierre Bemba weighed heavily on the proceedings. Bemba belonged to one of the most fanatic Mobutist clans and with all the fraud and corruption, which such a connection implied. During the war, he led the MLC rebel group, sustained by Uganda. At the end of 2002, his MLC movement was accused of war crimes (cannibalism).<sup>94</sup> Bemba himself has been convicted by a Belgian court for human trafficking.<sup>95</sup>

*Le Potentiel*, a newspaper traditionally close to Mobutist circles, wrote that Bemba addressed a letter directly to Gécamines and Lundin on January 20, 2005.<sup>96</sup> In this letter, Bemba referred to a videoconference that took place on December 23, 2004, "in the offices of the World Bank"<sup>97</sup>. Reportedly, participants of this videoconference were Lundin Holdings, Phelps Dodge Exploration Corp., the Minister of Planning, the Governor of the *Banque Centrale* and the principal counselor to the Presidency (Bemba's representative). However, *Le Potentiel* does not mention the presence of Gécamines. Bemba wrote that the parties reached a consensus on the revised TFM project and he authorized for the start of the negotiations with Gécamines to amend the existing contracts.

A striking fact of the proceedings was that the Minister of Mines, Diomi Ndongala, was totally absent whereas the Minister of Planning was present. When interviewed by IPIS in October 2007, Diomi Ndongala claimed that "the TFM deal was decisive for the presidential elections"<sup>98</sup>. In other words, the one who dealt "positively" with the Lundin/Tenke Mining Corp.'s and Phelps Dodge's proposals, received access to considerable financial means.

<sup>93</sup> "Le gouvernement de Transition n'a pas fait meilleur que ceux qui ont exercé le pouvoir d'Etat pendant la période des guerres de 1996-97 et de 1998. Bien au contraire, l'hémorragie des ressources naturelles et des autres richesses du pays s'est amplifiée sous le couvert de l'impunité garantie par la Constitution aux gestionnaires gouvernementaux". (« The Transition government did not do any better than those who exercised the state power at the time of the wars of 1996-97 and 1998. On the contrary, the bleeding of natural resources and the other richnessess of the country increased under the cover of impunity guaranteed to the governmental administrators by the Constitution»). In the Lutundula Commission's report. p. 270.

<sup>94</sup> LINAPYCO, *Déclaration de la Ligue Nationale des Associations Autochtones Pygmées de la RDCongo* LINAPYCO, Published by Netherlands Centre for Indigenous People on January 28, 2003.

<sup>95</sup> RTBF, *Bemba condamné*, May 16, 2003.

<sup>96</sup> The information on this letter comes from the following article: *Le Potentiel*, *Scandale minier au Katanga. Bradage de Tenke-Fungurume*. February 23, 2005. According to Annexe B1 of the Duncan & Allen report, this letter's reference is: n° 002/VP/ECOFIN/DirCab/Ch/05.

<sup>97</sup> *Le Potentiel*, February 23, 2005.

<sup>98</sup> Interview with ex-Minister of Mines Diomi Ndongala. October 16, 2007 in Kinshasa.

In the IPIS interview, ex-Minister Diomi Ndongala stated <sup>99</sup>: “This dossier belongs to the secrets of the state. It is an extremely delicate file. I can say though that the election (or re-election) of the head of state depended on how one was going to treat the contracts. I was the third candidate, next to Bemba and Kabila. My position was: there will be no *bradage* (sell out), we don’t give in to the pressure. This hindered those who were in a hurry. Don’t forget that I had been pleading for transparency in the uranium export for example. I had also introduced computer programs to trace the diamond exports, something that grossly disturbed Bemba who was smuggling to Congo Brazzaville. But TFM was of another order. Here the higher interests of the State were at stake. I can tell you this: Lundin wanted to have me involved, if you understand what I mean. But I refused. So Lundin looked for other government members who were more cooperative. The Minister of Plan, Thambwe Mwamba, was one of them, and Bemba of course. They withdrew the dossier from me and gave it to Thambwe Mwamba”<sup>100</sup>.

Ex-Minister Diomi was not the only one opposing the new deal. Gécamines gave its view in a *memo* on January 19, 2005, showing that the state mining company strongly approved the development of mining activity which had been inactive for too long. The state company opposed, however, that TFM slowed down the optimal exploitation of resources. Gécamines also stressed that the signing of the new convention should follow the normal procedure. “The file should therefore get the approval of the Board of Gécamines and then be handed over to the government”.<sup>101</sup> Bemba’s letter, sent just the next day, simply neglected Gécamines views and efforts to intervene in the process.

On July 19, 2005, the Council of Ministers approved the terms of TFM’s revised conventions and in September, signed all of the documents.<sup>102</sup> On October 27, 2005, Presidential Decree n° 05/117, which makes the agreement official, was made public.<sup>103</sup>

### The amended contract of 2005

- TFM’s capital was restructured in 200 shares,
- Gécamines’s stake was reduced to 17,5%, Lundin Holdings receives 82,5%,
- Lundin was represented by Lundin Holdings (160 shares) and five off-shore subsidiaries (1 share each) leaving Gécamines with the remaining 35 shares,
- The prime de cession dropped from US \$250 to US \$100 million (the US \$50 million paid in 1997 was included); regarding the prime de cession, no payment would occur as long as the Trabeka case remained unsettled,
- Fiscal exonerations in the Mining Conventions were replaced by the terms of the Mining Code, introduced with support from the World Bank in 2002; however, TFM chose to stay submitted to the convention’s regime and not to the stricter Mining Code (art.51 CMAR) and
- The production goal was reduced to 40,000 tonnes of copper per year with additional production of cobalt; once this production was underway, Lundin Holdings would study how to increase production significantly,
- Lundin Holdings would advance the necessary funding to start production and be reimbursed at

<sup>99</sup>The following is an IPIS translation from notes written in French.

<sup>100</sup> Diomi’s accusations are flagrant and appalling. How should they be interpreted? On one hand, they can be read as political mud throwing. Most of the time those who accuse are not asked to produce proof before justice and profit from impunity. On the other hand, an amount of frustration may be involved. First, the Minister was sacked during this period (December 2004-January 2005) and according to him, it was because he was too successful in fighting diamond smuggling. Second, he maintains that he was a strong contender for the presidency but lost against the main candidates, Joseph Kabila and Jean-Pierre Bemba. Examples of Diomi’s conflictual relationship with president Kabila and Vice-President Bemba and information on his suspension from government in November 2004 can be found in the report *The State vs. the people*, published by Fatal Transactions-IPIS in 2006.

So, how should one look at Diomi’s allegations? IPIS has tried to confront people close to Vice-President Jean-Pierre Bemba to question the accusations. IPIS did not succeed in tracing Mr. Delly Sesanga, *directeur du cabinet du ‘chairman’ Bemba* and in charge of mining dossiers in 2005. IPIS has met, though briefly, with his successor Mr. Fidèle Babala, now member of the *Assemblée Nationale*. Babala qualified Mr. Diomi as ‘*un farfelu*’ (crazy), added that Diomi himself in another dossier had asked for a US \$500,000 commission from a Canadian company and stated that “Phelps Dodge walked in on big clogs” (“*avec les grands sabots*”), meaning that the US company used “big means”. What kind of “big means”, Mr. Babala could or would not say.

Much of Congolese politics lies on the streets. Common knowledge, or should we say, common myth, has it that Vice-President Bemba’s elections were subsidized by Phelps Dodge. Proof may be found in the agreement made at the “videoconference” that took place far from the public eye.

<sup>101</sup> Le Potentiel. o.c.

<sup>102</sup> The documents signed were : a new shareholders agreement (*Convention d’Actionnaires Amendée et Reformulée*, CAAR), the new statutes (*Statuts Amendés et Coordonnés de TFM*) and a new mining convention (*Convention Minière Amendée et Reformulée*, CMAR).

<sup>103</sup> *Situation de l’évaluation des partenariats de la GCM par D&A*. Duncan & Allen o.c.

- an interest reference rate (the so-called LIBOR+2) before payment of dividends,
- TFM would pay 0.3% of net sales into a social development fund,
- The Force Majeure declared in February 1999 was lifted, but a Force Majeure clause was still kept and
- Phelps Dodge and/or its companies were allowed to acquire a stake in Lundin Holdings and/or TFM.

A few days later Phelps Dodge obtained the controlling interest of TFM. On October 31, 2005, it exercised its option taken in 2002 and acquired a 70% stake in Lundin Holdings. This is equivalent to a controlling interest of TFM. Phelps Dodge then replaced the Lundin Group's Tenke Mining Corp. as TFM's operator. The TFM ownership was then structured as follows: Phelps Dodge (57.75%), Tenke Mining Corp. (24.75%), Gécamines (17.5%) – with Lundin's 5 off-shore subsidiaries complicating the picture.

Under the deal, Gécamines would receive asset transfer fees totaling US \$50 million, "including a US \$15 million asset transfer payment that was paid by Phelps Dodge on November 16, 2005"<sup>104</sup>. Phelps Dodge and Lundin/Tenke Mining Corp. would split obligations. Phelps Dodge agreeded to fund pre-development costs and an additional US \$10 million of asset transfer payments. Thereafter, Phelps Dodge and Tenke Mining Corp. would fund 70% and 30% of any advances. Phelps Dodge had the ability to withdraw from the project any time, as long as it paid a US \$750,000 fee.

Freeport McMoRan (the company has owned Phelps Dodge since 2007) states that it made no payment to the Lundin Group to become the major shareholder of TFM.<sup>105</sup>

In 2005, the Congolese State negotiated several mining Joint Ventures. The World Bank, sponsor of the audits made by IMC in 2003 and Duncan & Allen during 2005, regarded most of these deals to be negative for the country. A World Bank memo from September 8, 2005 states, "The dimension of the assets to be transferred to the companies by virtue of the contracts exceeds the norms of rational and highest use of the mineral assets"<sup>106</sup>.

Other observers have made similar remarks. A mining expert working with the Congolese mining sector in Lubumbashi suggested that a production goal of some 40,000 tonnes of copper per year was ridiculous for "the World's Biggest Public Copper Company"<sup>107</sup> because of the enormous and exploitable reserves at Tenke Fungurume.

As early as spring 2005, observers started to ask questions. Why such haste? The newspaper *Le Potentiel*, in its article on the "mining scandal" wrote, "why hurry on Tenke Fungurume when exactly now the World Bank and COPIREP<sup>108</sup> are selecting a consultant who's to revalue all Gécamines' partnerships?"<sup>109</sup> In 2004, audit contracts had been already promised to Ernst & Young (financial audit of Gécamines), the law firm Duncan & Allen (legal audit) and IMC (technical audit).<sup>110</sup> Duncan & Allen signed its contract with COPIREP only on February 1, 2005.

<sup>104</sup> Phelps Dodge, *Annual Report 2005*.

<sup>105</sup> Questioned by IPIS on this matter, Peter Faur, spokesperson of Freeport McMoRan, wrote in an e-mail on December 14, 2007: "We paid nothing to Lundin, but we took on a number of obligations for the project. These details were offered in the Phelps Dodge 2006 10-K report filed with the U.S. Securities and Exchange Commission (references to Phelps Dodge have been changed to Freeport to avoid confusion)". Mr. Faur also referred to the said annual report: "On November 2, 2005, Phelps Dodge, through a wholly owned subsidiary, exercised its option to acquire a controlling interest in the Tenke Fungurume copper/cobalt mining concessions in the Democratic Republic of the Congo (DRC). The action came after the government of the DRC and La Generale des Carrieres et des Mines (Gecamines), a state-owned mining company, executed amended agreements governing development of the concessions and after approval by DRC presidential decree. Freeport now holds an effective 57.75 % interest in the project, along with Tenke Mining Corp. at 24.75% and Gecamines at 17.5% (non-dilutable). A Freeport subsidiary will be the operator of the project as it is developed and put into production. As part of the transaction, Gecamines will receive asset transfer payments totaling US \$50 million, including a US \$15 million asset transfer payment that was paid by Freeport on November 16, 2005, over a period of approximately five years as specified project milestones are reached. Freeport is responsible for funding all pre-development costs and an additional US \$10 million of asset transfer payments; thereafter, the Company and Tenke Mining Corp. are responsible for funding 70% and 30%, respectively, of any advances".

<sup>106</sup> World Bank Office Memorandum, *Contracts between Gecamines and private companies*, 8 September 2005, §3.

<sup>107</sup> IPIS Interview, October 21, 2007, in Lubumbashi.

<sup>108</sup> *Comité de Pilotage de la Réforme des Entreprises Publiques* (COPIREP). This administrative body was created in October 2002 to manage public sector reform projects funded by foreign donors, including in the DRC's mining parastatals. In: *Le Potentiel, Scandale minier au Katanga*, February 23, 2005.

<sup>109</sup> *Le Potentiel, Scandale minier au Katanga*, February 23, 2005.

<sup>110</sup> *Africa Mining Intelligence, Gécamines' new advisers*, n°94, October 13, 2004. Cited in: *The State vs. the People*, o.c., p. 48.

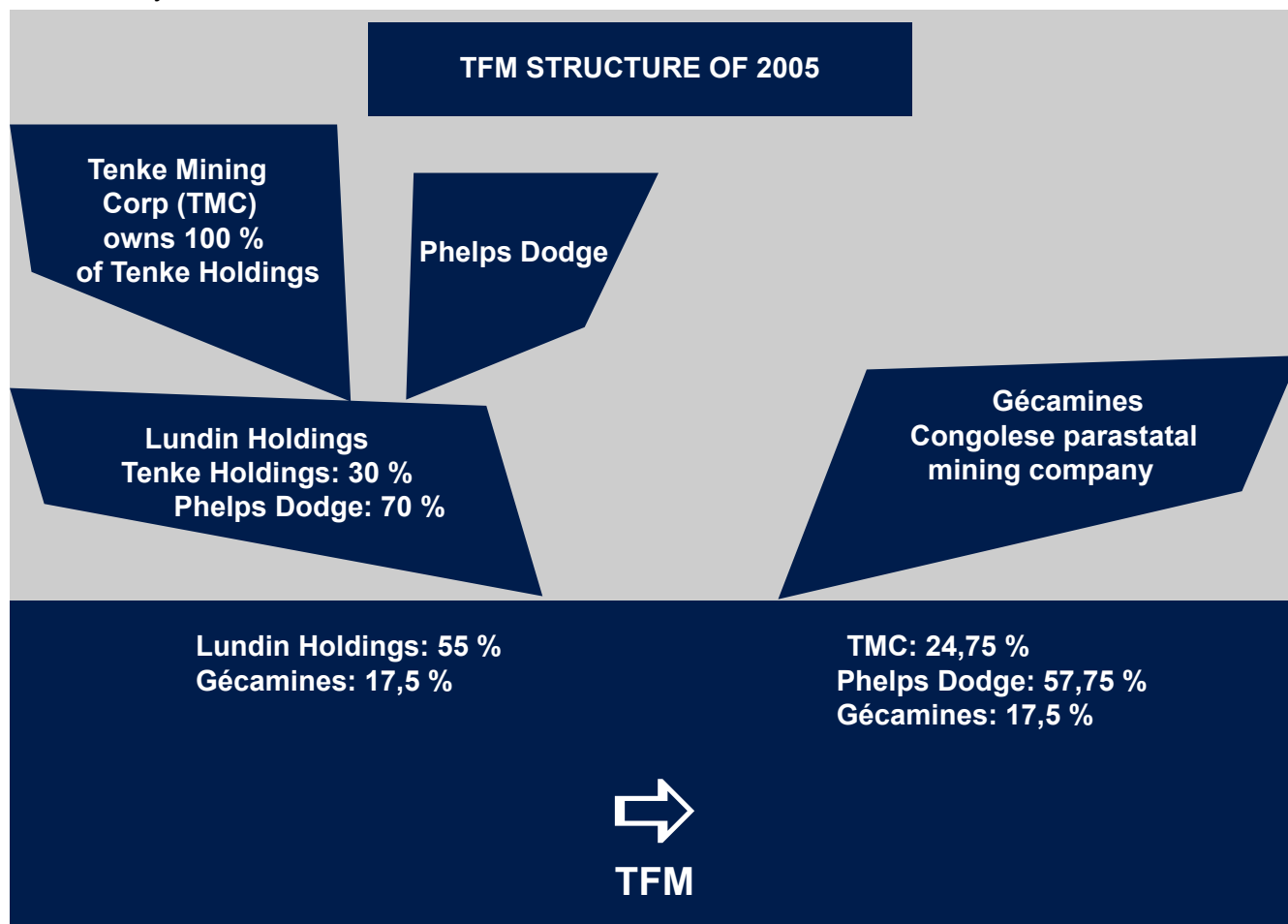


In its final report in April 2006, Duncan & Allen complained that its work started with “a 14 month delay”. Duncan & Allen claimed to have been sabotaged from different sides. For example, the report stated, “The *Direction Générale* de la Gécamines was hostile to the project from the beginning”, and, “far from stopping the negotiations and the approval of partnership agreements until we’ve made our recommendations to improve these agreements, Gécamines and the government have already acted.”<sup>111</sup> The Tenke Fungurume partnership agreement was a *fait accompli*, concluded Duncan & Allen. The law firm was not the only one to share such frustrated sentiments.

Duncan & Allen does not elaborate on who might have been profiting from the haste. Earlier, in June 2005, the Lutundula Commission had been slightly more explicit when it recommended the suspension of all “alienation by conventions or contracts” until the installation of elected institutions. This recommendation was intended to prevent any selling off or benefiting from the country’s resources “at the dawn of elections”<sup>112</sup>.

“Why the government decided to approve the contracts when its own consultants have been so highly critical of them?” asks the World Bank’s Principal Mining Specialist Craig Andrews in a memo dated September 8, 2005. There has been no “thorough analysis, appraisal and valuation of the (mineral) assets”, Andrews writes, “no competitive bidding and no public disclosure as to the terms and conditions of the contracts”.

In a letter to SwedWatch and IPIS in January 2008<sup>113</sup>, Lundin Mining describes the amendment process as transparent, well thought through and in respect of the highest use of Katanga’s mineral assets. The company writes that all four of the transitional government’s vice-presidents, as well as the mining and financing ministers, all agreed that amendments of the agreements were appropriate and that Gécamines’ shares should be reduced. According to Lundin Mining, the amendments of the contract – including the introduction of corporate income tax, import and export duties – “were widely felt to be more fiscally sustainable for the DRC.”



<sup>111</sup> Duncan & Allen, o.c. 3.2.1.2, 3.2.3.7

<sup>112</sup> “(...) contre la tentation de la prédation et du bradage à la veille des élections”. The Lutundula Commission’s report, p. 270.

<sup>113</sup> Letter from Lundin Mining, January 28, 2008.

### 3. Project scope

#### Abstract

*Finally, TFM became operational in 2006. Mining is set to begin in 2009. The investment needed to reach a production volume of 130,000 tonnes of copper per year is now estimated at US \$900 million.*

The Tenke Fungurume Mining project achieved an operational stage in 2006, after an almost ten-year sleep.<sup>114</sup> Since there has never been any exploitation, it is called a green-field mine. The copper and cobalt deposits at TFM are “one of the world’s largest known copper-cobalt resources” and will be developed into a “large-scale, long-life mine”<sup>115</sup>. Unit costs will remain low for a simple reason: the hills that will be exploited in the concessions have very high tenures of copper and cobalt.



*A view of the TFM plant zone, from what is left of Mulumbu village.  
(Photo IPIS)*

TFM says that the concessions, totaling 1,437 km<sup>2</sup>, remain “extensively under-explored”. The company nevertheless had considerable geologic and mineralogical documentation performed and dating back to the first explorations during World War I. Known and indicated resources for the whole concession are 235 million tonnes (3.01% copper and 0.31 % of cobalt). Further resources are estimated at 265 million tonnes (2.6% of copper and 0. 19% of cobalt).<sup>116</sup>

Kwatebala is the richest hill in the concessions. It has almost 80 million tonnes of proven and probable copper and cobalt reserves with an average tenure of 1.8% copper per tonne and 0.3% cobalt per tonne. The Goma and Fwaulu have smaller reserves (17 and 6.4 million tonnes) but higher copper grades.<sup>117</sup>

The project life is put at 41 years: 19 years of mining (2008/9-2028: Kwatebala Hill for 8 years, Goma in 2017-18, Fwaulu and the remainder of Kwatebala 2018-2028), and 22 years (2028-2049) of processing the low-grade stockpiles. The elements of the project are:

- Mine the ore bodies at Kwatebala, Goma and Fwaulu,
- Build a processing plant where the ore will be transformed into metal,
- Build infrastructure: roads, power, water, sewer and accommodation,
- Build a zero discharge facility where tailings, residue and water from the plan and other waste can be stored,
- Make the facilities meet international environmental standards and
- Implement a social program including resettlement and community development activities.

The estimated total cost of the project was at US \$650 million to start producing copper and cobalt by the end of 2008. In October 2007, around “55% of the design and 70% of the procurement were complete”. However, Lundin Mining Corp. announces that planning was slightly behind schedule and that production would start only “into 2009 due to delays in construction work”<sup>118</sup>. The scope of the project has been

<sup>114</sup> Most of the information in this part comes from: GRD Minproc, *Tenke Fungurume Feasibility Study. Technical Report*. April 12, 2007. An existing Financial Report has not been published online. The Technical Report can be found at <http://www.lundinmining.com/i/pdf/TenkeFungurumeFeasibilityStudy.pdf>.

<sup>115</sup> *Ibidem*, p. 11.

<sup>116</sup> Information provided by Lundin Mining referring to a report by TFM from June 23, 2006.

<sup>117</sup> *Ibidem*.

<sup>118</sup> Lundin Mining Corporation, *Updates on TFM*, October 24, 2007.

expanded from 7.000 to 8.000 tons per day, which, with other factors, leads to a 38% increase of the first phase capital costs of around US \$900 million.

In company presentations, Lundin Mining states that TFM will contribute significantly to the economy and to the rebuilding of the DR Congo. The company estimates that more than 50% of the cash flow will go to Gécamines and the country. If power, rail and other indirect revenues are included, the company estimates that more than 60% of the value of Tenke Fungurume will accrete to the DR Congo. "The TFM project is expected to be one of the largest tax payers, employers and catalysts for infrastructure rebuilding in the region, setting high standards which will contribute to more responsible, transparent mining and business practices than DRC has experienced any time in the past", wrote Lundin Mining in January 2008.<sup>119</sup>

### **Advantageous electricity deal with SNEL**

On February 26, 2006, TFM signed a *Protocole d'Accord* with the *Société Nationale d'Electricité* (SNEL) to provide the mining project with electricity.<sup>120</sup> It appears to be a barter deal where TFM will finance the reparations of SNEL's facilities in Katanga in exchange for electricity. SNEL wants to get its hydropower plant at Nseke, further north from Tenke Fungurume, up and running again. The initial agreement says that TFM will pay for reparations at Nseke's groups 1, 2 and 4.<sup>121</sup> TFM will also pay for some studies of Katanga's power grid. TFM advances the total cost as a 15-year loan with 10.5% interest. Consequently, TFM gives a loan at a high interest so that SNEL can pay for the studies and reparations.

At first, the budget needed for the studies and the reparations was calculated at US \$45 million, which would then be the compensation to TFM. However, the initial agreement has been refined and the total budget consequently has almost tripled. In November 2006, sources at SNEL disclose that TFM might receive a total repayment (with interests) of as much as US \$84 million.<sup>122</sup> According to the same sources, in January 2008, TFM broadened the scope of its deal with SNEL to all 4 groups at Nseke (instead of 3 out of 4 groups) and the calculated budget for the reparations and studies then increased from US \$45 million to some US \$140 million.<sup>123</sup> The negotiations to finalise this deal between SNEL and TFM were to take place in the beginning of February 2008.

Barter deals like this one are expensive for SNEL but the electricity company hardly has another choice. If the DR Congo wants to reindustrialise, it needs energy. The country can wait for the World Bank and its time-absorbing procedures to find loans at reasonable rates, or it can make direct deals with consumers but on their terms. Now, it is known that SNEL has made at least nine of these barter deals with mining companies.<sup>124</sup>

<sup>119</sup> Lundin Mining, *Tenke Fungurume Project Update*, presentation submitted to SwedWatch in January 2008 and letter from Lundin Mining, January 28, 2008.

<sup>120</sup> Of the 27 pages of this Protocol, 12 pages were published in October 2007. For further details, see [http://www.minfinrdc.cd/contrats/accord\\_tfm.pdf](http://www.minfinrdc.cd/contrats/accord_tfm.pdf).

<sup>121</sup> The reparation of Group 3 in Nseke will be financed through a similar barter deal by DRC Copper Cobalt Project (DCP).

<sup>122</sup> Custers R. *Voordelig stroomcontract voor Tenke Fungurume schept precedent*, in: Indymedia, November 21, 2006.

<sup>123</sup> IPIS telephone interview with senior staff member of SNEL, January 29, 2008.

<sup>124</sup> For a full list of companies, see, [http://www.minfinrdc.cd/contrats/snel\\_part\\_locaux.pdf](http://www.minfinrdc.cd/contrats/snel_part_locaux.pdf).

## Financial Restructuring

### Abstract

*In 2007, Lundin Mining bought Tenke Mining Corporation and the world's biggest private copper producer, Freeport McMoRan Copper & Gold Inc, bought Phelps Dodge. Consequently, new mining companies became involved in the Tenke Fungurume Mining project.*

On November 20, 2006, news of a consolidation in the copper mining business hit the financial world: Freeport McMoRan Copper & Gold Inc.<sup>125</sup> declared its intention to take over Phelps Dodge for US \$25.9 billion. The operation was carried out in stocks and cash. In total, Freeport offered US \$126 per Phelps Dodge share, which was 33% more than the price of one of Phelps Dodge share three days earlier. If Phelps Dodge shareholders agreed, the new combination would surpass BHP Billiton and become the world's biggest publicly traded mining group. Observers noted that "as a combined company, Freeport-McMoRan and Phelps Dodge think they can deliver nearly 1 billion pounds (or 450,000 tonnes) of additional copper production capacity in the next three years"<sup>126</sup>.

That same day, the Phelps Dodge share climbed to 28.55% on the New York Stock Exchange. Richard Adkerson, Chief Executive Officer of Freeport McMoRan, explained the operation to analysts and the press during an international telephone conference.<sup>127</sup> Freeport could not predict the evolution of the copper price, but Mr. Adkerson said, "Our company will have the capacities to manage an eventual drop of the prices". The new group controlled 75 billion pounds of copper reserves.<sup>128</sup>

The bid came at a time of striving copper and minerals prices. The main reason was strong demand, especially from China where the economy has been rapidly growing since 2000. On the other hand, since the 1980s when world copper prices were low, the mining companies have reduced their exploration expenditures and this now leads to a bottleneck on the supply side.

A few months after Freeport McMoRan bought Phelps Dodge in March 2007, Lundin Mining embarked on an exchange of shares with Tenke Mining Corporation. The operation was announced on April 11, 2007 during a joint conference call <sup>129</sup> and finished on July 3 when Lundin Mining and Tenke Mining Corporation "close their merger"<sup>130</sup>. Lundin Mining strengthened its position "to better deal with Tenke's joint venture partner in the development of the Tenke Fungurume project"<sup>131</sup>.

Lundin Mining offered Tenke Mining Corporation's shareholders 1.73 shares of Lundin Mining for every Tenke share and Tenke became a wholly owned subsidiary of Lundin Mining. Tenke Mining Corp's Congolese assets (its 24.75% stake in TFM) were passed on to Lundin Mining. Tenke Mining Corp's activities in South America were regrouped in a new company called Suramina.

The acquisition of Tenke Mining Corporation by Lundin Mining was completed on July 3, 2007, when shareholders of both companies voted in favor of the deal. Shareholders' equity increased by US \$1.8 billion to US \$3.9 billion and the existing interest in the Tenke Fungurume project "is consolidated into the assets"<sup>132</sup>.

<sup>125</sup> Freeport McMoRan Copper & Gold Inc. is using FCX as a symbol on the stock exchange.

<sup>126</sup> Businessweek, *Is Freeport-McMoRan's Offer Enough?*, November 20, 2006.

<sup>127</sup> Agence France Press, *Méga fusion dans le cuivre entre les américains FCX et Phelps Dodge*, November 20, 2006.

<sup>128</sup> Ibidem.

<sup>129</sup> *Tenke Merger, Conference Call*, Joint brochure Lundin & Tenke, April 11, 2007.

<sup>130</sup> Lundin Mining press release, *Lundin Mining and Tenke Mining Close Merger*, July 3, 2007.

<sup>131</sup> Tenke Mining Corp. Management Information Circular. May 18, 2007.

<sup>132</sup> Lundin Mining, *Lundin Mining Consolidated Results Third Quarter 2007*, November 13, 2007.



## 4. TFM's development programs

### Abstract

*Tenke Fungurume Mining Company (TFM) has thoroughly studied the impact of its mining project on communities living nearby and on the environment. It has written a broad action plan and calculated compensations. The outcome in regards to employment opportunities is modest, with only 1,100 new jobs anticipated once the proper mining will start. However, the social programs reflect a serious effort on behalf of TFM to lift the communities out of poverty through other development programs.*

The Tenke Fungurume Mining project is not only an industrial project; it also includes a Human Resources (HR) plan and a comprehensive social and environmental program.<sup>133</sup> The HR plan was written by GRDMinproc with Phelps Dodge and the Environmental and Social Impact Assessment (ESIA) was coordinated by Golder Associates.<sup>134</sup> Golder hired other experts like the French resettlement consultant Frederic Giovannetti.<sup>135</sup> Giovanetti's team included anthropologists Georges Koppert and Serge Cogels.<sup>136</sup>

TFM stresses that it follows internationally accepted environmental and social standards for major mining projects. The company refers specifically to the Equator Principles, the Voluntary Principles on Security and Human Rights, the Extractive Industries Transparency Initiative, as well as applicable OECD Guidelines for Multinational Enterprises and Performance Standards of the International Finance Corporation (of the World Bank Group) on Social and Environmental Sustainability.<sup>137</sup> In addition to these standards, TFM "also commits to design, build and operate the facilities aligned with a Quest for Zero philosophy (...) a philosophy embraced by Phelps Dodge Corporation, embodying the goals of designing and operating its facilities with the goal of having zero safety/environmental incidents or illnesses"<sup>138</sup>. TFM also notes, "Where TFM does not have specific policies of its own, it will adopt those of Phelps Dodge"<sup>139</sup>.

In an IPIS interview, TFM's Environmental and Social Manager in the DR Congo, Mark Hardin<sup>140</sup>, said that all subcontractors had to abide to TFM's environmental and social policy. They are also expected to appoint their own environmental and social officers.

The cost of the program is still not clear, but Mr. Hardin gave some figures. In 2008, some US \$3.4 million will be spent on community development. Resettlement mitigation will cost US \$8.3 million in total.

Work on the ESIA started in October 2004. It had to identify environmental and socio-economic resources potentially affected by the project, to predict and quantify effects, consider compensations, and suggest methods to mitigate and monitor affected resources.<sup>141</sup> 'Resources' in this context also means 'people'.

According to the ESIA, baseline data for the assessments were collected from late 2005 to May 2006.

<sup>133</sup> *Project Overview and Summary*, in: GRDMinproc, o.c., p. 16.

<sup>134</sup> Golder, in its own words, "*strive(s) to be the most respected global group specializing in ground engineering and environmental services*". The group undertook the TFM assessment out of its Johannesburg offices. For further information visit, <http://www.golder.com>.

<sup>135</sup> In an e-mail dated October 10, 2007, Mr Giovannetti confirmed that he had worked on the TFM project « *pour préparer le Plan de Réinstallation des personnes déplacées par le projet* » but, because of confidentiality reasons, he could not expand further on his findings. Many of these findings can be found in the ESIA documentation.

<sup>136</sup> Koppert and Cogels work as consultants via their bureau Gepfe (*Groupe d'Études des Populations Forestières Équatoriales*) in Paris. IPIS had the opportunity to interview Mr. Cogels at the Université Libre de Bruxelles on October 12, 2007.

<sup>137</sup> For more information about these guidelines and principles, please see [www.voluntaryprinciples.org](http://www.voluntaryprinciples.org), [www.oecd.org](http://www.oecd.org), [www.eitransparency.org](http://www.eitransparency.org). The Equator Principles are voluntary principles committing signatory banks to follow the environmental and social guidelines of the International Finance Corporation (IFC) of the World Bank Group. Since the principles were launched in 2003, they have become the standard for assessing and managing environmental and social risk in project financings. The guidelines of IFC stress the importance of impact and risk assessments and appropriate management systems. They include standards concerning working conditions, health and safety, involuntary resettlements, community engagement, consultations, biodiversity, pollution prevention, etcetera. For more information, see [www.equator-principles.com](http://www.equator-principles.com) and [www.ifc.org/ifcext/enviro.nsf/Content/PerformanceStandards](http://www.ifc.org/ifcext/enviro.nsf/Content/PerformanceStandards).

<sup>138</sup> TFM, ESIA.

<sup>139</sup> Ibidem p. 4.

<sup>140</sup> Mark Hardin worked with the US Peace Corps and United States Agency for International Development (USAID) before joining TFM. The IPIS Interviews with Mr. Hardin and his Congolese assistant Ida Efinda took place on October 22 and 26, 2007 at TFM's offices in Lubumbashi.

<sup>141</sup> TFM, ESIA, p. 4-5.



TFM put up a structure to run the action plans that resulted from the assessments (environmental, social, reclamation and closure, and emergency response). Mr. Hardin's staff includes an environmental manager, a resettlement task leader, a community liaison officer and a community development coordinator. The IPIS interviewer did not know their nationality. The larger staff included some Congolese. IPIS did not meet with staff-members other than Mr. Hardin and his assistant.

The printed publication of the ESIA is truly an impressive document. Most of this series of documents can also be consulted online.<sup>142</sup> The ESIA contains geochemical analyses and projections of the future mining activities, the building of tailings storage and waste rock facilities, groundwater, traffic, flora and fauna, information about air quality, and major hazards like dust, noise and vibration. It also looks at the livelihood of local residents and socio-economic impacts of the project.

TFM also compiled a database of people who at one stage of the project might be employed by TFM or its subcontractors. Their identities are noted along with their photographs, qualifications and priorities when it comes to hiring a certain workforce. "The number of direct project hires is anticipated to be around 2,000 construction workers at peak of the construction phase and approximately 1,100 workers during operation at the mine. (...) During operations four indirect livelihoods could be created for each direct job provided by TFM", writes TFM in an assessment.<sup>143</sup>

The employment figure is relatively low, but the social programs reflect a serious effort on behalf of TFM to lift the communities out of poverty through other development programs. Some of these programs and the role of the various NGOs involved in implementing the development programs will be discussed further in the next section.

## Resettlement

### Abstract

*TFM will open its first mine at Kwatabala Hill, the richest ore deposit within the concessions. Three villages will disappear and its current inhabitants are being resettled. Despite a complete Resettlement Plan from TFM, interviews with relocated people detail urgent problems that have been left unaddressed. The housing program is lagging behind schedule and the program's promoters have encountered a serious lack of understanding from the population.*

An urgent social concern at the Tenke and Fungurume concession is the fate of villagers who live close to the new industrial site. It soon became clear that TFM would start its production at Kwatabala Hill, in the Western part of its concessions, and build a processing plant nearby. It is known as "the Project Affected Area" and has a total surface of 2,911 hectares.<sup>144</sup>

Three villages are located very close to the plant site: Mulumbu, Amoni and Kiboko. The total number of "the Project Affected People" is "1,660 individuals belonging to 391 households"<sup>145</sup>. Their inhabitants are mainly cultivators who work the surrounding fields.

TFM made the decision to resettle these villages, give them new plots of land and compensate them for their loss of in-



*Mulumbu village, along with the neighbouring Amoni and Kaboko villages, have to disappear to make way for TFM's processing plant. (Photo IPIS)*

<sup>142</sup> For more information, visit <http://www.phelpsdodge.com/AboutUs/WorldwideLocations/Tenke+Documents.htm> or <http://www.golder.co.za>

<sup>143</sup> TFM, ESIA, p. 41.

<sup>144</sup> TFM Resettlement Action Plan, Draft, November 2006, p. 15.

<sup>145</sup> Ibidem.

come. “TFM concluded that resettlement of the three most proximate villages represents the lowest overall risk to both the residents as well as the future viability of the TFM mining operation.”<sup>146</sup> Early resettlement can lower a project’s cost. Mr. Hardin explains, “You can look at this problem in two ways: you can postpone it or anticipate to it. We’ve chosen for an Upfront Risk Management. This implies high costs in the beginning stage, but reduced costs later on.”<sup>147</sup>

During the past year, three teams of surveyors and some eight social scientists have been identifying the land users. They have also measured the economic significance of the land that the users were working on and they calculated a compensation system. TFM commits itself to do better than its minimal obligations. It could stick to the Equator Principles and compensate “at full replacement cost” but it intends to go beyond these principles and calculate compensations at “real replacement cost + 50%”<sup>148</sup>.

According to the RAP, TFM invested heavily in consultation with the affected communities. This consultation started in June 2006<sup>149</sup>, but many social and cultural issues proved to be difficult to address. An anthropologist who worked on the TFM project at several occasions recalls difficulties not only related to the very complex traditional land system and land ownership rulings, but also the animosity between several traditional chiefs and between relocated communities and original inhabitants.<sup>150</sup> It was also difficult to explain the principles of the RAP at the public meetings.<sup>151</sup> Since the communities are extremely vulnerable and not familiar with scientific research, cultural factors certainly played an important role.

Due to the industrial planning, resettlement needed to take place in 2007. The resettlement calendar placed both TFM and the concerned inhabitants under a large amount of strain. For instance, in November 2006, TFM announced that between May and September 2007 the new villages for the resettled populations were set for completion.<sup>152</sup> Yet, in October 2007, Mr. Hardin said that only 40 houses had been built in Kiboko although much more were needed.<sup>153</sup> All though houses were not complete, “the Project-Affected Area” still had to be cleared of inhabitants by the end of 2007.

## New jobs and loss of livelihood

### Abstract

*TFM tried to mitigate the effects of an inevitable loss of livelihood for the population at Tenke and Funurume. This problem stemmed from the fact that the mining company had removed all artisanal miners from its concessions. In theory, an agricultural program could partly compensate for this loss, but it appears that some essential costs for the farmers were overlooked. Moreover, clashes with deadly outcomes occurred in 2005 when the concessions were being cleared of artisanal miners and military personnel. TFM has also promised new jobs, essentially for the local populations, but subcontractors did not stick to the engagements, which led to new clashes in January 2008.*

For years now, expectations have been high that TFM will create many and well-paid jobs for the population that lives near the mining site. The company has made promises on this matter. It announced that during the construction work, some 1,800 to 2,600 people would be employed directly and 7,200 to 15,600 (or six times that number) indirectly. TFM has said that it will need 1,100 people in permanent jobs, when the production kicks off in 2009. These figures were also communicated to the local population during the community meetings and in the leaflets distributed at these occasions.

In this impoverished setting, jobs are an extremely sensitive topic. During its preparations for the social

<sup>146</sup> TFM Resettlement Action Plan, Draft, November 2006, p. 7.

<sup>147</sup> IPIS Interview with Mark Hardin, October 22, 2007.

<sup>148</sup> TFM Resettlement Action Plan, Draft, November 2006, p. 14.

<sup>149</sup> All in all, “more than 200 disclosure and consultation meetings took place from November 2005 to December 2006 with a variety of stakeholders including individual members of the general public, NGOs, special interest groups and regional and national government representatives”, ESIA, March 2007, p 5.

<sup>150</sup> IPIS Interview with Serge Cogels, October 12, 2007.

<sup>151</sup> “We had to explain and explain again. It was a very intensive process. For many people it was for instance very hard to understand that under the compensation system people who until then had rented a house, were to become the owners of newly built houses”. IPIS Interview with Serge Cogels on October 9 and 12, 2007.

<sup>152</sup> TFM, Troisième document pour fins de commentaires, November 2006, p. 15.

<sup>153</sup> IPIS Interview with Mark Hardin, October 22, 2007.

programs, TFM established an extensive job database that contained a long list of people and profiles of candidates for jobs at TFM and subcontractors. Depending on training and experience, each of these candidates was given a status of lesser or greater priority, and told when jobs might be available. In most cases, local candidates were said to have priority over candidates from outside the region.

On Monday, January 14, 2008, serious incidents took place at Fungurume. Between 3.000 and 5.000 people were estimated to have taken to the streets to reclaim their rights to jobs.<sup>154</sup> The upheaval was apparently caused by TFM's subcontractor PK Mining, an Australian mining equipment company<sup>155</sup>, who reportedly refused to work with a submitted list of job-candidates. When the news spread, a TFM company truck was destroyed and warehouses were plundered. Several people were arrested and locked up by the local police. The population was particularly angry because it assumed that people from outside their villages, and even from as far places as Mbuji-Mayi in the diamond province of East Kasai, were given jobs to the detriment of local people.<sup>156</sup> The human rights group *Action Contre l'Impunité pour les Droits Humains* (ACIDH) from Lubumbashi took down testimonials from police officers who said that they deliberately did not fire into the crowd since they regarded themselves as being part of the poor community. A policeman was quoted as saying, "We are there only to secure the comfort of the expatriates"<sup>157</sup>.

Another concern relates to the loss of income due to the new mining project. The long period of political and economic destabilisation has thoroughly disrupted Katanga's population. Thousands of people are estimated to have abandoned their fields to seek income from mining activities, especially artisanal mining. Otherwise, agriculture is the main economic activity in the Tenke and Fungurume region, with 99 % of rural households and 82 % of urban households engaging in some form of farming.<sup>158</sup> The scientists involved in the TFM project have stressed repeatedly that they are dealing with an extremely poor and vulnerable population. According to the ESIA, "the average earned in 2005 by farmers was approximately 69,000 Fc (US \$150.00) in rural villages, 60,000 Fc (US \$130.00) in Tenke and Fungurume and 179,000 Fc (US \$400.00) in Lukotola."<sup>159</sup>

Consequently, people have tried to gain an additional income to support their families. Some have joined the artisanal mining sector, which is mostly described as "illegal", or they drew profit from the sector in other ways. Artisanal mining activities are not mechanised. Instead workers handpick ore that is then sold to traders and mining companies in Katanga. The Mining Code that regulates the industry only allows artisanal mining in designated areas, but miners often look for ore wherever they can, also on concessions where they are explicitly forbidden to go.

According to a Draft of the RAP, "the village of Mulumbu was a stronghold of illegal artisanal miners between 2003 and 2005. It is estimated that as many as 1,500 to 3,000 artisanal miners may have settled in Mulumbu. (...) Local villagers did not engage in artisanal mining in large numbers, but took advantage of this surge in activity through sales of cattle and agricultural produce, as well as participating in transport, storage and washing of the heterogenite ore once it was dug."<sup>160</sup>

At the end of 2005, TFM wanted to clear its concessions of artisanal miners and it tried to do so in two ways. First, the company sent in the Mining Police and its own security service. Second, and simultaneously, it cut off the artisanal supply chain. TFM discouraged artisanal mining through control of entry and exit of ore.<sup>161</sup>

Unfortunately, for TFM, its plan did not go smoothly. In December 2005, Radio Okapi (which belongs to

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<sup>154</sup> IPIS telephone interviews on January 15, 16 and 17, 2008, with inhabitants from Fungurume and people employed by TFM at Fungurume.

<sup>155</sup> " L'incident actuel résulterait du rejet, par le chef du personnel de l'entreprise PK Mining, de la liste soumise pour l'engagement d'environ 450 personnes dont la majorité serait les habitants de la Cité de Fungurume", in : ACIDH, Communiqué de presse, January 21, 2008.

<sup>156</sup> See also: Bloomberg, Freeport-McMoRan's Congo Labor Policy Sparks Protest (Update3), 15 January 2008.

<sup>157</sup> ACIDH, o.c.

<sup>158</sup> TFM, ESIA, Socio-economic baselines, March 2007, p. 446.

<sup>159</sup> Ibidem, p. 451.

<sup>160</sup> TFM, ESIA, Resettlement Action Plan, Draft, November 2006, p. 17.

<sup>161</sup> TFM, ESIA, Long Summary, April 9, 2007, p. 2.

the UN Peacekeeping Force for the DR Congo, MONUC<sup>162</sup> reported on new incidents in Fungurume.<sup>163</sup> The report said that elements of the Congolese army, *Forces Armées de la République Démocratique du Congo* (FARDC), were brought in to tear down a roadblock that had been installed “illegally” by the Mining Police. The Mining Police believed the roadblock was useful in preventing any illegally mined ore from being taken out of the mining area. During this clash between FARDC and the police, there were no reported victims. However, Radio Okapi reported that during a clash three months earlier, an unspecified number of people, mostly artisanal miners who apparently had sided with FARDC, had been killed.

According to Mr. Hardin of TFM, the military was a large part of the problem.<sup>164</sup> Human Rights activists in Lubumbashi added that FARDC soldiers were dispatched to Tenke Fungurume by the hierarchy in the province to do some illegal mining, alongside the artisanal miners, for the benefit of their high-ranking officers.<sup>165</sup> These troops had to demobilize from Tenke Fungurume at the end of 2005 and showed no enthusiasm in doing so. The Mining Police and TFM’s security people then put up barriers at the entrance and exit of the concession, so that all cargo leaving the zone could be controlled. Consequently, income from illegal mining for the artisanal miners was cut off.<sup>166</sup> TFM also made artisanal mining less attractive by buying ore from them but at a “derisory price”<sup>167</sup>.

This double policy had significant impacts on the local economy. TFM recognised this in its ESIA. Local villagers lost income, because they could no longer sell produce and drinks to the miners and the women could not engage in the sorting, washing and bagging of ore anymore.<sup>168</sup>

When IPIS visited the village of Mulumbu, within the concession, the villagers denied that any artisanal miners were (still) around. Security was so tight that no clandestine miners seemed to dare entering the concession. Vehicles belonging to TFM, subcontractors or private security guards were constantly cruising through the area. Any person entering or leaving the concession was asked to identify himself at the entry gate.

Well aware that the resettlement was going to thoroughly disturb the local farmers’ agricultural calendar, TFM in its ESIA documents foresaw at least one “dead” season without harvest and the need for compensation for the according loss of revenue. Reactions of people interviewed in Mulumbu and at the resettlement area in Mpala, which are discussed in the next section, indicate that TFM might have miscalculated the financial needs and compensation.

## Community development

### Abstract

*Alongside the agricultural development, TFM plans on building new schools and creating a new local dynamics by introducing a small-scale industry. Small enterprises are going to supply building materials to the mining company. This program is coordinated by the American NGO PACT-Congo*

TFM has also written a Community Development Plan and has subcontracted the execution to the non-governmental organisation PACT-Congo<sup>169</sup>. PACT-Congo, part of the US NGO PACT, gets its funding from USAID and the United Kingdom Department for International Development (DFID) but also from private companies<sup>170</sup>. As stated in the latest PACT Annual Report, in the DR Congo it works with the “responsible mining companies” Anvil Mining and Tenke Fungurume Mining, “a pioneering initiative.”<sup>171</sup>

<sup>162</sup> MONUC is the French acronym for Mission des Nations Unies en République Démocratique du Congo.

<sup>163</sup> Radio Okapi, Accrochages entre éléments des FARDC et police des mines à Fungurume, 27 December 27, 2005.

<sup>164</sup> Interview with Mark Hardin at TFM, October 22, 2007.

<sup>165</sup> IPIS Interview with Timothée Mbuya of the NGO Association Africaine des Droits de l’Homme (ASADHO), on October 23, 2007 in Lubumbashi.

<sup>166</sup> IPIS Interview with Mark Hardin, October 22, 2007.

<sup>167</sup> IPIS Interview with a former “négociant” in Lubumbashi, October 23, 2007.

<sup>168</sup> TFM, ESIA. Long summary, p. 23.

<sup>169</sup> PACT arrived in Katanga in 2003. In 2004, it was involved in “the World Bank financed Kujenga Uhuru project for socio-economic reintegration of laid-off mine workers of Gecamines, the state mining company”. For more information, visit [http://www.pactworld.org/programs/country/congo/index\\_congo.htm](http://www.pactworld.org/programs/country/congo/index_congo.htm).

<sup>170</sup> Among its corporate partners, one finds companies such as Cabot Corporation, Citigroup, Chevron, Levi Strauss and Microsoft. For more information, visit <http://www.pactworld.org>.

<sup>171</sup> PACT, Annual Report 2006-2007.



During an interview in Lubumbashi with PACT-Congo's Director Richard Culp-Robinson, he reluctantly stated that his organisation "initially got US \$450,000 from TFM"<sup>172</sup>. Mr. Hardin from TFM explained that PACT-Congo was chosen for three reasons: Hardin knew PACT from his former work in Madagascar; in 2005 they were the only international NGO doing community development work in Katanga and they had experience with the mining sector. In the words of Mr. Hardin, "They also have the reputation of being coalition builders"<sup>173</sup>.

The TFM Community Development Plan has the following major chapters: support for agriculture, health, education, roads and transport, water, housing and electricity for the communities at Tenke and Fungurume. PACT-Congo oversees the Community Development Plan and works with other NGOs and local institutions for implementation.

Unfortunately, there have been some project deadlines not met, misunderstandings between TFM and the public and questions of project sustainability. Three chapters from the Community Development Plan will provide some examples.

First, regarding education, the Italian NGO ALBA, specialises in education programs. Two schools have been built, one in Tenke and one in Fungurume, for children directly disadvantaged by the mining project because they had to leave their familiar environment. Mr. Hardin said that pupils pay a US \$3 school fee per semester but that the true cost per pupil<sup>174</sup> was US \$20 per month and that TFM was covering the difference.<sup>175</sup> According to an ALBA employee, only 6 out of the 24 classrooms promised, are ready for use.<sup>176</sup> A third school will be built, for children from TFM and the surrounding communities, where tuition will be compulsory.

Another partner in this Community Development Plan is the Catholic Mission of Lukotola and they are focusing on agricultural support. The mission's own technical school produced furniture for the Tenke and Fungurume schools. In 1987, it started to train oxen to work the land. Now, it has signed an agreement with TFM to deliver 30 couples of oxen for the deprived communities in the TFM concession. These oxen have been lent to groups of inhabitants to help them cultivate the land.<sup>177</sup> There appear to be some misunderstandings on behalf of the cultivators regarding the terms of the deal. A Spanish missionary from Lukotola says, "People expect mana from heaven", and that "TFM should always clearly explain that they demand a counter-effort from the people when they hand out material"<sup>178</sup>. The same problem arose when the farmers received sowing material for their new fields. Apparently, it was not clearly understood that they had to reimburse TFM for the seeding material they had received.<sup>179</sup>

Lastly, PACT-Congo is in charge of a very visible part of the Community Development Plan, namely the setting up of dozens of small factories that produce bricks and fences for the TFM project. TFM needs 14 million bricks for its construction work in the TFM concession and villages; it also needs kilometers of fence to shut the concession off from the outside world.

PACT-Congo has been creating small firms to produce these bricks and fences. On April 11, 2007, a



Next to the TFM plan zone, the entrance has been blocked to what is left of Mulumbu village. (Photo IPIS)

<sup>172</sup> IPIS Interview with Richard Culp-Robinson, director of PACT-Congo, and his assistant Karen Hayes, Lubumbashi, October 26, 2007.

<sup>173</sup> IPIS Interview with Mark Hardin, October 26, 2007.

<sup>174</sup> There are 900 children in primary school, 300 of which come from TFM employee families. Interview with Mark Hardin on October 22, 2007.

<sup>175</sup> IPIS Interview with Mark Hardin, October 22, 2007.

<sup>176</sup> IPIS Interview in Fungurume on October 27, 2007.

<sup>177</sup> In November 2006, already 56 "development committees" had been created. Troisième document pour fins de commentaires, *Etude des impacts environnementaux et sociaux (EIES)*, TFM. November 2006, p. 19.

<sup>178</sup> IPIS Interview with father Juan Antonio on October 23, 2007 in Lubumbashi.

<sup>179</sup> IPIS Interview with father Juan Antonio on October 23, 2007 in Lubumbashi.



Katanga based newspaper wrote that 21 small and local enterprises had been created with the help of PACT.<sup>180</sup>

In October 2007, 37 brick factories and 4 fence factories were active, with some 400 employees. More than half of them had once been working as artisanal miners.<sup>181</sup> According to Mr. Hardin, four million bricks have already been produced.

This raises concerns about sustainability: what will happen once TFM has all the building material it needs? “We are looking at external markets, in Kolwezi for instance”, Mr. Hardin answers. According to Richard Culp-Robinson at PACT-Congo, expansion is inherent to the project. “The construction sector has good opportunities to do business. It is lucrative and sustainable. The entrepreneurs we work with, had to introduce a business plan and were given loans, and until now the loans have all been paid back according to plan. From January 2008 onwards, the factories will start to sell bricks in Likasi and Kolwezi”<sup>182</sup>.

Because the brick factories use wood-fired ovens, deforestation is another major concern. Again, neither Mr. Hardin nor Mr. Culp-Robinson saw major problems. They claim that land had to be cleared of trees and bush anyway, to make place for TFM’s process plant and other installations. “The wood that will not be used in the ovens”, Mr. Hardin says, “goes to the Lukotola technical school or to the stabilisation of the road slopes in TFM’s concession”. PACT-Congo also has the intention to use 5 to 10% cement and naturally harden bricks instead of baking them in ovens.

PACT-Congo has been criticised by Congolese and international NGOs who emphasize the importance of building relationships with local human rights organisations and other independent NGOs in the areas where they operate. According to these NGOs, PACT has acted more as an ambassador for the mining companies it works with, and, in some cases, has been prepared to overlook serious human rights violations for the sake of the company’s public image. PACT justifies its partnerships with the private sector by saying that it is constantly scrutinizing the companies and putting pressure on them to improve their practices. Besides aiding in development, TFM has also relied on PACT-Congo for advice in crisis management. In September 2007, two South Africans working for the drilling company GeoSearch brutalised two Congolese employees. The incident not only shocked the local population, it also became a national news item.<sup>183</sup> As a result, TFM had to dismiss the two South Africans. The company turned to PACT for some crisis communication consultancy towards the Congolese population.

## The Social fund

### Abstract

*In the coming years, a social fund will be created with money generated from TFM’s operations. Tenke Fungurume Mining will start contributing to this fund when its production becomes effective. The final amount of money that TFM will channel into the fund depends on metal prices and production levels. Local authorities have raised concerns that it will not be enough.*

TFM puts forward a long term perspective: the succeeding exploitations at Kwatabala, Goma and Fwaulu Hills might extend into year 2027 and after that stockpiled low-grade ore might be exploited for another 20 years.<sup>184</sup> TFM therefore sees as the “ultimate goal of the community development effort the establishment of a foundation for the allocation and management of community development funds”<sup>185</sup>. This fund will be administered by a foundation, which will be managed at its turn by a variety of stakeholders including local authorities, NGO groups and representatives of TFM.

Once the company starts making money from its copper and cobalt exploitation, TFM has agreed to

<sup>180</sup> Quiproquo, 21 entrepreneurs bénéficient de l’encadrement de Tenke Fungurume Mining à travers l’ONG américaine Pact-Congo, April 11, 2007, p. 4.

<sup>181</sup> IPIS Interview with Richard Culp-Robinson and his assistant Karen Hayes, Lubumbashi, October 26, 2007.

<sup>182</sup> IPIS Interview with Richard Culp-Robinson and his assistant Karen Hayes, Lubumbashi, October 26, 2007.

<sup>183</sup> Radio Okapi, Fungurume: deux Sud-Africains interpellés, September 26, 2007.

<sup>184</sup> TFM, ESIA, p. 8.

<sup>185</sup> TFM, ESIA, Issues and Response Report, March 2007, p. 73.

pay 0.3% of its net sales revenue into this fund. This will be in 2009 at the earliest. In the mean time, some figures have been circulating about the amount of money that the fund might administer. The World Bank has calculated that “on the basis of information in feasibility studies, the Tenke Fungurume mine will generate US \$1.2 million per year, starting in 2007, for local development funds, and more than US \$10 million in taxes and duties between 2007 and 2009”<sup>186</sup>.

During a “Question & Answer” session in May 2006 with representatives of the Kolwezi authorities a higher amount of money was mentioned for the development fund; some US \$2.7 million, which was considered by the local residents to be “far from enough”. TFM representatives replied that this figure had been given to illustrate the functioning of the fund and the contributions to the fund will depend on the metal prices on the world market and the production level in a given year.<sup>187</sup>



As part of TFM's social program, bricks are being made for houses at Fungurume. (Photo IPIS)

## Fungurume: Meeting the people

### Abstract

*The population in the TFM concession and in Fungurume has many complaints regarding the development program and how it is being carried out. The main critique is that TFM has wrongly calculated its financial support for the farmers and the resettled population. Moreover, the building of new houses for relocated people has been heavily delayed to the effect that people are living in camp-like circumstances, with only plastic sheeting for cover.*

The village of Fungurume conjures up images of a dusty and remote boomtown. Coming from Likasi in the East, the 60 km *Route Nationale* is in terribly bad shape. Under a hard-hitting sun, every passing car or truck trails a cloud of red dust through the hamlets. But when the rainy season starts at the end of October, the road turns into a track of thick mud and traffic becomes a chaotic view of vehicles avoiding potholes to the best of their ability.

Driving into the town of Fungurume, the first stop on the left is Schekilah's restaurant, just meters away from the market. On the right, a road leads to the railway station and the Catholic Church of Saint-Jacques. At the far end of town, Fungurume's Main Street goes north and leads to the airstrip of TFM and the Lukotola mission, some 20 km away.



Tenke Fungurume Mining has given this plot of land to the resettled farmers from Mulumbu village. As it is filled with tree trunks, it is very expensive to cultivate. (Photo IPIS)

<sup>186</sup> World Bank, Growth with Governance in the Mining Sector, World Bank Draft, unpublished report, available to the author for perusal only. October 16, 2007, p. 64.

<sup>187</sup> TFM, ESIA, Issues and Response Report, March 2007, p. 73.

At this junction, follow the *Route Nationale* in the direction of Tenke and Kolwezi, and drive up to TFM's local headquarters of Tenke Fungurume Mining s.a.r.l. On the other side of the road, is the entrance barrier of the concession where one security guard from the company and an agent of the Mining Police take identities of all in and outbound traffic.

The IPIS researcher arrived at the concession on a Saturday. Although nobody was working, some white 4x4-vehicles were circulating about the premises; most of them with white drivers at the steering wheel. Scattered throughout and in safely guarded parking spots, trucks and machinery belonging to subcontracting companies such as Safricas or Wilson Bayly Holmes (WBHO) are parked and waiting for the work week to begin. Inside the concession, there is around 300 km of road; nice, flat and wide. It is a sharp contrast to the poorly maintained public road outside. The roads are also marked with a signpost indicating every 500 meters distance. Visitors to the concession can see that road construction machines ate parts of existing hamlets.

Then, after a 20 km drive, a flattened plain appears and just next to it, on the right, sits what is left of the Mulumbu village. The area is entirely fenced. Within the perimeter some preparatory construction work has been done. Opposite Mulumbu, as if to constantly provoke its inhabitants that are about to be relocated, the construction company WHBO has built a container park with a restaurant and a medical post for its employees, the new inhabitants of the area.

The villagers of Mulumbu speak without restraint. They come and gather around the lime hut of a village "notable". Both men and women are present. About half a dozen people take part in our conversation. It is safe to say, that these people are not happy with what is happening at the land of their ancestors.

MK<sup>188</sup>: *"When TFM came, we welcomed them the arms wide open. We've blessed them. But they have not recognized the ancestors' power nor have they shown any particular consideration for my authority. TFM hasn't given me anything as a sign of their recognition. Do we want to move to Mpala? We don't know the grounds there. Do we want to live in TFM's new houses? We don't, because here's the power of our ancestors. Have we been consulted? No common agreement has been reached with TFM, they've decided unilaterally. Our main concern is our fields: we don't have any fields any more. How are we going to make a living? How are we going to survive?"*

- MWK: "TFM will start its exploitation at Kwatebala Hill. Kwatebala means: the rich mountain".
- TL: "Long before TFM you had SMTF here but they didn't really have a production. Then Lundin came, they owned everything but didn't last long. At some time they gave food to the population. From 1997 onwards, they put everybody on technical leave <sup>189</sup> ("congé technique")".
- MK: "Yes, we do receive money to cultivate; we receive US \$120.00 per hectare. But this is not enough. TFM has overlooked the fact that we need to pay labourers now to prepare the new fields for cultivation".
- TL: "We need at least US \$200.00 per hectare. Because the first year will be extremely heavy: to cut the trees and undig their roots, this is intensive and costly labour".
- MK: "TFM has given oxen to the chiefs, as a present. Then, they gave us a loan in the form of seed-ing material. At the end of the season, we had to pay this loan back. But the season was bad, there was too much rain and the harvest was poor. We couldn't pay back our loan. Then TFM has taken back the oxen".
- MA: "The new fields are far away. Many people leave from here now to work the new fields. Every day at 10 o'clock, a bus drives by to take us to the fields. But what can you do if you leave at 10 o'clock and start working at 11 o'clock? We are used to leaving for the fields very early in the morning".
- MWK: "The situation is this: our village is being cut in two. Some people have to leave for the fields in Munongo or Mpala, others still have their fields closer by. Consequently, the community is also

<sup>188</sup> People interviewed have been given anonymity.

<sup>189</sup> The term "technical leave" is a phrase used to explain the situation when the employer does not have work but must still pay the employee.



being cut in two. I mean, the population is diminishing. There will not be enough children left to run the school we have here and not enough teachers either. We've written to TFM about this concern but we don't get any reply".

- TL: "Our village has been in the process of being resettled since September. People have been moved to the farm of Munongo. But there are no houses there, and those who were the first to move have only received sheetings as a cover".
- MWK: "All of the artisanal miners who worked here before were strangers. They came from the cities. Our people fear to work as artisanal miners, because of TFM's security service. They know us all; it is easy for them to arrest us".

None of the villagers present at our conversation in Mulumbu have found a job with TFM. During the short stay in Mulumbu, the IPIS researcher met with only one person who was lucky enough to be employed by the mining project.

- MK: "I work with the drilling section (*"sondage"*). I make US \$200.00 to US \$220.00 a month. But I have a contract of determined length (*"contrat de durée déterminée"*) and there's a rumour now saying that our work will be finished before the end of the year. We get free medical care from the South African construction company WBHO. They also have a restaurant for the South Africans. We're not allowed to eat there, but we get a 10.000 Fc (US \$20.00) premium per fortnight as compensation. I too will have to move to Mpala. But I'm waiting until the new houses are finished".

Mulumbu lies within the concession, some 20 km west from Fungurume, but the new settlement for the Mulumbu villagers lies outside of the concession, east of Fungurume, and some 5 km down the road to Likasi.

On the *Route Nationale* a signpost reads *Ferme Munongo*. The village chief at Munongo agreed for the new village to be built but, as mentioned by the locals in Mulumbu, none of the new houses have been constructed. It is possible to see dozens of plots of land as well as the very first bricks for the foundations of the houses. The new fields have been cleared from bush and trees, but hundreds of tree trunks still stick up from the soil, making it impossible to cultivate the land. Some 220 households live here now in provisional camps. In the first camp, they have nothing more than orange plastic sheetings to take cover from the rain; in the next camp, some lime and leaf huts have been temporarily built.



Resettled people from Mulumbu village hope that TFM will keep its promise to build them houses. (Photo IPIS)

- MA: "TFM is a bunch of adventurers. Just look how we live here: like animals! We have three sheetings for some 50 people. And if you refuse to come here, you receive nothing at all. We have been living here for two and a half months now. They presented us with a contract which we had to sign. They gave us money to cut the trees and then they said: you have to use this money to start cultivating. They brought us here, but they themselves have nicely returned to Europe".
- JN1: "We call them Kilo-1 to Kilo-15, because of their handheld radios".
- TMM: "My house in Mulumbu has been destroyed. I have been forced to live here. Now I don't have a house either there or here".
- MA: "We have been helping to build new houses. But the construction work has been stopped be-

cause of a lack of materials. They are short in supply with everything: cement, sand, bricks. With the bricks you see there, you can build five houses, that is all”.

- KV: “Last year we did not cultivate, because all our land had been taken. And what about next year? We are totally blocked in our daily life. In Mulumbu we had other activities to feed our families. We sold some produce of our fields. But here this is impossible”.
- MA: “This land is not fertile. It is *bulonga kwa koza*, rotten land. We suggested that TFM would pay us US \$10,000. The company raised its offer to US \$7,000. Then, in May or maybe June, a delegation of bankers came to visit us. There were people from the World Bank, Canadians and Europeans. Apparently, they saw a possibility of paying more. But TFM didn’t do anything”.
- DT: “We get a sum of money for every hectare that we cultivate. But it is not enough. And we don’t get any rations of food either”.
- MA: “TFM gave us 3.000 FC (US \$6.00) for every 25 m<sup>2</sup> but actually the cost of labour is at 7.000 to 7.500 FC (US \$14.00 to US \$14.50) for such a plot of land”.
- JNl: “I’ve tried to get a job with TFM but I didn’t succeed”.
- MA: “Our contract with TFM said that they had to hire us first”.
- DT: “No, I heard that TFM does not want its subcontractors to hire people from Mulumbu because we need to cultivate”.

In the first camp, nobody is able to show resettlement documents. One person has a brochure, though, edited by the Congolese NGO ACIDH and its British counterpart Rights and Accountability in Development (RAID). The booklet is called “*Comprendre les principes directeurs de l’OCDE pour multinationales*” (Understanding the OECD Guidelines for Multinational Enterprises). Someone sceptically remarks that none of these nice principles is being applied in the Mpala resettlement camps.

The Displaced People of Mulumbu are not unanimous on how much they receive for reinstallation and compensation. In the second camp people complain about the difficult relationship with the original inhabitants of Munongo Farm. Here, however, some people have their contracts neatly stored and within reach.

- MEY: “This is the contract I’ve signed with TFM in September. As you can see, I’ve signed for the reception of a sum of US \$20.00 which is the installation premium. It includes a household and a cultivating kit”.
- MF: “US \$20.00 is not enough, not even to get rid of the tree trunks”.
- MEY: “Then, in the second part of the contract, you have the agreement for the compensation of the farming land. All the land I owned has been identified and measured. It totals 0.83 hectares. Now, the compensation rate is 120.000 FC per hectare plus a 50% bonus, which means 180.000 FC or some US \$360.00”.
- MF: “The original inhabitants tell us: you are going to waste your time with these plots of land. They simply are not cultivable. They have given you the barren land, which is red of colour, on top of the hill in the Munongo concession. The fertile land, which is black, lies in the valley around the farm houses”.
- EI: “We now have a conflict with the autochthonous people [the original inhabitants] over the use of the only well. They don’t want us to take our water from this pit and they have taken the bucket to make this message clear”.

IPIS also met with one local entrepreneur, the owner of a brick factory. He sees no future in working for TFM.

- JS: “I started my brick factory independently from TFM. At the prices they offer, I’m not going to sell my bricks to TFM. They pay 110 FC (US \$0.20) per piece while I can get 350 to 400 FC (almost US \$1.00) per piece in Kolwezi”.



## 5. To a new contract?

### Abstract

*The mining contracts of Tenke Fungurume Mining have been under review since June 2007. Although international NGOs have asked to temporarily maintain a moratorium, several lending institutions have accorded loans to TFM. It may well be that TFM's shareholders (Freeport McMoRan, Lundin Mining and Gécamines) will have to renegotiate the terms of their contracts with the Congolese government. At least this is what is suggested by a leaked document. But, after intensive lobbying from the US and President Kabila's visit to Freeport McMoRan in the US, TFM seems to have obtained guarantees from the DR Congo's authorities that the contract will remain untouched.*

A new phenomenon in Africa emerged in 2007 with regard to the mining sector. A number of countries started to review existing mining contracts or announced the intention to do so. These reviews are based on the assumption that the resource rich countries can earn more from their mineral assets if the contracts were to be renegotiated. Critique from civil society organisations also played a role in this process.

The West African state Liberia took the lead when it renegotiated a contract, signed in 2005, with the world's largest steel producer Mittal Steel.<sup>190</sup> In neighbouring Guinée-Conakry the new government gave in to trade unions, after a lengthy and radical strike in January 2007, and in April decided to start a procedure to review mining contracts.<sup>191</sup> In November 2007, the government contacted five law firms who are supposed to renegotiate certain contracts with private mining companies.<sup>192</sup> Now, Zambia, Sierra Leone and Tanzania are following these examples.<sup>193</sup>

The DR Congo has gone a long way on the same path. One of the first moves of the new coalition government of Prime Minister Antoine Gizenga (created in January after the country's first democratic elections since Independence in 1960) was to set up a Review Commission. This was done on April 20, 2007 by Martin Kabwelulu<sup>194</sup>, the Minister of Mines<sup>195</sup>.

The *Commission Ministérielle chargée de la révisitation des contrats miniers*, as the Minister calls it in his message, must examine, among other things, the contracts' clauses that go against national development and suggest modalities for their revision. The contracts will be categorised into three groups: viable, less viable and non-viable contracts. The viable contracts are considered to be the most productive ones and in order with tax payments. Which contracts were going to be reviewed was not officially made public. However, on April 21, 2007, the newspaper *Le Potentiel* revealed a list of contracts.

The commission started its work in June 2007. Its members came from different government administra-



A man shows the resettlement contracts signed with Tenke Fungurume Mining. (Photo IPIS)

<sup>190</sup> Global Witness, Newsletter, August 2007.

<sup>191</sup> Reuters, Guinea government says to review all mine deals, April 11, 2007.

<sup>192</sup> L'Aurore, Guinée: Un Cabinet pour réviser les conventions et contrats miniers, Conakry, November 5, 2007.

<sup>193</sup> Reuters, Sierra Leone says to review mining contracts, 31 October 2007; Mineweb, Now Tanzania to review all *mining* contracts, November 15, 2007.

<sup>194</sup> Kabwelulu belongs to the Parti Unifié Lumumbiste (PALU) of Prime Minister Gizenga, perhaps the only political party that succeeded in keeping a clean reputation during the Mobutu regime.

<sup>195</sup> Minister of Mines of the DR Congo, April 20, 2007. Arrêté ministériel n° 2745/CAB.MIN.MINES/01/ 2007 portant *mise sur pied* de la Commission ministérielle chargée de la révisitation des contrats miniers. Arrêté ministériel n°2745/Cab.Min/Mines/01.

tions and ministerial cabinets. Alexis Mikandji, *directeur de cabinet* of the mining minister, assumed the presidency. The Review Commission was given three months to screen some 60 mining contracts. In the course of their work, external experts offered to help and three of them were taken onboard: the US-based non-profit Carter Center, the Open Society Initiative for Southern Africa and Compagnie Benjamin de Rothschild, part of the LCF Rothschild Group.

The Tenke Fungurume Mining contract did not appear on the list published by *Le Potentiel* in April 2007, but the TFM case has been added afterwards. In November 2007 Lundin Mining stated that it had been subject of a contract review. "As part of the review process, a government commission team was received by the Tenke Fungurume project and a successful site visit was conducted"<sup>196</sup>.

Because of the review, uneasiness prevailed at TFM's offices in Lubumbashi as well as in Freeport McMoRan's headquarters in Phoenix, Arizona during the fall of 2007. When IPIS planned and executed a field research in October 2007, neither TFM nor Freeport wanted to discuss contract terms or operational progress until the government's Contract Review was complete. Diplomatic sources stressed that mining companies kept off NGO's or research bodies because the smallest revelation might negatively influence the commission's final report, which was met with growing impatience at the end of October 2007.

The cautiousness on behalf of Tenke Fungurume Mining may also stem from the fact that TFM needs fresh money. TFM is currently constructing roads, a processing plant, a tailings facility, houses, et cetera, and funding is supposed to be provided by Freeport and Lundin Mining on a 70:30 basis. Therefore, these companies were negotiating debt financing with a consortium of banks throughout 2007.<sup>197</sup>

On July 11, 2007, an international coalition of NGOs appealed to institutions such as the Overseas Private Investment Corporation (OPIC) of the USA, the European Investment Bank (EIB) and Export Development Canada (EDC) to wait for the Review Commission's conclusions before any lending was granted. This coalition of NGOs, which calls themselves, "Fair Share for Congo", urged the banks not to give any irresponsible financing to Tenke Fungurume Mining. "Presumptions of irregularities when the Tenke contract was made demand that this contract be scrupulously examined".<sup>198</sup>

The appeal came the day before OPIC was slated to approve a guarantee and an investment for the TFM project. OPIC had been under pressure from US based environmental activists for some time and in July 2007, it issued a response which, if briefly summarised, saw no problem with Tenke Fungurume Mining.

**OPIC's arguments for not seeing any problems with TFM were as follows:**

- TFM is NOT listed for review by the commission,
- The Tenke project's contracts "were executed and amended in accordance with law",
- There will not be artisanal mining, including child labor, in a commercial mining project such as TFM,
- The project enjoys broad local support,
- Replacement, homes and water supplies will be provided by the project,
- The project is making every effort to engage numerous stakeholders and
- During its community meetings in April 2007, OPIC was able to see that community members were active participants in the resettlement process.

OPIC refers to TFM's ESIA, from which it seems to copy-and-paste all the company's main arguments, be it on concerns of biodiversity, deforestation, water quality and other subjects. On August 15, 2007, TFM's loan passed without any problem. OPIC decided to provide US \$250 million in financing to an unidentified affiliate of Freeport McMoRan and US \$150 million in political risk insurance<sup>199</sup>, even though the Congolese Review Commission had not presented its conclusions.

<sup>196</sup> Lundin Mining, Lundin Mining 2007 Third Quarter Results, November 13, 2007.

<sup>197</sup> Ibidem.

<sup>198</sup> Fair Share for Congo, Déclaration «Un part équitable pour le Congo» sur Tenke Fungurume Mining, July 11, 2007. IPIS has studied three major mining projects for this coalition.

<sup>199</sup> OPIC, OPIC Board approves up to US \$400 million for copper project in DRC. Press release, August 17, 2007.

The EIB did the same by according a financing of €100 million to TFM in the week of July 23, 2007. On October 2, 2007, the African Development Bank (ADB) granted a US \$100 million loan to TFM, which consequently became the first private sector mining project in the DR Congo financed by the ADB. “Representing 11% of GDP, the project has a substantial foreign direct investment in the country and thus will have impacts both in terms of employment creation and contribution to Gross Domestic Product”, says ADB in a statement.<sup>200</sup> Moreover, TFM’s Social Manager Mr. Hardin has mentioned the Development Bank of South Africa as another lender to TFM.

OPIC’s almost partisan pro-TFM stance does not come as a surprise. The US government had a long history of interest in and supporting to the mining projects at the Tenke and Fungurume concessions. The interest dates back to the 1970s when the Tempelsman Company took part in the *Société Minière de Tenke et Fungurume* (SMTF). Tempelsman was a close ally to the Zairian President Mobutu but also had close ties with the US government. Tempelsman’s right hand man in SMTF was Larry Devlin, the former Chief of Station for the Central Intelligence Agency (CIA) in Leopoldville (Kinshasa). Mr. Devlin later left the CIA and his life of public service for the private sector in SMTF.

The US Embassy and government in Kinshasa have been closely following the Tenke Fungurume project for decades. In 1991, Melissa Wells, then US Ambassador to Kinshasa visited Tenke Fungurume. Over the past years, the US Embassy seems to have actively lobbied for the DR Congo’s government to sign the agreement with Phelps Dodge. According to the Carter Center, US officials “[demonstrated] unambiguous disregard for the moratorium [asked for by the IMC and Duncan & Allen-reports]”<sup>201</sup>. In 2005, the Embassy’s temporary *Chargé d’Affaires* played a central role while personally urging the President’s office to agree to amend the TFM contract.<sup>202</sup> In 2006, this person retired from the State Department and became Vice-President for Government Relations, Africa for Phelps Dodge in Kinshasa.

The habit of going back and forth from the public to the private sector and vice versa is known as the “the revolving door”. Asked about the former *Chargé d’Affaires* and an eventual conflict of interest, the Embassy’s Economic Counselor, Christopher Corkey said that he sees no harm at all.<sup>203</sup> According to TFM’s Mr. Hardin the former *Chargé* has been cleared under the Foreign Corrupt Practices Act (FCPA) and is “extremely useful because of her numerous contacts” in the capital Kinshasa.<sup>204</sup>

John Fenn, senior Vice President for Africa for Phelps Dodge, was officially appointed by the White House as a member of the US delegation and on December 6, 2006, attended the official installation of President Joseph Kabila. In return, President Kabila paid a visit to Freeport’s Morenci Mine in Arizona, during an official trip to the US in October 2007.<sup>205</sup> Two months later, in December 2007, Richard Adkerson, Chief Executive Officer with Freeport, was quoted saying: “I met recently with the president of the country and he encouraged us to move ahead fast. (...) He gave assurances no arbitrary steps would be taken”<sup>206</sup>.

Not satisfied with the way OPIC decided on the TFM loan in September 2007, US activists from Environmental Defense urged OPIC to make the minutes of the Board Meeting public under the Freedom of Information Act (FOIA). OPIC did send some 60 pages of meeting notes. However, 80% of the text had been blacked out and was completely unreadable. Even the section titled “Host Country Development Benefits” on page 27 had been censored.

<sup>200</sup> ADB, The ADB boost Copper & Cobalt mining in DRC USD 100 million to Tenke Fungurume Project. Press release October 3, 2007.

<sup>201</sup> The Carter Center Review of the DRC Mining Contracts. Update and Recommendations, November 30, 2007. Unpublished document, shown to the author for perusal only.

<sup>202</sup> The International Crisis Group, referring to interviews it did in Kinshasa in October 2006 and January 2007, puts the relationships between Joseph Kabila, foreign embassies and multinational enterprises in a broader political context. ICG describes how members of the International Committee in support of the Transition (CIAT), have promoted their economic interests, allegedly by helping companies obtain mining contracts directly from the presidency. CIAT consisted of the ambassadors of the US, France, Belgium, UK, South-Africa, China, Angola, Canada, Russia, the EU and the AU. The ICG-report from July 2007 says: “The U.S., Canada, South Africa and Belgium took the lead, seeking to control strategic reserves of copper, cobalt and other minerals and restrict China’s access. Nothing signified this shift better than the U.S. ambassador’s public celebration of Phelps Dodge’s acquisition of the Tenke-Fungurume concessions in Katanga in August 2005 and the grandiose June 2006 ceremony in Kolwezi marking the reopening of the Kamoto mine, attended by Belgian, EU, Canadian, French, Angolan and even UN representatives.” In: International Crisis Group, *Congo, Consolidating the Peace*, July 5, 2007, p.8.

<sup>203</sup> IPIS Interview with Christopher Corkey at the US Embassy in Kinshasa, October 16, 2007.

<sup>204</sup> IPIS Interview with TFM’s Mark Hardin, October 26, 2007 in Lubumbashi.

<sup>205</sup> Eastern Arizona Courier, Congo president tours Morenci mine, October 29, 2007.

<sup>206</sup> Reuters, Freeport-McMoRan CEO told Congo mine can go ahead, December 6, 2007.

At the end of September 2007, the Contract Review Commission, on its part, obtained an unofficial extension of its mandate for one month.<sup>207</sup> Several diplomatic missions in Kinshasa were said to be skeptical of the outcome of the commission.<sup>208</sup> A company representative that had been given anonymity by the British newspaper *The Economist* said that his company had been asked for money in exchange for a favorable hearing.<sup>209</sup> At the same time diplomatic missions and the business community started discussing what to do during the next stage, if the DR Congo's government was to demand the renegotiation of some particular contracts.

World Bank officials in Kinshasa clearly opted for assistance from international (and explicitly not Congolese) law firms.<sup>210</sup> These officials also disputed the expertise on mining matters of a non-profit organisation like the Carter Center. However, on October 11, 2007, the Belgian ministry of Foreign Affairs accorded a €150.000 subsidy to the Carter Center to give independent advice to the Congolese authorities. Five days later, the Belgian embassy in Kinshasa invited the Carter Center's Peter Rosenblum to attend a meeting on the contract review. Representatives from a dozen embassies showed up, which shows the great interest of the international community.

When this report was being finalised, the Contract Review Commission had not yet published its findings. Its report will first go to the DR Congo government who will make political decisions. However, the newspaper *Le Phare* (which belongs to the opposition camp) has published what it calls a draft of the commission's report.<sup>211</sup> The conclusion of this draft contains no "viable contracts" at all. TFM is classified in the second category of contracts that need to be renegotiated.

According to the document, the Review Commission criticised the decrease of Gécamines' stake (from 45% to 17.5%) as well as the decrease of the transfer fee (from US \$250 million to US \$100 million of which US \$65 million have been paid). Allegedly, it also found the Force Majeure unjustified and questioned why the feasibility study was not delivered before the convened deadline.

In the document published by *Le Phare* the Contract Review Commission recommends that Gécamines' partner in TFM (which is not specified) must be forced to pay US \$185 million. The production targets must be increased to a minimum capacity of 500,000 tonnes of copper per year (instead of some 130,000 tonnes as it is foreseen now). The draft also states that the DR Congo has to demand royalties from TFM (in order to increase Congo's income from the project).

Alexis Mikandji, the president of the Contract Review Commission, has declared that the document published by *Le Phare* is false, but in November 2007, a member of the cabinet at the Ministry of Mines told the author of this report that this document "has not been invented". Just before the publication of this report, the Congolese deputy minister of Mines, Victor Kasongo said that the government's review had exposed levels of irregularities that far exceeded its expectations.<sup>212</sup> He said that all contracts would need to be renegotiated by different degrees.

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<sup>207</sup> Global Witness, The Congolese mining sector in the balance. Global Witness briefing. October 1, 2007.

<sup>208</sup> IPIS Interview with Western diplomat, October 15, 2007 in Kinshasa.

<sup>209</sup> The Economist, Who Benefits from the Minerals?, September 22, 2007.

<sup>210</sup> IPIS Interview at the World Bank, October 17, 2007 in Kinshasa.

<sup>211</sup> Le Phare, Contrats miniers. Tableau d'évaluation et de classification des contrats, November 2, 2007.

<sup>212</sup> Mining Weekly, Metorex Confident DRC Concessions 'in good standing', February 6, 2008.



## 6. Conclusions

The DR Congo needs foreign investments to be able to generate money from its natural resources. The so called “resource paradox” continues to characterise the country. Despite the abundance of valuable minerals, the majority of the people continue to live on less than a dollar per day. There are several reasons for this, such as the colonial and neo-colonial heritage, widespread corruption, recent armed conflicts and, the inability to assure that a substantial share of the income generated by mining remains in the country and - most importantly – that the income is being redistributed to the Congolese people.



*People who have been resettled from Mulumbu villaged are living like refugees under plastic sheetings in October 2007. (Photo IPIS)*

Fair and balanced mining contracts, negotiated in a transparent and legitimate way, are crucial for the country's future. However, World Bank funded reports and specialists have concluded that the contracts, which transferred concessions to foreign investors in the past, like the concessions of Tenke and Fungurume, have often been signed in a rush, behind closed doors and without proper valuation of the assets. More research is needed in order to conclude if the terms of the TFM contract of 2005 are fair and balanced or not, and if the contract is constructed in such a way that it sufficiently takes the DR Congo's best interest into consideration.

The history of the Tenke Fungurume project very much reflects the environment in which contracts have been negotiated and sealed in the DR Congo. Approvals for the project have been required both from dictator Mobutu (during the war in 1996), from Laurent-Désiré Kabila (in 1997) and from the transitional government (in 2005). The founder of the Lundin Group, Adolf Lundin, admitted having offered Mobutu a donation for the dictator's election campaign during a meeting when Mobutu was to approve that the rich concessions were transferred to Lundin Holdings. Adolf Lundin claims that the money offered was never transferred to Mobutu, but it cannot be excluded that the offer played a role in Mobutu's decision to approve the deal.

Since the Mobutu era, Congolese politicians have been heavily involved in economic activities, as owners or administrators of parastatal and private companies. This intermingling of interests continues to exist, also in the mining sector where some political key players have taken up functions on the management or the board of foreign mining companies. Both local and international organisations report about corruption on all levels within the mining sector. Rumours about contributions to political parties or candidates for election are common, but are difficult to prove most of the time. Only recently, a law was adopted that regulates the financing of political parties by the Congolese state. However, it says nothing about contributions from companies. The risk remains imminent that financial contributions from companies, instead of capability or estimated benefit for the country and its people, are decisive when mining contracts are negotiated, approved or revised.

Foreign mining companies possess great potentials to contribute to a substantial rise of the country's GDP, jobs and income creation as well as to peace and stability. Tenke Fungurume Mining's (TFM's) salaries are higher than those offered by many other mining companies in Katanga. The ambition of avoiding all safety incidents, environmental damage and illnesses is also most welcomed in a mining province where death and injury rates are notoriously high and environmental problems are widespread.

The current operator of TFM has launched a substantial development program, including resettlement and compensation schemes, education possibilities, creation of alternative source of income, et cetera. However, interviews conducted with relocated people in October 2006 indicate that several problems need to be addressed. The people interviewed complain about loss of livelihood and insufficient compensations. In October 2007, IPIS found relocated people living under precarious conditions in camp-like settings. The construction of houses, offered by TFM, was greatly delayed. SwedWatch, Diakonia and IPIS thus stress that there is an urgent need to address the problems outlined above.



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## 8. Acronyms

ACIDH	Action Contre l'Impunité pour les Droits Humains (DR Congo)
ADB	African Development Bank
AFDL	Alliance des Forces Démocratiques pour la Libération du Congo
ALBA	Association laïque pour les bambins d'Afrique (ALBA)
BCDI	Banque de Commerce, du Développement et d'Industrie (Rwanda)
BCECO	Bureau Central de Coordination (DR Congo)
CIAT	Comité International d'Accompagnement de la Transition (DR Congo)
COPIREP	Comité de Pilotage de la Réforme des Entreprises Publiques (DR Congo)
EDC	Export Development Canada
EIB	European Investment Bank
ESIA	Environmental and Social Impact Assessment
FARDC	Forces Armées de la République Démocratique du Congo
FCPA	Foreign Corrupt Practices Act (USA)
FOIA	Freedom of Information Act (USA)
GCM	Gécamines (DR Congo)
HR	Human Resources
IMC	International Mining Consultants Group (UK)
MONUC	Mission des Nations Unies en République Démocratique du Congo
NGOs	Non Governmental Organisations
OECD	Organisation for Economic Cooperation and Development
OPIC	Overseas Private Investment Corporation (USA)
PDG	Président Délégué Général
RAID	Rights and Accountability in Development (UK)
RAP	Resettlement Action Plan
s.a.r.l.	Société à Responsabilité Limitée
SADC	Southern Africa Development Community
SMTF	Société Minière de Tenke et de Fungurume
TFM	Tenke Fungurume Mining (Company)s.a.r.l.
UN	United Nations (Organisation)
US	United States (of America)
USAID	United States Agency for International Development
WBHO	Wilson Bayly Holmes (Construction Group, South Africa)



## 9. Timeline

<b>1972-1984: Société Minière de Tenke et de Fungurume</b>	
<b>1994</b>	
1994, Dec. 23	Gécamines (GCM) launches limited tender for Tenke Fungurume
<b>1995</b>	
1995, May 26	First selection: <ul style="list-style-type: none"> <li>• Anglo-American Corp Safr</li> <li>• Gencor-BHP</li> <li>• La Source Cie Minière</li> <li>• Iscor Ltd</li> <li>• Lundin Group</li> </ul>
<b>1996</b>	
1996, Aug. 25	Adolf H. Lundin meets president Mobutu in France
1996, Sept. 3	Creation of Lundin Holdings (Bermuda)
1996, Aug-Sept	East Congo: start of anti-Mobutu rebellion
1996, Nov. 30	Tenke Fungurume Mining (TFM): conventions signed <ul style="list-style-type: none"> <li>• 'Convention création TFM' between GCM (GCM) 45% and Lundin Holdings (LH) 55%</li> <li>• 'Convention minière' between Zaïre, GCM and LH</li> <li>• Consultancy agreement between LH and TFM</li> </ul>
1996, Dec.9 & 20	TFM Decrees
1996, Dec.	Adolf H. Lundin visits Tenke and Fungurume
1996, Dec.9	Tenke Mining Corp. buys Tenke Holding (owner of Lundin Hold.)
<b>1997</b>	
1997, Apr.28	New government ratifies TFM conventions
1997, May 17	Laurent-Désiré Kabila new president of Democratic Republic of Congo
<b>1998</b>	
1998, March 31	GCM-Trabeka mixed commission to solve the Trabeka dispute
1998, August	Rwandan and Ugandan troops invade Congo
1998, December	BHP agreement with LH to take TFM option
<b>1999</b>	
1999, Feb.23	TFM and LH declare Force Majeure
<b>2000-2001</b>	
2000-2002	BHP and Lundin want changes to TFM contracts
2001, January	President Kabila assassinated. Joseph Kabila successor
<b>2002</b>	
2002, July 11	Mining Code
2002, August	Phelps Dodge replaces BHP Billiton as option holder
2002-2004	Phelps Dodge and Lundin want changes to TFM contracts
2002, Sept.30	IMC selected to study Gécamines' restructuring
2002, Oct.16	UN Expert Panel lists Lundin as US Expert Panel lists Lundin.
2002, December	Pretoria peace agreement (Accord Global et Inclusif)
<b>2003</b>	
2003, May 21	Tenke Mining defence before UN Expert Panel
2003, July 1	Transition: start (1+4)
2003, November	IMC report recommendation: put all negotiations on hold

## 1972-1984: Société Minière de Tenke et de Fungurume

### 2004

2004, Jan.16	Phelps Dodge Exploration Corp forms Joint Venture with Tenke Holdings
2004, Apr.24	Parliament votes creation of 'Commission Lutundula'
2004, December	Lundin agreement with GCM, Minister Plan and Bemba's cabinet
2004, Dec.16	TFM on ECOFIN agenda

### 2005

2005, Jan.20	Bemba's letter; ECOFIN agrees
2005, Feb.01	Law firm Duncan & Allen receives task to study GCM's Joint Ventures
2005, June 26	Commission Lutundula finishes first report
2005, July 19	Council of Ministers approves new TFM deal: GCM 17.5%, Lundin 82.5%
2005, Aug.4	Decrees approve Joint Ventures of TFM and Kamoto
2005, Sept. 8	Memo of World Bank's Craig Andrews
2005, Sept. 28	TFM's amended convention signed
2005, Oct.27	Decree
2005, Oct.31	Phelps Dodge lifts option on Lundin stake in TFM

### 2006

2006, Feb.26	TFM-SNEL protocol on electricity
2006, Feb.26	Phelps Dodge says: TFM Feasibility Study completed
2006, Apr. 6	Duncan & Allen, final report
2006, Nov.20	Freeport McMoRan announces take over of Phelps Dodge
2006, Dec.06	John Fenn (of Phelps Dodge) at inauguration of president Kabila

### 2007

2007, March 19	Freeport McMoRan incorporates Phelps Dodge
2007, Apr. 4	GRD Minproc awarded TFM supervising contract
2007, Apr. 11	Tenke and Lundin merger announced
2007, Apr. 12	TFM Feasibility Study by GRD Minproc published
2007, Apr. 14	DRC government announces Review of Mining Contracts
2007, Apr. 20	Minister's decision to create Review Commission published
2007, June 18	Review Commission starts working
2007, July 23	European Investment Bank accords €100 mln loan
2007, Aug. 17	OPIC (US) accords US \$250mln credit
2007, Oct. 3	African Development Bank accords US \$100mln credit
2007, Oct. 24	TFM's investment up from 650 to US \$900mln
2007, Oct. 28	President Kabila visits Morenci mine of Freeport McMoRan in US
2007, Nov. 02	Le Phare publishes 'leaked' conclusions of Review Commission
2007, Nov.06	Contract Review Commission submits report to government
2007, Dec.06	Freeport CEO says TFM can go ahead

### 2008

2008, Jan.14	Fungurume village: popular protest against employment policy of TFM
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