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MINING COMPANY: Concept Paper

TENKE FUNGURUME MINING PROJECT

Democratic Republic of Congo

for

International Finance Corporation (IFC) Road-Test

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**Preparation for the International Finance Corporation’s Road-Test
Tenke Fungurume Mining Project, Democratic Republic of Congo [DRC]**

STATEMENT OF PURPOSE

The purpose of this paper is to provide COMPANY with assistance in preparing for its development of a framework and process that will ultimately produce a ‘Road-Test’ of the performance standards defined by the International Finance Corporation’s (IFC) in its *Guide to Human Rights Assessment and Management*.

This project would follow both the IFC Road-Test guidelines, and include consultation with the International Business Leaders Forum (IBLF) to develop a practical tool that would assist the company in its efforts to navigate, mitigate and manage business risks and challenges defined by the international human rights architecture in hard rock mining that continues to draw both global media and NGO attention.

Getting Ahead of the Curve

As company staff noted, they would both benefit from the results of this assessment while playing an active role in the baselines development of the Human Rights Impact Assessment (HRIA) tool. Further, staff noted that the “assessment of our DRC project could become an important case study for our overall operations.”

Although every country is unique – requiring country-specific strategies – the methods and strategies developed for the Road- Test would assist THE COMPANY in its efforts to identify human rights issues to be addressed, ameliorated and managed.

As the IFC observes, no specific indicators yet exist to accurately predict or measure human rights challenges. But the Road-Test is designed to assist top-management in establishing a process by which stakeholders and information can be brought together and organized to inform corporate business judgment.

Methods and Strategies

The methods and strategies would complement, and, to some extent, draw from, the company’s existing procedures such as those defined by The Voluntary Principles of Human Rights, The Extractive Industry Transparency Initiative, the Environmental and Social Impact Assessment (ESIA) and corporate social responsibility strategies promoted by the International Council on Mining and Metals.

The result of this process would produce a Road-Tested human rights impact assessment that is consistent with the IFC-ICBL framework, and create an internal

capacity for implementation and self-evaluation that is capable of withstanding IFC review.

Competitive Advantage

One cannot overstate the urgency for the company to get its team organized for a preliminary assessment both as a matter of comparative advantage and to get ahead of the human rights curve to protect the corporate reputation as a mining company that is capable of setting the standard with its adherence to the IFC-ICBL architecture.

The results of this initiative will prepare top and field management to welcome the IFC and ICBL with its proverbial ducks in order.

PART I

Project

With road tested field-dynamics evolving, the IFC Guide offers an opportunity to get ahead of the human rights curve as it applies to the mining industry, and help set the stage for performance standards.

Whether or not this is the appropriate time to publically move forward with the IFC Road-Test, it is, nonetheless, crucial to develop a framework and internal management capabilities that would link together the range of international and domestic laws, principles and conventions with field-conditions so that when the circumstances are appropriate for full participation in IFC's Road-Test, the management team would be fully prepared.

Backdrop

According to the European Investment Bank (EIB), an investor in the *Tenke Fungurume Mining Project*, this operation counts amongst the first large private sector mining projects to be carried out in post-conflict Congo, and therefore is "highly significant" from an economic, social and developmental point of view. The EIB also notes that the Tenke project "incorporates best industry practices" in an operation that are located within two concessions totaling 1,500 square kilometers in Katanga Province.

Despite a number of effective guidelines such as the EIB, EITI and the Voluntary Principles, there are currently no widely recognized human rights standards, which form industry-wide 'best practices.' But, as best-practices continue to evolve, perhaps the most significant model is found in the continuous dialogue and consultation with communities within the operational footprint.

World Class Resource

Given the Tenke mine's location in the DRC's rich copper belt, combined with its reputation as the "largest and highest grade undeveloped copper/cobalt deposit in

the world today,” this world-class resource will undoubtedly continue to draw interest and attention from critics and supporters alike. According to the World Bank Group (WBG), “the mining sector in DRC is poised for an extended period of growth.”

In June 2009, *Metals Place* reported that production in the *Tenke-Fungurume* copper-cobalt mine “is higher than expected and should end up exceeding long-term forecasts.” Indeed, the world’s largest publically traded copper company in 2008 sold, from its U.S., Chilean, Indonesian and DRC mines, some 4.1 billion pounds of copper, 1.3 million ounces of gold, and 71 million pounds of molybdenum.

Mine Dependent Economy

The economy of Katanga Province, as with the country itself, is almost entirely dependent upon the exported mineral resources. Other sources of domestic livelihood have been neglected, typical of this and other resource-rich regions of the world. The WBG recently noted that DRC’s government faces an enormous challenge of fulfilling its “twin mandates” of decentralization of power to the provinces, and retrocession of mining taxes. The Bank also reported that although the Tenke mine region was always within government control during civil war, and that the cultures of “rent seeking, corruption and impunity remain deeply engrained.”

In such volatile situations, corporate reputation and brand name can shift in a moment despite any financial and human resources dedicated to mitigating environmental and social harm or improving life in the operation’s footprint. Global NGO networks and media attention tend to keep a watchful eye on the activities of companies that operate in political unstable and often impoverished mining regions. It remains crucial, therefore, that the company operate its Katanga minefields in a manner that is both as a matter of fact and perception, beyond human rights reproach.

Legacy Challenges to a Successful Human Rights Program

To develop an effective IFC human rights program, it is essential to address legacy issues. In the Democratic Republic of Congo, legacy issues abound. The company’s personnel – particularly expats – are far more accepted at national and local levels when they can demonstrate a detailed awareness of historical dynamics, – local and national –, which is particularly useful in meetings with community leaders or skeptics.

Turbulent History

For example, management is likely aware of the turbulent history of that region over the years, beginning with King Leopold’s exploitation of Congo’s resources to more than three decades of a strong grip by Mobutu Sese Seko, then one of the world’s wealthiest heads of state during the Cold War. This was followed by Laurent Kabila, who was viewed as an obstacle for peace following the success of his movement in

toppling Mobutu, then followed by his son, Joseph, who today seeks to improve DRC's standing in his resource-rich nation both domestically and worldwide.

This is a region where access to mineral wealth by the DRC's high-ranking politicians has, over the years, fueled civil wars and has led to popular perceptions that anti-corruption measures are more a tool to root out political adversaries than a genuine effort to serve the interests of the population.

Perhaps the greatest challenge for a human rights program is drawn from media and NGO accounts that paint a picture of the mining sector in Katanga Province as a "vicious cycle of corruption, mismanagement and patrimony" that recalls the Mobutu era in that mining rents have yet to build a properly functioning social institutions despite a variety of reform initiatives.

Governance

According to the watchdog group, *Global Witness*, the government of the DRC has failed to adequately insure that Katanga's enormous natural wealth is used for the benefit of the Congolese population and for the country's development. The NGO reported that during 2005, patterns of corruption and interference by senior political officials in mining contracts became "more entrenched."

Improvements

The DRC, however, has improved its mining laws, such as the 2002 ratification of the Mine Law, which is consistent with international best practices for sustainable and transparent development. In another step forward, in 2004 the government signed on to the Extractive Industry Transparency Initiative (EITI), in the context of increased numbers of contracts with foreign or multi-national mining companies.

The WBG strategy to "kick-start" the mining sector, support improvements in the nation's regulatory structure, and promote both foreign and domestic investments which led to a restructuring of *Gécamines*, the state owned mining company. *Gécamines* has since been creating partnerships with private companies which *Global Witness* claims provides the private companies with huge share of rents but leaves the state-owned company with "crumbs."

Nucleus of a Regulatory Regime

But despite the nucleus of a regulatory regime, *Global Witness* also reports that the government has demonstrated minimal ability or will to fully implement standards, such as the EITI, or implements an effective distribution of rents to the communities where the mining companies operate.

The WBG reports that in Katanga Province, generally speaking, the "social and environmental conditions are deplorable." Social services that had earlier been provided to local communities by *Gécamines* are now are jeopardized due, in part, to loss of rents. With weak governance, a question that emerges is to what extent are

social policies the obligation of government and to what extent the obligation of the industry?

Road-Testing Corporate Human Rights Obligations

But irrespective of any human rights obligations, companies such as the company, particularly in new areas of operation, are responsible to ensure that their presence in the region does not accentuate the problems that have defined the mining sector in the past.

To obtain a 'social license to operate' mining companies can make a significant contribution to change the way that business has been done and help create a more positive environment long after the operation is closed out.

Financial Crisis

Just as the urgency for a world-class human rights program, with emphasis on the resettlement stage, emerged, so did a global financial crisis that rippled through all global markets. The market changed dramatically in the past six months, perhaps evidenced by the company's breathtaking drop in share price from \$127 to its low of \$17 – and now approaching \$57 per share. These global events have altered both financial and political risk parameters as the collapse in commodity prices coupled with turmoil in the financial markets as much as halved the value of major corporations, including mining.

Comparative Advantage: Chinese Companies

Yet even as western companies have pulled back in mergers and acquisitions, China's overseas investments – particularly in petroleum and mining – doubled in 2008, to \$52 billion, with an expected increase of 13 percent this year. The New York-based advisory group, Rhodium, noted that the current markets has created opportunities for China to "go bottom fishing," even though some analysts criticize Chinese interests to overpay or "failure to grasp" all of the challenges involved in a takeover or acquisition.

Comparative Advantage: Western Companies

As a global consensus builds for human rights compliance, companies in a variety of sectors are finding comparative advantage against other Western and also Chinese companies by getting ahead of the human rights curve.

Key Drivers for the IFC Road-Test

A range of stakeholders, from NGOs, shareholders, public interest litigators, international agencies, local communities, media, litigation, employees and, in some instances, governments, are the key drivers of CSR.

The globalization of information networks has accelerated NGO and other stakeholder capacities to seek corporate disclosures, spotlight poor labor, environmental and human rights practices and to raise public awareness of company practices.

Financial markets are increasingly interested in CSR accountability given a growth in demand for socially responsible investments (SRI) by both institutional and individual investors. Several new indexes have been created in the past few years, including the FTSGood in London and the Dow Jones Sustainability Index in New York.

According to a World Bank Group CSR Report, “investor requests have gained motivational force.”

PART II: Key Issue

Resettlement

One cannot overstate the significance of resettlement as a social matter, a matter of international human rights law, and a political matter that contains the capacity for attracting a global spotlight.

Since the company is resettling some 50,000 people to make way for the mining operations, it offers a potential flashpoint for the company’s reputation in its Katanga operations, thereby requiring the most carefully planned strategies for displacements. In the best of circumstances, analysts note that rarely are people better off after resettlement.

Given the legacy elements in the DRC and the complexities that accompany mining-induced resettlement, it is crucial that a first rate on-the-ground strategy be developed prior to resettlement, one which assesses knowable risks, cost estimates, conducted within the IFC’s “free prior and informed consultation and consent “ before resettlement, and post-resettlement realities mapped out with the participation of all of the major stakeholders.

Although THE COMPANY currently has a strong program in place, it needs to go well beyond compliance in its efforts so as to form a significant component to the IFC Road-Test, one that involves both individual and collective rights.

A well-developed and effective resettlement program will set the stage for the shape of the company’s reputation in Congo.

PART III

The IFC Road Test: Building Blocks

Sector-specific standards and practices on human rights are compatible with several of the company’s ongoing initiatives regarding security, transparency and resettlement. The IFC Human Rights Road-Test would both draw from the company’s other effective initiatives and also provide continuity for the range of activities and strategies that

comprise the emerging set of guidelines and indicators that are designed to enhance industry performance.

What follows are several corporate initiatives that have been integrated into management practices. The IFC Road-Test would build upon and complement these efforts.

Security: Voluntary Principles of Security and Human Rights

The Voluntary Principles of Security and Human Rights logically provide a significant yet incomplete element of a framework for the company's human rights risk assessment and strategy.

To effectively assess degrees of political and human rights risk, a key strategy is to continue to meet with community and other leaders to discuss risks and what can be done to prevent or reduce it.

An effective approach in place in other locations that emerge from such dialogue, for example, has been to create parallel systems of corporate and community security, allowing for outside security persons and community persons to be hired for the same position – a tandem event – so that matters are handled both in local culture and corporate culture. The two would work in tandem with direct consultation and coordination with each other.

Transparency: The Extractive Industry Transparency Initiative (EITI)

Given that exclusion of civil society could jeopardize a country's EITI compliance, DRC's February 22, 2008 acceptance as a Candidate Country provides significant space for the company's active engagement with stakeholders who might participate in the design, monitoring and evaluation of the EITI process – who can also be a bridge to the IFC initiative. EITI has been useful in directing the international communities' attention to the extractive sector

International Council on Mining and Metals (ICMM)

ICMM, established in 2001, with a mandate to assist the mining industry with sustainable development strategies, of which human rights is a core component. Specific support and criticism, for the Draft Report by the Special Representative of the Secretary General (SRSG) included ICMM's "basic argument" that "the very nature of the mining industry – often involving large-scale, fixed investments, in some of the world's least development countries, and with significant localized impacts, creates both potential constraints and opportunities for enhancing human rights performance."

PART IV

The IFC–IBLF Road Test for a Human Rights Impact Assessment and Management

Methodology

Several and sometimes overlapping stages of research, field–work and writing over the course of a year would be needed to produce a report that would provide both the framework and substance for the IFC Road Test. Effectively, this initiative would prepare management at national and Katanga levels to more ably meet the parameters of the IFC–ICBL program. A core image is that of a three–pronged stool: corporate, government and NGOs working together.

Given the international interest in human rights matters combined with the company’s ongoing resettlement, it is urgent to begin this process as soon as possible. If the political climate requires that the IFC–IBLF involvement be delayed, then this initiative would prepare THE COMPANY to be shelf–ready for the formal IFC–ICBL engagement.

The Team

Team members to be developed in accordance with tasks and would include both internal and external persons, including DRC people.

Eight Steps of Human Rights Impact Assessment and Management

Team members would be responsible for the IFC 8–step process that is the centerpiece of this initiative. According to the IFC, it “begins with assembling the information needed, moves on to assessing the managing the human rights risks and challenges, and concludes by monitoring the performance of the business operations.” It also requires incorporation of existing and new strategies into a seamless management practice.

The 8–steps require distinct and interrelated skills sets for each stage, including:

- An initial appraisal of the need for a HRIA (including parameters).
- Assemble information – both a corporate level and on the ground – to understand the context in which the project will operate.
- Determine the current human rights baseline or status quo of the project. (This should include what THE COMPANY is already doing in terms of Voluntary Principles etc.
- Verify the human rights issues through engagement with relevant stakeholders. (This dimension is key and will define the level of success of the project and allows for all parties to sit at the table.)
- Assess the actual and potential human rights impacts on the project. (Here I would utilize the GRI standards as well as IFC and ICBL.)

- Prepare conclusions and recommendations. (Also include a discussion of process, as contemporaneous notes should be taken as this initiative unfolds. For it is in the process – as much as conclusions – that human rights protections occur.)
- Eliminate or mitigate negative impacts and promote positive impacts by integrating human rights management into the overall project management. (Identify the top 3 or 4 issues that concern stakeholders, work of improving those areas and then look to the long list of human rights described by IFC and ICBL.)
- Monitor, evaluate and report on the project in operation. (A key component of evaluation is the more qualitative approach of asking the recipients about the impact of improvements.)

Costs

TBD

The Road–Test: My Role

My role is to assist with design, programmatic coordination, linking international human rights law with realities on the ground, having access to both top management and field level management.

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A.L. Parlow is an independent advisor and consultant to CEOs and top management in the petroleum, sugar–ethanol and mining industries, and international agencies. She has conducted field–work, assessments, developed crisis management strategies and written numerous reports in order to implement ‘Best Practices’ strategies in Corporate Social Responsibility/sustainability (CSR) for private companies and international agencies, such as the World Bank Group.

Her most recent assignment was in the U.S. Gulf Coast, as Alabama Branch Chief for Witt Associates and BP Petroleum. Parlow’s assignment was to assess the short–medium and long–term priorities of families, business, political leaders and communities impacted by the Gulf Coast oil spill.

Prior to that 2010 assignment, Parlow conducted field–work and produced strategies for a three–year initiative to advise a Caribbean–based family–owned sugar production plantation and mill company and a US based law firm in an program that produced an internal management structure in sustainability from top to field–management levels. She has also advised a major multi–national mining company on CSR regarding its Democratic Republic of Congo operations. In 2011, Parlow produced a “Best Practices” preliminary report on CSR for the Three Affiliated Tribes and its petroleum initiative in North Dakota.

Parlow has spoken at several international meetings on the topic of Corporate Social Responsibility, including the International Sugar Organization, the World Bank and a North Dakota oil shale consortium.

Parlow’s 2004 dissertation for her advanced degree in law from Oxford University was on the topic of Corporate Social Responsibility in the petroleum industry. Her work has brought her to South America, the Caribbean, Central America and sub–Saharan Africa and Central Asian locations.

In consultation with appropriate law firms, Parlow assembles location–specific teams with specialized skills when relevant. Parlow is a Certified Mediator.