

THE
CARTER CENTER



April 21, 2015

The Honorable Mary Jo White
Chair, U.S. Securities and Exchange Commission
100 F Street N.E.
Washington, DC 20459-1090

Dear Chair White,

I am writing to encourage the SEC to introduce a reporting rule for Section 1504 of the Dodd-Frank Act regarding disclosure of tax payments from extractive industries with no country exemptions. In particular, I urge that the reporting rule requires that payments be differentiated by country, company, project, and tax flow. The disclosure of this information would enable journalists, civil society groups, and parliamentarians to hold governments and state-owned mining companies accountable.

Since 2007, The Carter Center has worked closely with civil society in the Democratic Republic of the Congo (DRC) to advance good governance in the country's industrial mining sector. The DRC has the world's most significant cobalt deposits, over 10% of global copper reserves, and a growing industrial gold mining sector. If properly managed, mining sector revenue could help alleviate poverty and generate economic growth in one of the poorest nations on earth.

U.S. disclosure requirements have a global impact. At the international level, they contribute to the advancement of a global consensus on extractive industry standards for transparency. In the DRC, American multinational Freeport McMoran controls the largest copper mining project. The largest gold mining project, Kibali Gold, is controlled by Randgold Resources, which is listed on the NASDAQ Stock Market. These flagship projects set the standard for information disclosure and corporate social responsibility practices in the DRC.

Further, access to project-by-project data on tax payments in the DRC would directly benefit the work of The Carter Center and its Congolese civil society partners by bolstering their efforts to monitor revenue flows to sub-national governments and state-owned companies. In addition, such data would encourage debate on the fiscal regime and strengthen the fight against corruption. A list of practical uses for the data is enclosed.

This level of disclosure would not represent a significant additional reporting burden for companies. Corporations already collect such disaggregated data, and the majority of mining companies in the DRC, including Freeport McMoran and Randgold Resources, have demonstrated willingness to report detailed tax payments to their industry body, the Chamber of Mines, based on the notion that a more transparent business environment is in their interest. Moreover, companies already declare such payments to the Extractive Industries Transparency Initiative (EITI), albeit only two to three years after the fact, limiting its utility in current advocacy efforts.

In sum, we believe that requiring the disclosure of tax payments disaggregated by country, project, and type, would not overburden mining companies, but instead would have an immediate and substantial positive impact on the efforts of civil society organizations and activists to advance transparency and accountability in the DRC.

If you would like any further information on any of these points, please feel free to contact me, or my Carter Center colleagues, Atlanta-based Erin Crysler (erin.crysler@emory.edu), or Lubumbashi-based Daniel Mulé (revenues@congomines.org).

Sincerely,



Ambassador (Ret.) Mary Ann Peters
Chief Executive Officer

Enclosure

Practical uses of project-level tax data

Monitoring revenue distribution to sub-national levels of government

The DRC's Mining Code explicitly states that provincial- and local-level authorities are entitled to a percentage of royalties generated by mining projects established within their jurisdictions (25% and 15% of the mining royalties, respectively).¹ In practice, however, the vast majority of revenues is kept by the national government. While civil society actors have repeatedly called for the government to adhere to its legal obligations to decentralize mining revenues, their efforts have been hampered due to the lack of data available on individual mining projects. The disclosure of project-level tax data would enable civil society groups to accurately calculate revenues owed to sub-national governments and to conduct more effective advocacy aimed at ensuring that revenue is appropriately reinvested in the sustainable development of mining regions.

For example, Katanga-based civil society organization *Action contre l'Impunité et pour les Droits Humains* (ACIDH) published a report in 2012 that analyzed the contribution of the province's mining revenues to the national, provincial, and state-owned companies' coffers.² The report uncovered widespread inconsistencies between their estimates and the national government's revenue publications. For some mining operations, only very limited data was available, particularly for provincial taxes and for contractual flows to state-owned companies. These gaps made it difficult to accurately calculate revenue flows, let alone the subsequent distribution of those revenues.

Greater transparency of payments to state-owned companies

The DRC's state-owned mining companies, most notably Gécamines, SOKIMO and SODIMICO, control many mining permits covering large swaths of land. Joint venture contracts between international investors and the state-owned companies have become standard practice in the DRC, and the approach has yielded the latter hundreds of millions of dollars. Civil society actors have raised questions about whether some of these payments have been diverted. For example, two \$175 million signing bonus payments to the DRC state and its companies were included in the 2008 Sicominex collaboration agreement, but it remains unclear if the payments were actually made, and who collected them.

The Carter Center has worked extensively to ensure that payments to state-owned companies are publicly reported as part of the EITI. This requires constant monitoring of specialist press outlets and stock market sources to identify when deals have taken place and payments made; otherwise, there are still certain revenue flows that risk being unaccounted for. For example, Anvil Mining reported that it was required to pay an unprecedented \$55 million to the state-owned mining company in the context of a takeover.³ Because the Carter Center regularly monitors relevant stock exchange publications, we were able to ensure it was included in the EITI, but this is only a partial solution. Many payments are not disclosed, partly because large-scale multinationals do not always consider each of those payments as 'material'. Project-by-project reporting would thus provide a systematic source of reliable information on such payments to the state-owned mining companies to avoid potential oversights or omissions in the DRC's EITI reports.

¹ See Law No. 007/2002 of July 11, 2002, *Journal officiel de la République démocratique du Congo*, art. 242 for information on retrocession.

² ACIDH, 2012, *Transparence des revenus miniers en RDC: Cas de la Province du Katanga*, www.congomines.org/fr/acidh-transparence-des-revenus-miniers-en-rdc-katanga

³ See Liezel Hill, *Anvil Reaches Deal With Congo's Gécamines on \$1.3 billion Minmetals Offer*, Bloomberg News, Feb. 11, 2012, available at <http://www.bloomberg.com/news/2012-02-10/anvil-reaches-deal-with-congo-s-gecamines-on-1-3-billion-minmetals-offer.html> and Press Release, MMG, *Minmetals Resources offer for Anvil Mining proceeds following agreements and approval* (Feb. 10, 2012), available at <http://www.mmg.com/en/Investors-and-Media/News/2012/02/10/Minmetals-Resources-offer-for-Anvil-Mining-proceeds-following-agreements-and-approval.aspx>

Encouraging debate on the fiscal regime

The availability of EITI data on DRC mining companies' tax payments by revenue flow has led to a more informed dialogue among key stakeholders about the fiscal regime, particularly in the context of the DRC's Mining Code reform.⁴ The discussion has focused on significant under-collection of key revenue flows, such as profit taxes. Data from the EITI and other sources shows that the vast majority of mining companies in the DRC are not declaring profits despite having been in production for several years. In the context of the Mining Code review in 2014, The Carter Center provided detailed information on the fiscal regime to Ministry of Mines officials and other key stakeholders, and proposed several policy reforms, such as ring fencing provisions, reductions in accelerated depreciation, and greater minimum capitalization requirements aimed at closing tax loopholes. Access to timely project-by-project data published by type of tax would allow for more specific comparisons between fiscal projections and actual payments for particular mining projects.

Combatting corruption

Since 2011, the DRC has been embroiled in a series of scandals regarding secret and often underpriced sales of assets of state-owned mining enterprises. Project-level information from the London Stock Exchange (LSE) and the EITI allowed activists to obtain information about how much money changed hands. However, project-by-project payment disclosure would have provided a fuller and more accurate picture of some of the deals. One example relates to the Mutanda and Kansuki mining projects. Gécamines sold its stake in these joint venture projects to some offshore shell companies in 2011. The sale only became public knowledge because one of the joint venture partners, Glencore, reported the sale on the LSE, though without disclosing the sale price. Activists and the International Financial Institutions pushed the Congolese government to publish key contracts related to the share sale, which it eventually did, revealing a combined sale price of \$137 million. 2011 EITI-DRC data later gave a contradictory figure for the deal of \$189 million, plus a subsequent \$20 million in 2012. If project-by-project revenue disclosure had been mandatory, it would have allowed activists and journalists to verify exactly how much money was involved and where these payments went, instead of having to use incomplete and contradictory information.

Another example of potentially diverted revenue relates to OM Group, which is listed on the New York Stock Exchange (NYSE). OM Group's payments to Gécamines were held up in an escrow account due to a pending law suit against a third company. When Gécamines won the case, it was entitled to around \$100 million that had accumulated in the escrow account. While not required to do so, OM Group reported the payment to the NYSE because it was related to a high profile legal case. Gécamines, however, reported to the EITI only having received \$40 million. This information has enabled to civil society to ask questions about the inconsistency. If not for OM Group's voluntarily disclosure, the \$60 million discrepancy would have gone unreported.

⁴ See, e.g., Michael Kavanagh, "Congo Said to Plan Boosting Mine Royalties, Increase Stakes", Bloomberg Business, Apr. 14, 2015, available at <http://www.bloomberg.com/news/articles/2015-04-14/congo-said-to-plan-boosting-mine-royalties-increase-stakes>.