

MAISON DES MINES DU NORD KIVU:

ANALYSIS OF FISCAL AND PARAFISCAL FLOWS OF THE TWANGIZA MINING PROJECT,

Tax exemptions granted to Twangiza Mining: a shortfall for the Congolese State?

EXECUTIVE SUMMARY

(translated from French)

La Maison des Mines du Kivu (MMKi) conducted an analysis of the fiscal and parafiscal flows of the Twangiza Mining Project to understand the actual revenues that should be paid to the Government, revenues that are actually paid to the Government under this project and revenues that should have been paid if the project was governed by the Mining Code of 2002.

On February 13, 1997, the Mining Convention signed between the Democratic Republic of Congo (formerly Zaire), SOMINKI and Banro Corporation exempted SAKIMA from taxes. After signing a friendly settlement agreement with the Congolese government in 2002, Banro set up four subsidiaries, 100% owned by Banro. One of these is Twangiza Mining SARL, which controls gold deposits, and was sold to Banro by the Congolese Government. The amendments signed after the friendly settlement agreement exempted Banro and its subsidiaries from all substantial tax obligations.

In 2004, Twangiza Mining SARL, holder of 6 operating permits (OP 68, OP 44, OP 40, OP 41, OP 43, and OP 42), started exploration activities before beginning its production phase in 2012. Analysis of the Mining Convention and its amendments indicates a project with extremely limited fiscal and parafiscal impacts.

This is problematic because in a typical situation in the DRC mining sector, private companies and state portfolio companies (SOEs), form joint ventures (JVs) together according to agreements that contain certain parafiscal obligations to which the JVs are subject, beyond all tax obligations of the Mining Code. However, in this case, we could not find the State shareholder through the SOE, and Banro has almost a total exemption from tax obligations.

This report presents the results of analysis primarily conducted on the tax system, the various flows actually paid by Twangiza Mining and assumptions relating to possible payments that the company should have made to the Government if the tax system of the Mining Code of 2002 was applicable to the project.

Indeed, in a normal situation, that is to say, if an exemption had not been granted to Banro Corporation (Twangiza Mining Sarl), the Government should benefit payments for the following 6 flows: Surface area fees, *redevance minière* (royalty paid to the State as per the

mining code), Royalties, Taxes on profit also known as IBP, equity contribution on dividends and a share on dividends.

In the case of Twangiza Mining, as a result of those exemptions under the Mining Convention and its amendments, the company only paid to the Government the following flows: the *redevance minière* (mining royalty paid to the State as per the mining code) was paid only once (in 2013) without a legal basis for doing so; the Royalties were previously paid only once (in 2012).

For these two flows paid, the Government thus collected a sum estimated at \$ 2 million since the start of production of the company.

Under article 91 of amendment No. 1 to the Mining Convention, Twangiza Mining Sarl will pay the IBP in 2023, before the convention's expiration.

Under the conventional regime by which Banro Corporation exempts its subsidiaries from paying most of the taxes, the team found that the Congolese Government remains looser in the set up of the Mining Convention. According to analysis made by the research team, the Congolese Government has or will have lost approximately \$19,154,582 between 2010 and 2016.

An innovation of this conventional regime is the contribution to community development, under Article 6 of Amendment No. 2 to the Mining Convention which requires Banro to pay 4% of net profits to the Government, after repayment of capital.

Unfortunately, the generation of net profit takes a long time and it takes even longer for capital repayment, therefore the local community does not benefit from this provision.

Thus, the research team made recommendations to the Congolese Government, to Banro Corporation and to Twangiza Mining, focusing on the non-renewal of the mining convention between Banro Corporation and the Congolese Government, on the consideration of Government shareholding in the Twangiza project and on the urgent need for the review of Article 6 of amendment No. 2 to change the base of the contribution for community development funds from net profit to gross revenues and delete the condition related to the repayment of capital.

In addition, the team encourages a higher level of transparency that would involve not only publishing the missing contracts related to Banro's projects, but also making annual reports and financial statements of these mining sector projects publically accessible.¹

¹ The provisions of this article extend the tax exemptions enjoyed by SAKIMA to all Congolese subsidiaries of Banro.

IV.RECOMMENDATIONS

In view of the analysis and estimates made to assess the fiscal impact of the Twangiza project and Banro Corporation, the following recommendations are made:

To The Government of the DRC:

- No longer give general exemptions to extractive companies.
- Do not allow a mining company to exploit natural resources without direct or indirect shareholding of the Congolese Government.
- Do not renew the agreement signed with Banro once it expires in February 2027, 30 years after its signing.
- Insert in the draft law revising the Mining Code provisions that prohibit the renewal of mining contracts and the requirement for ongoing agreements to comply with the Mining Code once they expire.
- Publish and make available the contracts transferring mining rights awarded to Banro by SAKIMA and other contractual documents applicable to Banro projects.
- Initiate, in agreement with Banro, a review of Article 6 of amendment No. 2 on the obligation to pay a community development contribution based on the model provided in Article 21 of the amended and restated Mining Convention of Tenke Fungurume Mining project, which is based on gross revenues, and in which repayment of capital is not a condition of payment.
- Provide clarifications on the collection of the *redevance minière* (mining royalty paid to the State as per the mining code) in relation to the exemptions granted to Twangiza Mining Company.
- Reassign to the province of South Kivu and the concerned decentralized territorial entities 25% and 15% of the *redevance minière* (mining royalty paid to the State as per the mining code), in accordance with Article 242 of the Mining Code.

To Banro Corporation :

- Endorse the recommendation for reviewing Article 6 of amendment No. 2 community development fund contributions as proposed above.
- Publish all reports (especially financial reports) in French to allow citizens to understand and use them.
- Clarify terms of capital repayments to ensure a proper understanding of the due date for the payment of the contribution to the community development fund.
- Provide clarifications on tax advances of \$2,000,000 mentioned in Amendment 2 of the Mining Convention and on how they will be repaid.
- Commit to the non-renewal of the Mining Convention with the Congolese Government and maintain fiscal barriers between projects of its subsidiaries.

To Twangiza Mining Sarl:

- Provide clarifications regarding the payment of the *redevance minière* (mining royalty paid to the State as per the mining code) made in 2013 to the amount totaled \$ 1,000,000 while it was exempt from paying this tax.
- Provide clarifications on the non-payment of royalties for 2013, even though it was subject to this payment, which it paid in 2012 totaling \$ 1 million.
- Explain any debts of Twangiza Mining, including any debts to affiliated parties.
- Publish and make publicly available all annual reports and financial statements in accordance with OHADA accounting rules.

Summary of the Study's Findings:

The table above synthesizes the results of our analysis of fiscal and parafiscal flows to which the Twangiza Mining Sarl project is subject. Comparing the Mining Convention regime to that of other projects (subject to the Mining Code and potentially a contract), we note the absence of the following: two parafiscal flows (royalties and contributions to community development); four fiscal flows (Surface area fees, *redevance minière*, taxes on profits and gains, tax on dividends); and dividends to the SOE. These have been the subject of our analysis that shows the following:

The Congolese Government remains the biggest loser of this Mining Convention. The Congolese Government has recorded a total estimated shortfall of **\$ 19,154,582** from the years 2010 through 2015. Moreover, according to our analysis, the Government could record a shortfall in potential revenues in the amount of **\$ 6,966,634** for the year 2016 alone.

This year is the fifth and final year of the application of deferred losses provision according to our estimates. If the deficit continues, the estimated amount for this year could be even higher. However, as the amount of 7 million USD of lost revenues represents the amount otherwise payable after the deferred losses are completely recovered by profits, it may be regarded as an annual loss of revenue, even if it starts one or more years later.