

resource matters

Deciphering the \$440 million discount for Glencore's DR Congo Mines



The Paradise Papers revealed that one of the companies Glencore currently controls got a \$440 million discount on the price it paid for access to some of the Democratic Republic of Congo's best mines.

In response, Glencore said the price was “essentially correct.” Was it?

A closer look at the contracts shows that the KOV mine, one of the worlds' richest copper and cobalt deposits, was nearly entirely excluded from the bonus calculations. Glencore's company also won't pay any additional fees for access to almost 4 million tons of copper reserves the Congolese state-owned company promised the company.

Executive summary

In early November 2017, the Paradise Papers – a massive leak of confidential corporate documents – revealed that a company currently operated by Glencore, the Swiss multinational commodities and mining company, negotiated a signing bonus in 2008 for a very valuable mining complex in the Democratic Republic of Congo that was \$440 million less than what Congo's state-owned miner Générale des Carrières et des Mines (Gécamines) had asked for.¹ The signing bonus was also four times less than the rate virtually all of the company's peers had agreed to for their access to Congo's copper reserves.²

Congo is one of the poorest countries in the world; at the time, \$440 million represented more than Congo's entire education budget.³ Documents leaked through the Paradise Papers also indicate that the discount was obtained with the help of the controversial Israeli businessman Dan Gertler, who is known to be a close friend of Congo's President Joseph Kabila. Several organizations and governments have reportedly investigated serious allegations regarding Gertler's involvement in high-level corruption, according to Bloomberg News and other media outlets.⁴ Gertler and his holding have systematically denied any wrongdoing.

Glencore responded to media reports about the Paradise Papers revelations by arguing that the signing bonus amount was "essentially correct,"⁵ and that the terms were set before Gertler's involvement in the negotiations.

Resource Matters analyzed Glencore's response and has come to a different conclusion. The discount is real, and it was a result of several underlying factors.

The most important one relates to the KOV open pit mine, an extremely rich copper-cobalt deposit and one of the first that Gertler and his associates acquired in Congo's copper belt.⁶ Civil society groups, lawyers, and members of Congo's parliament criticized the contract for KOV during initial negotiations in 2004 and 2005; they claimed the deal failed to provide a fair share of the revenues for Congo.⁷

Congolese authorities decided to renegotiate the contract along with dozens of other mining deals from 2007 to 2009, in an attempt to harmonize compensation for the mines across the sector for the Congolese state-owned companies.⁸ One of those standardized benefits was the signing bonus. For KOV, the bonus should have been \$240 million according to the sector-wide standard. Instead, contractual documents show that the investors only paid \$5 million, or 48 times less than the applicable rate.

This note first describes the context in which the signing bonus negotiations took place in 2007 to 2009. It then zooms in on how those negotiations played out for KCC, a company which got access to some of the best deposits of Congo's copper belt and is currently operated by Glencore. KCC only paid a \$140 million signing bonus rather than the initial \$585 million Gécamines had asked for as a result of several discounts. First, excluding the KOV open pit mine from the calculations reduced the bonus by at least \$235 million. Second, Glencore and the other KCC shareholders will not be paying any signing bonus for the 4 million tonnes of copper reserves that Gécamines has promised to find for KCC. If discovered, this should have generated an additional \$140 million bonus, a considerable amount that the Congolese state-owned company will no longer

receive. Finally, KCC seems to have relied on a different definition of “reserves” than most other investors when calculating the bonus for the remaining reserves, leading to an extra \$65 million discount.

Glencore told Resource Matters that it would not provide any further on-the-record comments on this issue, while Gertler's Fleurette group did provide substantive answers to questions, which are reflected in this note. Gécamines did not respond to a request for comments.

Resource Matters calls on Glencore, the Fleurette group, and other investors involved in the negotiation of this signing bonus to clarify why and how they became entitled to such a significant discount.

Congo's Contract Review

Congo's mineral wealth in the southeast of the country has attracted billions of dollars of foreign investment in the past two decades. It has become the continent's largest copper producer, and it produces about half of the world's cobalt, a mineral that is key for rechargeable batteries. Until the mid-1990's, Congo's most prominent state-owned mining company, Gécamines, had a quasi-monopoly over Congo's copper and cobalt sector. By 1997, Gécamines started selling some of its assets to a variety of private investors.⁹

This initial privatization process took place in a context of civil war, fragile political transition, and inexperience in negotiating investment deals – resulting in terms that were generally considered detrimental to the country's financial interests. By 2005, a wide range of civil society and institutional actors first called for a halt, and later for a renegotiation of the deals.¹⁰

Shortly after the 2006 elections, Congo launched the so-called "Revisitation process," a sector-wide contract review aimed at negotiating additional financial benefits for the Congolese state for the mining sites that Gécamines had transferred to its joint venture partnerships before the 2006 presidential elections.¹¹ The Revisitation Commission, a team of civil servants, state-owned company representatives and a few external analysts, reviewed dozens of copper-cobalt, gold, tin, coltan and diamond contracts. The verdict of the Commission was clear: all contracts under review should either be cancelled or renegotiated.¹²

During the renegotiations, which officially started in late August 2008,¹³ the Congolese government tried to standardize a range of financial benefits for Gécamines in each of the partnerships. Investors begrudgingly accepted to come to the table, and most ended up giving in to the different demands.¹⁴

Among the revenues that Gécamines tried to secure was a "signing bonus" – known in Congo as a "pas de porte." These were lump sum payments that allowed investors to partner with Gécamines and access some of its coveted copper and cobalt deposits. The Congolese renegotiation teams asked all Gécamines partners to pay a signing bonus according to the following formula:

$$\text{Signing bonus} = \$35 \text{ per tonne of copper reserves}^{15}$$

According to a report by The Carter Center, the great advantage of this formula was its simplicity.¹⁶ More than three quarters of Gécamines' partners accepted the \$35 per tonne of copper reserves to define their signing bonuses.¹⁷ Since there were a few partnerships diverted from this standard, the average rate Gécamines' joint ventures accepted to pay was about \$33 per tonne of copper reserves, according to Resource Matters calculations.¹⁸ Glencore for instance accepted to pay exactly \$35 per tonne for its Mutanda Mining project, a fairly unknown project at the time, which has since become the world's biggest cobalt producer. Glencore wrote to The Carter Center in 2016:

“It was understood that the authorities had determined how they wanted each contract to be structured to ensure consistency across all the operations. The revised Mutanda contract is in line with contracts for other projects in the mining industry in the DRC and includes new provisions governing access premium which resulted in up-front access premium payments to the authorities.”¹⁹

As Resource Matters will illustrate below, these sector-wide contract standards were not, however, upheld in the two other contracts that Glencore was involved in: those for KCC and for the DRC Copper and Cobalt Project (DCP).

Kamoto and KOV: the Heart of Congo's Copper Belt

Before the contract renegotiations started, Glencore had set its eyes not only on Mutanda Mining, but also on world-class mining sites around the town of Kolwezi, the historical backbone of Gécamines' operations. The local population nostalgically remembers these sites as the vibrant heart of the copper belt that made the province thrive for several decades. Some of Gécamines' directors had tried to hold on to the Kolwezi sites as long as they could, but the political elite decided to privatize them before the 2006 presidential elections.²⁰

Although the mines around Kolwezi used to function as one single large mining complex, Congolese authorities split them up and granted them to two different joint venture companies in 2004: Kamoto Copper Company (KCC) and DRC Copper and Cobalt Project (DCP).²¹ The two deals effectively transferred the control over some of the best mines in the country to the two joint ventures. Each company was spearheaded by a well-connected businessman: KCC by George Forrest, a Belgian businessman, and DCP by Gertler.²²

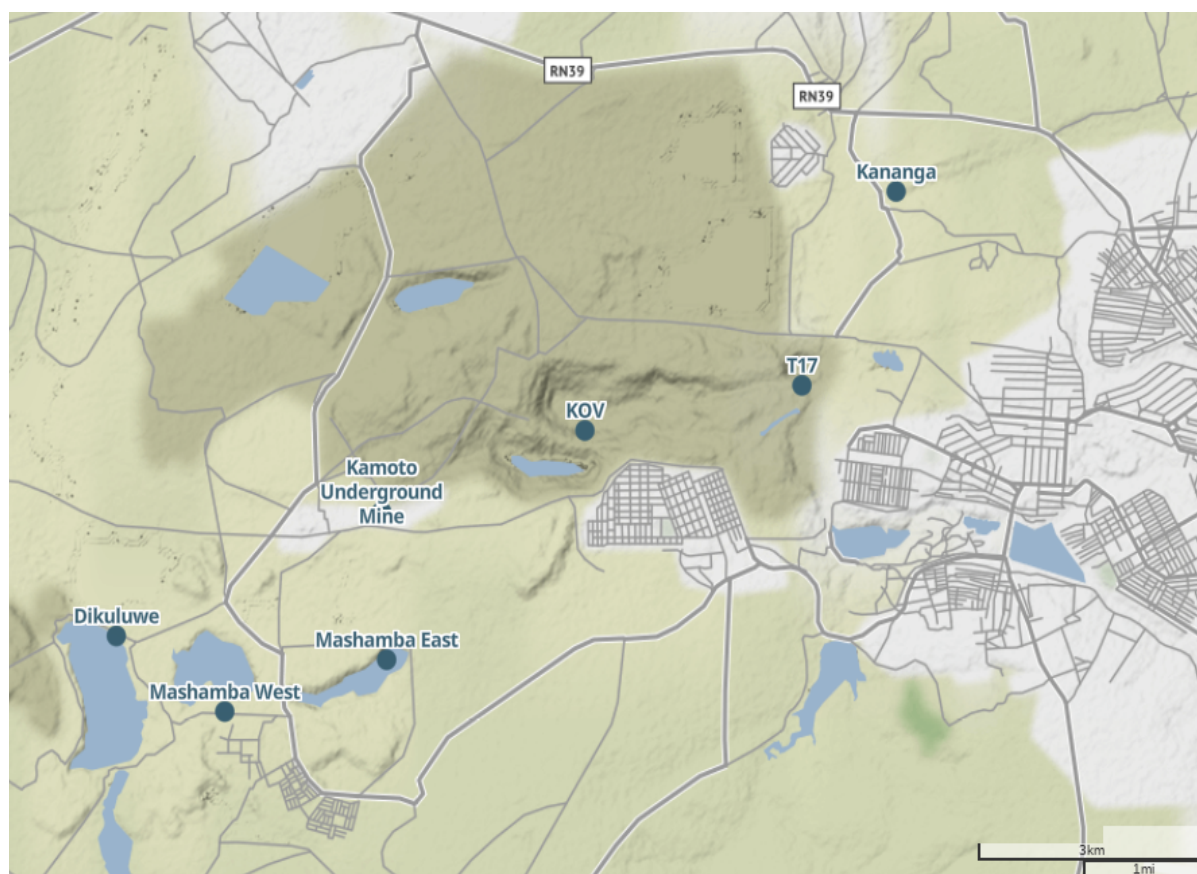
“Warning! A fire-sale!!!,” reported a Congolese anti-corruption organization during the final negotiations for the KCC and DCP contracts in 2005, calling the contracts “the most flagrant scandal of all.”²³ Different law firms wrote that the deals had “very harmful clauses for Gécamines,”²⁴ that the private investors' obligations were minimal while Gécamines' were very substantial,²⁵ and that Gécamines would be more indebted after signing the contract than if it kept the mines to itself.²⁶

The critics stressed that these deals would effectively deprive Gécamines of its most valuable reserves. The World Bank's Principal Mining Specialist wrote that KCC and DCP would “remove approximately 75% of the reserve and productive base of Gécamines.”²⁷ A Kinshasa-based American diplomat alerted his colleagues in a cable that the proposed KCC and DCP joint ventures “would take the most valuable of Gécamines assets and leave the company with few options for further development.”²⁸ A Congolese parliamentary commission recommended suspending the negotiation of the two deals “to prevent depriving Gécamines of its equipment and deposits that constitute the backbone needed for its revival.”²⁹ To no avail: President Kabila approved the KCC and DCP contracts less than a year before the 2006 presidential elections.³⁰

After the elections, the Contract Re-visitation Commission that analyzed the myriad contracts that had been signed before the election agreed that Gécamines' contribution had not been adequately taken into account in the KCC and DCP deals.³¹ In late 2007,

it recommended that both contracts be renegotiated.³² The goal was to better evaluate Gécamines' contribution – its reserves and equipment – and secure fair compensation.

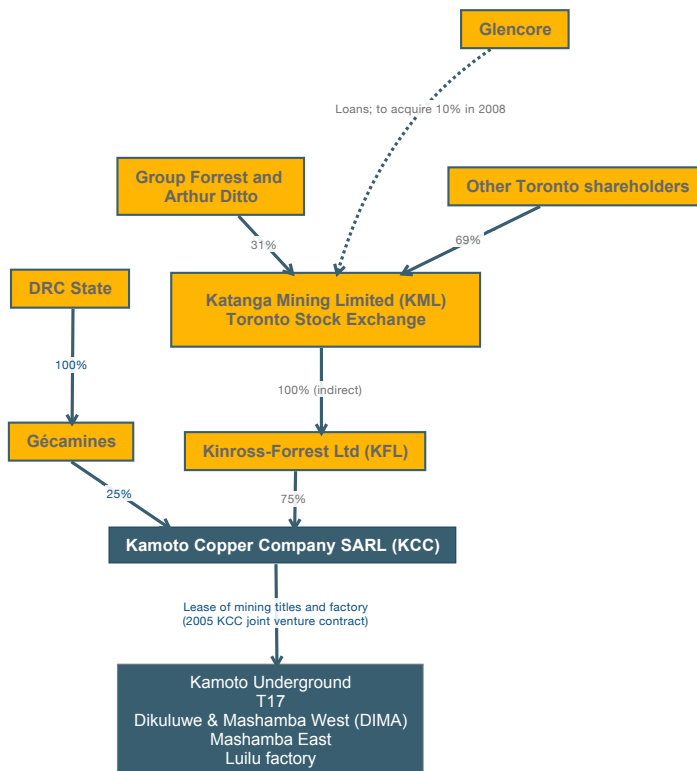
Before the official renegotiation process started in September 2008, Glencore acquired an interest in the parent companies of DCP and KCC.³³ The investors started discussing a merger of the two Congolese joint ventures, an idea Gécamines initially disliked, according to the Paradise Paper documents.³⁴ Gertler received a mandate from the investors' board to advocate for the merger and managed to convince Gécamines to change its mind – in less than three weeks.³⁵ This merged entity kept the name KCC; for clarity's sake, this note will refer to the consolidated joint venture as



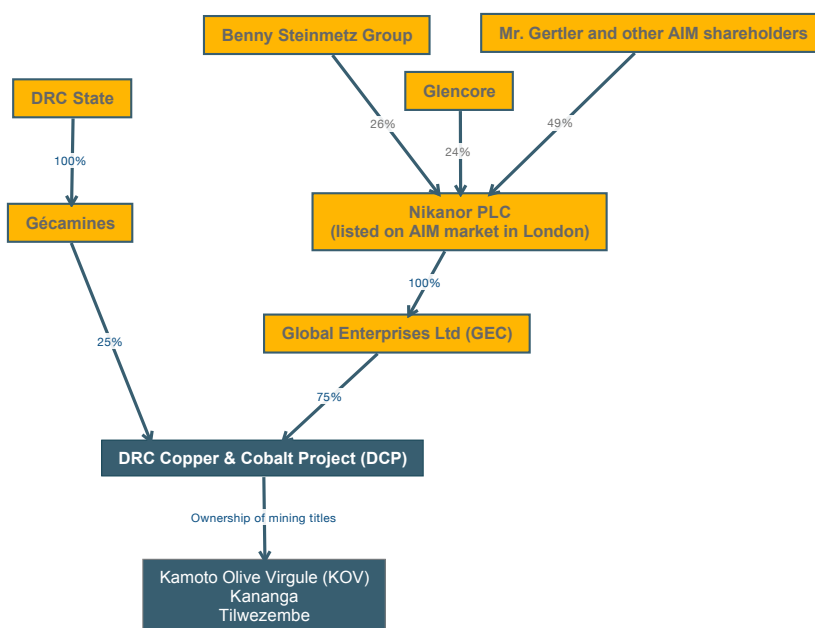
“KCC-DCP”.

In 2004, Congo divided the rich mining sites around the Kolwezi, in southeastern Congo, into two groups. KCC gained control of one group, including the Kamato underground mine, Dikuluwe, Mashamba West and East, and T17. DCP acquired the titles for the other group, namely KOV, Kananga and Tilwezembe. The latter is cobalt-rich deposit situated further east, close to Mutanda Mining, and is not depicted on this map.

KCC Ownership Structure 2007



DCP Ownership Structure 2007



Congo's \$580+ million Signing Bonus Request

During the contract renegotiations, Congo wanted a signing bonus proportional to the copper reserves the partnership covered. KCC-DCP controlled more than 16.6 million tons of copper, according to its renegotiated contract that was eventually approved in 2009.³⁶ Observers estimated that this constituted half³⁷ or even three quarters³⁸ of all the reserves Gécamines owned in 2002. At the applicable standard of \$35 per tonne of copper, KCC-DCP would have had to pay a bonus of more than half a billion dollars:

$$16,612,068 \text{ tonnes} \times \$35 \text{ per tonne} = \$581.4 \text{ million}$$

The leaked Paradise Papers, which include board minutes about these contract discussions, confirm that Gécamines effectively asked for such a large bonus – \$585 million to be precise – in October 2008, when the official sector-wide negotiations were in full swing.³⁹

In a board meeting, KCC's investors agreed that "this was a substantial change" they could not sign up to.⁴⁰ They decided to "have a discussion with Dan Gertler,"⁴¹ who stayed actively involved in the merged KCC-DCP joint venture and had strong connections with Congolese authorities.⁴² Less than two weeks later, the signing bonus was brought down to \$140 million, less than \$8.50 per ton.⁴³

Glencore confirmed to the International Consortium of Investigative Journalists, which published the Paradise Papers, that Gécamines had effectively asked for \$585 million, but that KCC-DCP's parent company Katanga Mining Limited had "successfully maintained its position that the sum it had previously announced was essentially correct."⁴⁴

"Previously announced": a signing bonus for KCC had indeed been announced several months before the official renegotiations in the fall of 2008. In February 2008, Katanga Mining had reported that:

KCC will pay to Gécamines as compensation US\$35 per tonne of remaining copper reserves identified in the feasibility study. This sum, which is approximately US\$135 million, will be paid over time.⁴⁵

Ostensibly, KCC and its shareholders did not challenge the \$35 per tonne rate. To understand the \$440 million discrepancy between Gécamines' request and the ultimate bonus, one has to look at the other part of the equation: the amount of reserves for which the companies owed a signing bonus. Using the "\$35 per tonne of copper reserves" formula, a \$135 million signing bonus means less than 4 million ton were to be paid for, rather than the 16.6 million ton mentioned in the 2009 KCC-DCP convention.⁴⁶ How did the investors, which by this point included Glencore, get from 16.6 to 4 million tons of copper reserves?

Year	Kamoto Copper Company (KCC)	DRC Copper Cobalt Project (DCP)
2004	Signature KCC contract	Signature DCP contract
2005	President Kabila signs KCC decree	President Kabila approves DCP decree
2006	Katanga Mining raises funds for KCC in Toronto	Nikanor raises funds for DCP in London
2007	Glencore provides loan to Katanga Mining for KCC	Glencore invests in Nikanor for DCP
Nov 2007	Agreement to merge parent companies Katanga Mining and Nikanor: Katanga absorbs Nikanor	
Feb 2008	KCC agrees to a \$135 million signing bonus	
Aug 2008	Agreement to merge Congolese companies KCC and DCP: KCC absorbs DCP	
Oct 2008	Gécamines requests a \$585m signing bonus for KCC-DCP; Katanga board members reject requests and have “discussion with Gertler”	
Dec 2008	\$140m for KCC-D CP is accepted by Gécamines	
Jul 2009	Signature of KCC-DCP joint venture, confirming \$140 million signing bonus	

First discount: Exclusion of KOV, “one of the world’s largest high-quality copper and cobalt ore bodies”

An analysis of the KCC-DCP contract shows that the deposits that DCP brought to the KCC-DCP joint venture were almost entirely excluded from the bonus calculations.

When Glencore writes that Katanga managed to “maintain” in October 2008 the KCC signing bonus it had negotiated in February 2008, it omits to remind the reader that the “KCC” in February 2008 was very different from the “KCC” in October 2008. In February, KCC and DCP were distinct joint ventures; by October, the KCC-DCP merger had already been approved, and KCC had *absorbed* DCP. As a result, KCC (effectively KCC-DCP) owned significantly more reserves than before. Logically, the signing bonus for KCC-DCP in October should be much higher than in February: it should include the \$135 million bonus for KCC plus the signing bonus for DCP. How much was DCP’s signing bonus? And was it proportional to the copper reserves it obtained, as the formula requires?

The value of DCP’s mines is beyond doubt.⁴⁷ Its shareholders described DCP’s flagship site, Kamoto Oliveira Virgule (KOV), as “one of the world’s largest high-quality copper and cobalt ore bodies” in 2006.⁴⁸ In addition to massive quantities of cobalt,⁴⁹ KOV held about 6,88 million tons of copper reserves, according to Gécamines’ estimates and the investors’ own stock publications.⁵⁰ Based on the formula, the KOV reserves should have yielded the following signing bonus:

$$6.881.931 \text{ tons} \times \$35 \text{ per ton of copper reserves} = \$240,87 \text{ million}$$

And yet, contractual terms show that Gécamines accepted a signing bonus of only \$5 million for DCP.⁵¹ \$5 million instead of \$240 million, or \$0.72 per ton, rather than the usual \$35: that is proportionally 48 times lower than what virtually all other investors agreed to during the contract review.

In its response to the journalists who published the Paradise Papers, Glencore did not explain why DCP’s investors got this almost complete exemption from signing bonus requirements – in fact, it does not explicitly talk about DCP’s signing bonus at all. In response to questions from Resource Matters seeking further clarification, Glencore said it would not provide any further on-the-record comments beyond those of its initial response to the Paradise Papers.⁵²

**Reserves at
KCC and DCP**



Glencore invokes that KCC used to *lease* its licenses and only effectively acquired them during the contract renegotiations in 2008 and 2009,⁵³ while DCP already owned its titles from the time the joint venture was initially set up. According to Glencore, the bonus should only apply to the permits that “were *actually transferred* to KCC”.⁵⁴ Glencore possibly implies that this difference in legal ownership explains why DCP barely had to pay any bonus for KOV and its other deposits.

This argument unfortunately fails to convince. DCP was not at all an exception: virtually all the Gécamines joint ventures that went through the contract review process had acquired their mining titles many years earlier.⁵⁵ The whole point of the Revisitation was that those transfers had happened without proper compensation and that extra payments should be made to rectify the imbalances in the initial deals. In the case of DCP, the Revisitation Commission specifically recommended “increasing the signing bonus” for the deposits it had acquired.⁵⁶ At the end of the contract review, nearly all Gécamines joint ventures accepted paying a signing bonus for titles they already owned.⁵⁷ This was for instance the case for Mutanda Mining, Glencore's other DRC joint venture, which accepted to pay the \$35 / ton even though it had owned its mining title since 2001.⁵⁸

It hence seems that DCP's investors managed to keep the bonus as low as \$5 million, for one of Congo's richest copper-cobalt mines. This discrepancy begs further clarification from all parties involved in the talks at the time.

POUR GLOBAL ENTREPRISES CORPORATE LTD

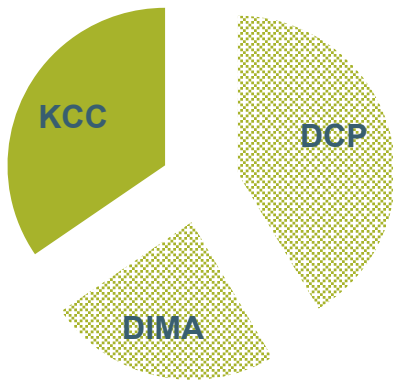

Dan GERTLER

In 2004, Gertler signed the DCP contract for the world class KOV mine, which attracted a lot of criticism. The Congolese contract review recommended rectifying the contractual imbalance and increasing DCP's signing bonus. According to the standard applicable to the sector, the signing bonus for this mine should have amounted to \$240 million. Instead, DCP committed to paying only \$5 million, or 48 times less than the norm. Both Glencore and Gertler were significant shareholders at the time of the renegotiations. Neither have answered questions as to how they obtained such a significant discount.

Second Discount: Exclusion of 4 million tons of Promised Reserves

Excluding DCP brought KCC-DCP's reserves down from 16.6 million tons to 9.7 million tons of copper.⁵⁹ That revised amount should still have generated a signing bonus of \$340 million, in other words \$200 million more than what KCC-DCP ultimately agreed to. This means there must have been an additional discount on KCC's end.

This second discount might be the result of the fact that out of the 9.7 million tons, about 4 million were *promised* to KCC, rather than "actually transferred."⁶⁰ These promised reserves also seem to have been excluded from the bonus calculations. This warrants some further explanation.



Around the time of the contract review, Congo desperately needed to retrieve some of the reserves it had previously granted to investors, as it wanted to set up a large minerals-for-infrastructure project with Chinese construction investors.⁶¹ Congolese authorities asked KCC whether it could give back part of the rich deposits it was leasing. In February 2008, KCC accepted to *transfer back* two sites to Gécamines: Dikuluwe and Mashamba West, collectively known as "DIMA."⁶²

KCC's parent company explained to its investors at the time of the DIMA retrocession that it would not pay a signing bonus for those reserves.⁶³ At first sight, this makes good sense: why would the investors pay a bonus for something they did not receive? Was it indeed not generous of them to give back such valuable deposits in the first place? Yet a closer look offers a more nuanced view.

KCC did not give up on those reserves altogether. In the 2009 KCC convention, Gécamines agrees to identify nearly 4 million tons of copper reserves to *replace* the DIMA deposits.⁶⁴ Logically, KCC's investors should pay a signing bonus for these so-called "replacement reserves" when and as Gécamines finds and transfers them to KCC.⁶⁵ At \$35 per tonne, this could generate \$140 million dollars for Gécamines.

However, KCC's investors won't have to pay this: the convention expressly states "there will be no complementary signing bonus to be paid later for the Replacement Reserves."⁶⁶ In other words, KCC is entitled to almost 4 million

tons of copper reserves for which it did not pay a bonus in the past, and for which it also won't pay a bonus in the future.

If Gécamines fails to find the 4 million tonnes, it will have to pay \$285 million to KCC.⁶⁷ If Gécamines can't pay, that amount will be withheld from the revenues the state miner should normally get from KCC – primarily royalties and dividends.⁶⁸

It is unlikely that Gécamines will be able to identify the replacement reserves. That is because Gécamines will have to find *more* than what KCC's investors knew was available at DIMA. To understand this, one has to grasp the semantics of the term “reserves.”

It appears that the 4 million tonnes at DIMA were based in Gécamines' “geological reserves” estimate. This old measurement is generally more optimistic than the *certified* reserves investors typically use, such as JORC-certified reserves.⁶⁹ According to KML's estimates, DIMA contained only 0.93 million tonnes of JORC-certified copper reserves at DIMA.⁷⁰ And yet, KCC is now entitled to 3.99 million tons of *JORC-certified* reserves to make up for the foregone DIMA deposits.⁷¹ Similarly, KCC is entitled to more than 205,000 tonnes of certified cobalt reserves, when KML's own estimates at DIMA amounted to 27,000 tonnes of cobalt. This means that KCC is entitled to four times more certified copper reserves, and seven times more cobalt reserves than it had certified when it transferred DIMA back to Gécamines.

Reserves (tonnes)	Contained copper	Contained cobalt
Certified reserves available at DIMA (Katanga Mining report)	931,000	27,000
Certified reserves Gécamines owes to compensate for DIMA (KCC convention)	3,992,185	205,629

If Gécamines wants to comply with its replacement reserves obligation, it will have to find a deposit that is even larger than the gigantic deposit of Kamoa, a “major discovery of historic importance” west of KCC.⁷² The chances that Gécamines will be lucky enough to find a deposit that is nearly twice as big as Kamoa are extremely slim. So far, it has failed to identify the reserves by the initial mid-2015 deadline, which now been pushed back to 2019.⁷³

In other words, KCC's investors – at this point primarily Glencore – are entitled to either 4 million tonnes of certified copper and more than 200,000 tonnes of certified cobalt or, alternatively, withholding \$285 million in revenues Gécamines could have gotten from KCC, for giving back permits they did not pay a signing bonus for.

DIMA, “an estimated value of \$825 million”?

In its response to the Paradise Papers journalists, Glencore wrote in relation to DIMA that “Katanga also agreed to release significant copper cobalt reserves to Gécamines with an estimated value of USD 825 million.” This is presented as a considerable favor given to Gécamines that offsets the signing bonus discount.

While the DIMA reserves were undoubtedly valuable, the \$825 million figure is arguably an exaggeration. This preliminary estimate had been announced in February 2008, but it was “subject to review by the parties” and was significantly downsized to \$285 million in the following year. The Paradise Papers documents show that the \$825 million estimate had in fact “been calculated on the undiscounted cash flows,” while the latter figure was the “real, discounted” value. When an international NGO relied on comparable undiscounted figures to criticize a deal between Gécamines and Dan Gertler that came to light in 2016, Gertler’s Fleurette Group called such financial calculations “amateurish to the point of bogus.” Invoking the undiscounted \$825 million estimate in response to the International Consortium of Investigative Journalists therefore seems misleading at best.

(KML press release Feb 7 2008; KML Annual Report 2008; KML board minutes; Fleurette response to Global Witness Nov 15, 2016)

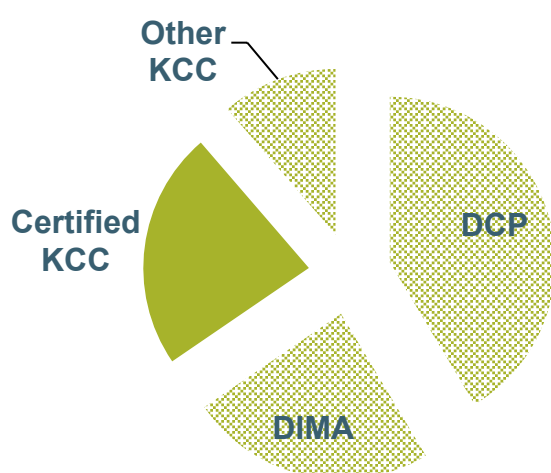
Third Discount: Use of a More Conservative Reserve Estimate

Excluding the DCP reserves and the DIMA replacement reserves reduces the reserve base by almost two thirds:

$$16,612,068 \text{ (total)} - 6,881,931 \text{ (DCP)} - 3,992,185 \text{ (DIMA)} = 5,737,952$$

$$5,737,952 \text{ tonnes} \times \$35 \text{ per tonne} = \$200,8 \text{ million}$$

The signing bonus that would have been owed for the remaining reserves would come down to about \$200 million.⁷⁴ And yet, it upheld that \$140m was “essentially correct.”



A potential explanation for this final \$60 million discount might be that KCC relied on the more conservative JORC-certified reserve estimate when defining its own signing bonus. In the February 2008 press release, KCC's parent company mentioned that it would pay for “copper reserves *identified in the feasibility study.*” (emphasis added). Such feasibility studies tend to

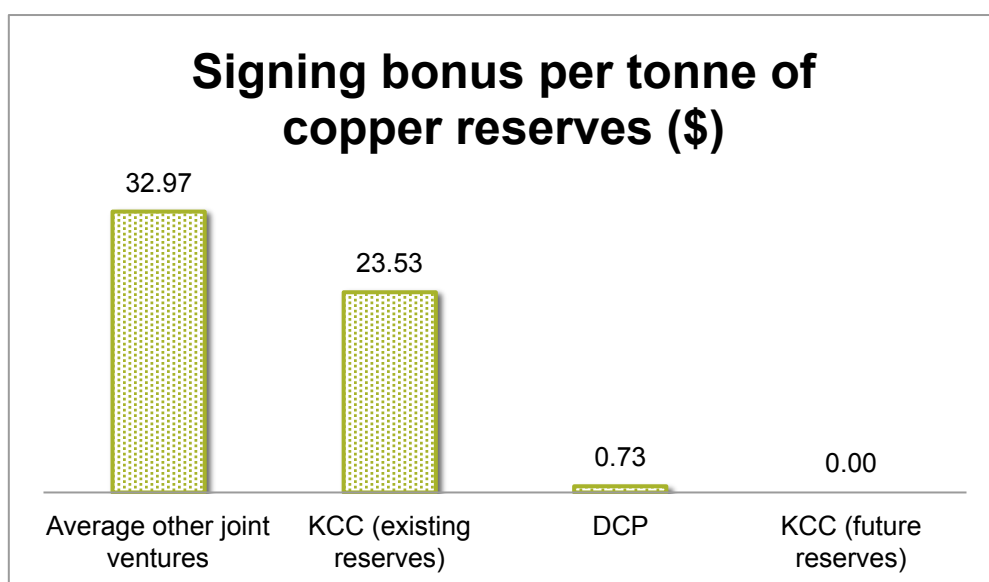
use the more conservative JORC-Code or similar certification standard. These often lead to lower reserve estimates than what Gécamines relied on during its negotiations: its *own* historical estimates of the reserves.

Using a more conservative definition of reserves represents a favor Gécamines granted to KCC and DCP, which it did not systematically grant to its other partners.⁷⁵ It is odd to rely on a standard for the signing bonus that was different from the one used to define how many reserves KCC-DCP is entitled to.⁷⁶

Conclusion

When Congo privatized Gécamines' flagship mines in Kolwezi and granted them to KCC and DCP in 2005, many observers heavily criticized the imbalanced nature of the deals and called for a *fair share for Congo*.

One of the financial benefits Congo tried to obtain in the subsequent contract review was signing bonuses. The amount of that bonus depended on the tonnage of copper reserves each partnership received from Gécamines. Since KCC and DCP acquired some of the best mines – more than half of Gécamines' reserves, according to several estimates – the signing bonus should have amounted to hundreds of millions of dollars. Gécamines asked for a \$585 million bonus, but parties ultimately settled for \$140 million. Glencore deems this bonus “essentially correct.”



Resource Matters' analysis leads to a different conclusion. It turns out that the DCP mines were almost entirely excluded from the signing bonus calculations. This was namely the case for KOV, one of the best mines of the Congolese copper belt, which should have generated a \$240 million signing bonus but instead only yielded \$5 million. In addition, KCC-DCP will not have to pay any signing bonus for 4 million tonnes in reserves Gécamines promised to provide by 2019. This would generate another \$140 million discount for Glencore and the other KCC investors. KCC's shareholders negotiated a third discount on the remaining KCC reserves by using a more stringent reserve definition than the one commonly used in the contract renegotiations.

Resource Matters calls on the KCC-DCP investors to clarify how and why they received this potential preferential treatment. Similarly, Congolese authorities involved in the negotiations at the time should explain why they accepted to so significantly lower the applicable standards for KCC and DCP, which resulted in a loss of hundreds of millions of dollars for Congo.

Endnotes

¹ Will Fitzgibbon et al, Room of Secrets reveals Glencore's Mysteries, November 5, 2017, available at <https://www.icij.org/investigations/paradise-papers/room-of-secrets-reveals-mysteries-of-glencore/>.

² The Carter Center, A State Affair – Privatizing Congo's Copper Sector, November 3, 2017, available at www.congomines.org/rapport-gecamines [Hereinafter "The Carter Center, A State Affair, 2017"].

³ DRC, Budget 2010 – Synthèse des dépenses par fonction, February 5, 2010, 2.

⁴ See, e.g., Global Witness, Secret Sales, series of publications available at <https://www.globalwitness.org/fr/campaigns/oil-gas-and-mining/congo-secret-sales/>; Africa Progress Panel, Africa Progress Panel, Equity in Extractives: Stewarding Africa's Natural Resources for All: Africa Progress Report 2013, 2013; Tom Wilson, SFO Probes Israeli Billionaire, Ex-ENRC Directors Over Congo, Bloomberg News, December 5, 2016; U.S. Securities and Exchange Commission, Administrative Proceedings File No. 3-17595 in the matter of Och-Ziff Capital Management Group LLC, OZ Management LP, Daniel S. Och and Joel M. Frank, September 29, 2016; United States of America vs. Och-Ziff Capital Management Group LLC, Deferred Prosecution Agreement Cr. No. 16-516, September 29, 2016. Tom Wilson, Franz Wild and Jesse Riseborough, Congo Backs Billionaire Gertler After Och-Ziff Allegations, October 4, 2016.

⁵ Glencore, Updated Statement by Glencore and Katanga to the International Consortium of Investigative Journalists, October 27, 2017 [Hereinafter "Glencore Response ICIJ 2017"], available at <https://www.icij.org/investigations/paradise-papers/glencore-responds-icijs-questions/>.

⁶ See Convention de Joint-Venture entre la Générale des Carrières et des Mines et Global Enterprises Corporate Ltd telle que modifiée par l'accord intervenu entre parties signé à Lubumbashi le 13 décembre 2004 relative à l'exploitation de la mine à ciel ouvert de KOV et des gisements de Kananga et de Tilwezembe [Hereinafter "Original DCP Contract 2004"].

⁷ See e.g. Réseau de Lutte contre la Corruption et la Fraude, *Bradage Criminel du Patrimoine Minier du Congo, Cas des Partenariats Kinross-Forrest et GEC avec la Gécamines*, January 2005, 7 (Hereinafter 'RELCOF Bradage Patrimoine Minier 2005'); Rights and Accountability in Development (RAID), Key Mining Contracts in Katanga—The Economic Argument for Renegotiation, April 2007.

⁸ See, generally, Ministry of Mines of the Democratic Republic of Congo, Termes de Reference pour la Renégociation et/ou la Résiliation des Contrats Miniers [Terms of Reference for Renegotiation], August 2008.

⁹ The Carter Center, A State Affair 2017, 16-29.

¹⁰ The Carter Center, A State Affair 2017, 31-32.

¹¹ DRC, Arrêté ministériel n° 2745/CAB.MIN/MINES/01/2007 du 20 avril 2007 portant mise sur pied de la Commission ministérielle chargée de la revisitation des Contrats miniers.

¹² Commission de Revisitation des contrats miniers, Rapport des Travaux, November 2007 [Hereinafter 'Revisitation Report 2007'].

¹³ Ministre des Mines, Termes de Reference pour la Renégociation et/ou la Résiliation des Contrats Miniers, 27 août 2017 [Hereinafter 'Ministry Renegotiation Terms of Reference 2008'].

¹⁴ See, generally, The Carter Center, A State Affair, 2017, 33-35.

¹⁵ The Carter Center, A State Affair, 2017, 33.

¹⁶ The Carter Center, A State Affair 2017, 34.

¹⁷ Fifteen joint ventures stuck to the \$35/t formula to define their signing bonus: AMCK: 318.000 tonnes of copper reserves; \$11,13 million signing bonus according to formula; \$20 million signing bonus in contract (Anvil Mining Concentrate Kinsevere Contract N°722/10525/SG/GC/2005, Avenant 2 of January 21, 2009, Art. 1.1 and 2); CMSK: 233.120 tonnes of copper reserves; \$8,1 million signing bonus according to formula; \$8,5 million signing bonus in contract (Compagnie Minière du Sud-Katanga Contract N° 642/6734/SG/GC/2004, Avenant 1 of 26 November 2009, Art. 1 and 11); COMMUS: 900.000 tonnes of copper reserves; \$31,5 million signing bonus according to formula; \$31,5 million signing according to contract (Compagnie Minière de Musonoie Global Contract N° 708/10534/SG/GC/2005, Avenant 4 of April 24, 2010, Art. 1 and 2); CMT: 150.000 tonnes of copper reserves; \$5,25 million signing bonus according to formula; \$5 million signing bonus according to formula (Compagnie Minière de Tondo N°719/10522/SG/GC/2005, Avenant 2 of 21 may 2009, art. 1 and 9); Metalkol (Kolwezi Tailings): 1.676.399 tonnes of copper reserves; \$58,67 million signing bonus according to formula; \$60 million signing bonus according to contract (Metalkol Contract N°1045/20501/SG/GC/2010, Art. 1(48) and 7.1); MIKAS: 60.000 tonnes of copper reserves ('réserves certaines'); \$2,1 million signing bonus according to formula; \$2,1 million signing bonus according to

contract (Minière de Kasombo Contract N°707/10533/SG/GC/2005, Avenant N°2 of April 29, 2010, Art. 3.1); MKM: 100.000 tonnes of copper reserves; \$3,5 million signing bonus according to formula; \$3,5 million signing bonus according to contract; (Minière de Kalumbwe Myunga Contract N°489/10336/SG/GC/2001, Avenant 1, August 28, 2009, Art. 2.2 and 3.2); MUMI: 958.343 tons of copper reserves ('certaines'); \$33.542.005 signing bonus according to formula; \$33.542.005 signing bonus according to contract (art. 1 and 10e Mutanda Mining Contract N°474/10300/SG/GC/2001, Avenant 3 of January 6, 2009, Art. 1 and 10e); SEK: 200.000 tons of copper reserves; \$7 million signing bonus according to formula; \$7 million signing bonus accord to contract (Société d'Exploitation de Kipoi Contract N°417/6789/SG/GC/2000, Avenant 2 of January 14, 2009, Art. 1 and 3); Sicomin: 10.616.070 million tons of copper reserves; \$371,56 million signing bonus according to formula; \$350 million signing bonus according to contract (Convention de Collaboration entre la République Démocratique du Congo et la Société Sinohydro Corporation Relative au Développement d'un Projet Minier et d'un Projet d'Infrastructures en République Démocratique du Congo of April 22, 2008, Art. 4 and 5.1); SMCO: 305.000 tons of copper reserves; \$10,675 million signing bonus according to formula; \$10,675 million signing bonus according to contract (Shituru Mining Corporation Contract N°691/10505//SG/GC/2005), Avenant 1, Art. 1 and 2); SMK: 735.000 tonnes of copper reserves (certified); \$26,355 million signing bonus according to formula; \$26,355 million signing bonus according to contract (Société Minière de Kolwezi Contract N°457/10246/SG/GC/2001, Avenant 3 of July 1, 2009, Art. 1.2 and 10.4); SMKK: 127.000 tons of copper reserves; \$4,455 million signing bonus according to formula; \$4,5 million signing bonus according to contract (Société Minière de Kabolela et Kipese Contract N°RDV/349/9517/SG/GAC/99, Avenant 1 of January, 13 2009, 1.2 and 6.3); Swanmin: 180.000 tons of copper reserves; \$6,3 million signing bonus according to formula; \$6,4 million signing bonus according to contract (Swanmines Contract N°460/10269/SG/GC/2001, Avenant 4 of January 13, 2009, Art. 1 and 10.4); TFM: 2.500.000 tons of copper reserves; \$87,5 million signing bonus according to formula; \$130 million signing bonus according to contract (Amended and Restated Tenke Fungurume Mining Convention of September 28, 2005, Addendum 1 of December 11, 2010, Art. 4). No contracts have been disclosed for the initial terms of Kansuki SPRL, Comide and Kipushi Corporation. One of the main outliers is Boss Mining, which kept its signing bonus at \$2 million but accepted to increase Gécamines' share from 20% to 30%. Another outlier is Ruashi Mining, which Resource Matters has not found an alternative explanation for.

¹⁸ Resource Matters calculations based on all renegotiated joint venture contracts except KCC-DCP and two unpublished contracts (Comide, Kipushi Corporation) for which the reserves and signing bonus are not known.

¹⁹ Glencore, Response to The Carter Center, June 17, 2016, 6.

²⁰ The Carter Center, A State Affair, 2017, 23-25.

²¹ Convention de Joint-Venture entre la Générale des Carrières et des Mines et Kinross-Forrest Limited relative à l'exploitation de la filière Kamoto (Mine) – Dima – Kamoto Concentrateur Usines Hydrométallurgiques de Luilu n° 632/6711/SG/GC/2004 of February 7, 2004 [Hereinafter "Original KCC Contract 2004"]; Original DCP Contract 2004.

²² The Carter Center, A State Affair, 2007, 23-25

²³ RELCOF Bradage Patrimoine Minier 2005, 7.

²⁴ Duncan & Allen, Fiche Analytique de l'Accord de Partenariat VIII – GEC – en vue de l'exploitation de la mine à ciel ouvert de KOV et des gisements de Kananga et de Tilwezembe, 1.

²⁵ Ropes & Gray, Review of Mining Agreements in the Democratic Republic of the Congo, Memorandum dated December 31, 2007, 3.

²⁶ Fasken Martineau DuMoulin, Analysis of the DCP convention for Rights and Accountability in Development, February 19, 2006. It should be noted that the analysis was withdrawn before publication because of allegations of conflict of interest, as Fasken Martineau DuMoulin had other clients in the DRC mining sector.

²⁷ Craig Andrews, World Bank Office Memorandum to the Country Director of the Democratic Republic of Congo, September 8, 2005 [Hereinafter "World Bank Memorandum 2005"].

²⁸ U.S. Embassy in Kinshasa, Diplomatic Cable 05KINSHASA731_A, Congolese Mining Primer (April 29, 2005), 7, as cited in The Carter Center, A State Affair, 2017, 23.

²⁹ Assemblée Nationale – Commission Spéciale chargée de l'examen de la validité des conventions à caractère économique et financier conclues pendant les guerres de 1996-1997 et de 1998, Rapport des Travaux, 1e Partie, June 26, 2005, 175-176.

³⁰ Décret n° 05/070 du 04 août 2005 approuvant la Convention de Joint-Venture conclue le 07 février 2004 entre la Générale des Carrières et des Mines et Kinross-Forrest Limited [Hereinafter "KCC Decree 2005"]; Décret n° 05/114 du 13 octobre 2005 approuvant la Convention de Joint-Venture

conclue le 09 septembre 2004 entre la Générale des Carrières et des Mines et Global Enterprises Corporate Ltd [Hereinafter “DCP Decree 2005”].

³¹ See, generally, Revisitation Commission Report 2007, 52-61 (DCP) and 71-80 (KCC)

³² Revisitation Commission Report 2007, 60-61 and 80.

³³ For a business analysis of KCC, DCP and Glencore's investments in the two projects at the time, see Renaissance Capital, Democratic Republic of Congo – The Congo Chess Board, Sector Update, October 11, 2007.

³⁴ Katanga Mining, Board of Director Minutes, June 28, 2008 (“Gécamines did not appear to accept the principle of merging DCP with KCC.”)

³⁵ Katanga Mining, Board of Director Minutes, July 10, 2008 (“Dan Gertler had fulfilled his mandate very well (...) [Gécamines approved the MOU on July 11, 2008]”).

³⁶ Article 6.14.1 mentions “the total of 16.612.068 tons of copper ... Gécamines initially brought to the [KCC] and DCP convention.” Convention de Joint-Venture Amendée, Consolidée et Réformulée entre la Générale des Carrières et des Mines et KFL Limited et Global Enterprises Limited relative à l'exploitation, en particulier, des mines de Kamoto, de Mashamba Est, de KOV, de Tilwezembe, de Kananga, de T17 et à la location des installations et des équipements dont le concentrateur de Kamoto (KTC) et les usines hydrométallurgiques et d'électro-raffinage de Luilu, Gécamines contract nr. 1014/19238/SG/GC/2009, [hereinafter “Amended KCC Convention 2009”].

³⁷ In 2002, Gécamines estimated is had about 40 million tons of copper reserves left which it had not yet transferred to joint venture partnerships. See Gécamines, Concessions et Réserves Géologiques, Presentation (2002), slides 17 and 49.

³⁸ World Bank Memorandum 2005; RELCOF Bradage Patrimoine Minier 2005, 8.

³⁹ See Ministry Renegotiation Terms of Reference 2008; Katanga Mining Limited, Board of Directors minutes, October 13, 2008.

⁴⁰ Katanga Mining Limited, Board of Directors minutes, October 13, 2008.

⁴¹ Katanga Mining Limited, Board of Directors minutes, October 13, 2008.

⁴² See, generally, M. Kavanagh, F. Wild and J. Ferziger, Gertler Earns Billions as Mine Deals Leave Congo Poorest, Bloomberg Markets, December 5, 2012 [hereinafter “Bloomberg, Gertler Earns Billions, 2012”].

⁴³ Amended KCC Convention 2009, Art. 6.2.10.

⁴⁴ Glencore Response ICIJ 2017.

⁴⁵ Katanga Mining, Katanga Announces Agreement on Transfer of Mashamba West and Dikuluwe Deposits, News Release Nr. 04/2008, February 8, 2008 [Hereinafter ‘Katanga, DIMA Release Announcement, 2008’].

⁴⁶ Amended KCC Convention 2009, Art. 6.14.1.

⁴⁷ <http://congominer.org/reports/149-revisitation-du-contrat-gecamines-drc-copper-and-cobalt-project-sarl-dcp>

⁴⁸ Nikanor, Annual Report 2006, non-numbered introduction page.

⁴⁹ KOV contained cobalt reserves of more than ten times the world's cobalt production at the time. Revisitation Commission Report 2007, 56 (510.280 tonnes of geological cobalt reserves); Nikanor Annual Report 2006, 16 (658.000 tonnes of probable cobalt reserves; 843.000 tonnes of indicated cobalt resources) *Compare with* United States Geological Survey, Mineral Commodities Summaries, January 2006, 53 (annual production of 52.400 tonnes of contained cobalt).

⁵⁰ Revisitation Commission Report 2007, 56 (6.881.931 tonnes of geological copper reserves); Nikanor Annual Report 2006, 16 (6.757.000 tonnes of probable copper reserves; 8.755.000 tonnes of indicated copper resources).

⁵¹ Amended KCC Convention 2009, Art. 6.2.10 (i) and (ii). The contract explicitly splits up the \$140 million total signing bonus as follows: (1) GEC [DCP's shareholder]: \$5 million; (2) KFL [KCC's shareholder]: \$135 million. This split is confirmed in the leaked Paradise Papers documents: “With regard to the pas de porte, (...) it has been split as to \$135m KCC, \$5m DCP which had been part of the history of the revisitation.” Katanga Mining Limited, Board of Directors minutes, March 13, 2009

⁵² Charles Watenphul on behalf of Glencore, emailed response to questions from Resource Matters dated November 22, 2017.

⁵³ Glencore, Response ICIJ, 2017.

⁵⁴ Glencore, Response ICIJ, 2017 (emphasis added).

⁵⁵ See, e.g., Kingamyambo Musonoi Tailings Contract 2004, Art. 7.1; Tenke Fungurume Mining Convention of September 28, 2005, Art. 3.3; Chabara Contract N°705/10531/SG/GC/2005 of December 6, 2005, Art. 3.1(b). See also Duncan & Allen, Projet d'Evaluation Juridique des Accords de Partenariat de la Gécamines – Rapport Provisoire, November 16, 2005, recommending in vain that Gécamines sign

lease agreements instead of transferring the ownership of its titles to the joint ventures (at page 12). In that sense, KCC's title lease was the exception rather than the rule. The only other exception to our knowledge was Anvil Mining Concentrate Kinsevere, which also leased its titles rather than owning them. It paid a signing bonus according to the standard, even as it kept leasing its titles after the contract review.

⁵⁶ Revisitation Commission Report 2007, 61.

⁵⁷ See above for the list of 15 companies that accepted the rule.

⁵⁸ Mutanda Mining Contract 2001, Art. 3.1.(b).

⁵⁹ $16.612.068 \text{ tonnes (total)} - 6.881.931 \text{ (DCP)} = 9.730.137 \text{ tonnes.}$

⁶⁰ Glencore, Response ICIJ, 2017.

⁶¹ Convention de Collaboration entre la République Démocratique du Congo et la Société Sinohydro Corporation Relative au Développement d'un Projet Minier et d'un Projet d'Infrastructures en République Démocratique du Congo (April 22, 2008).

⁶² Katanga, DIMA Release Announcement, 2008.

⁶³ Katanga Mining wrote that "KCC will pay to Gécamines as compensation US\$35 per tonne of *remaining* copper reserves identified in the feasibility study", suggesting that the DIMA reserves were excluded. Katanga, DIMA Release Announcement, 2008.

⁶⁴ Amended KCC Convention 2009, Art. 6.14.1: "Parties agree that the reserves to be replaced in exchange of the Released Reserves [DIMA] are equal to 3.992.185 tonnes of copper and 205.629 tonnes of cobalt ("the total Replacement Reserves") on a total of 16.612.068 tCu and 1.733.336 tCo initially brought by Gécamines to the initial JV Convention and the DCP JV Convention."

⁶⁵ Investors in most other Gécamines joint ventures promised to pay an additional \$35/t signing bonus for new reserves identified on the concession beyond the initially promised amount of reserves, usually in the final paragraph of the articles defining the signing bonus amount (see above).

⁶⁶ Amended KCC Convention 2009, Art. 6.2.11.

⁶⁷ Amended KCC Convention 2009, Art. 6.14.1.

⁶⁸ Amended KCC Convention 2009, Art. 6.14.1.

⁶⁹ « The Australasian Code for Reporting of Exploration Results, Mineral Resources and Ore Reserves ("the JORC Code") is a professional code of practice that sets minimum standards for Public Reporting of minerals Exploration Results, Mineral Resources and Ore Reserves." See, generally, <http://www.jorc.org/>.

⁷⁰ Katanga Mining Ltd., Annual Information Form for the Year ended December 31, 2007, March 20, 2008, 39-40. According to this table, Dikuluwe and Mashamba West contained only 740kt + 190kt = 930kt of certified proven and probable reserves, not 3.99 million tonnes (= historical reserves).

⁷¹ Amended KCC Convention 2009, Art. 6.16.1.

⁷² Ivanhoe, Ivanhoe Nickel & Platinum announces a major copper discovery at its Kamoa Project in Katanga Province, in the Democratic Republic of Congo, April 1, 2009. After years of exploration, this "major discovery of historic importance" has 2,3 million tonnes of certified copper reserves. OreWin for Ivanhoe Mines Ltd, Kakula Resource Update, June 2017, 282.

⁷³ Glencore, Response to Global Witness, March 3, 2017.

⁷⁴ This was another amount Gécamines asked for, according to Glencore. See Glencore, Response ICIJ, 2017: "Gécamines put forward various positions regarding the Pas De Porte [signing bonus] it believed was payable by KCC, including amounts of USD 585 million and USD 200 million."

⁷⁵ One of the important projects that was allowed to use certified reserves was Tenke Fungurume Mining, today one of the most productive copper projects in the country. TFM used an estimate of 2.5mt Cu of certified reserves, even though Gécamines' own historical estimate was higher. However, it also used a higher rate: \$58 per ton instead of \$35. If this higher rate TFM used would have been applied to the case of KCC-DCP's certified reserves (excluding DIMA), the signing bonus would have had to be $9.855 \text{ million tons} \times \$58 = \$571,9 \text{ million}$, which is even higher than the \$585 million Gécamines asked for.

⁷⁶ Those reserves, 16,6 million tonnes, are based on Gécamines' own estimate.