

## QUESTIONS FOR A MULTI-STAKEHOLDER DIALOGUE ON RESPONSIBLE INVESTMENT IN WEAK GOVERNANCE ZONES

### *Response from a junior mining company with operations in the DRC*

#### **Investor roles in weak governance host societies**

1. Do companies have a role in helping to support reform of economic and political institutions in host societies?

*“All companies who are investing in foreign societies have a role towards positively influencing host economic policy to some practical degree, especially if such reform is widely recognized as being needed. The debate is whether they should have an overt role in political reform, or not. Generally we believe that foreign investing companies should take extra steps to be a-political and not favouring any one political group or ideology – i.e. do not get involved in the political process if this is avoidable. Let the continuance or diminishment of mining investment in that host society speak for itself as far as the political process is concerned,..... unless that society has a well-known chronic problem with the political environment that is dramatically damaging the economy of that society. ”*

2. If companies have such a role,

- Is this role different in weak governance zones than it would be elsewhere?

*“Some lobbyists promote that Western natural resource sector investors should not invest in troubled countries such as DRC. This is a position we are regularly confronted with, but our position is that it does not help the general population of a weak governance or conflict zone if responsible investors boycott that environment. In fact matters get much worse for the population since the void is filled with less scrupulous developers who do not follow Western business norms. (A prime example being the current illicit cobalt trade and export in Katanga and the murky diamond business out of Kasai.) Therefore if we are to be successful in more challenging host countries such as DRC, we see our role needs to be proactive in regards to the severe institutional/political problems in that environment. (This assumes that no other external authority is there to protect our interests – such an entity rarely exists, or they come and go like the UN Panel on Exploitation of DRC Resources with no sustainable influence).*

*If we wish to be successful with a mining investment in a weak governance zone, and taking into account the normal 10 year time frame from initial exploration through to a profitable outcome on a typical base metals mining project, it is necessary for us to elevate our role to positively influence reforms that affect the economic policies of the host society. In weak governance zones, the economy is inevitably tied closely to the politicians (and/or the military authorities), hence our need to have active communication with politicians and a diplomatic role in promoting reforms that assist us, but those initiatives must be consistent with achieving good governance by international standards.”*

- How are they to tell the difference between positive contributions to the reform process and inappropriate involvement in local politics (which Recommendation II.11 of the Guidelines asks them to avoid)?

*“This is a difficult question. Ultimately the level of influence various companies try to exert are at the discretion of each company’s senior executives. Guidelines such as those put out by the OECD are helpful in directing the company’s role to make positive contributions and influence by example, but frankly, knowledge of OECD guidelines as they should apply to resource sector investment in difficult countries is not widely known by most mining executives of mid-tier and junior companies from what I have seen. Many companies either follow the practices of other competitors in the host country, or they gravitate towards applying principles which are generally accepted as constructive and acceptable in the environments from where the company is headquartered. Therefore, when you look deeply at the origin of most companies, you will see a wide variation of what is deemed as an acceptable role.”*

- How are they to distinguish between their own roles and those of host governments, international organisations and home governments (e.g. their diplomatic services, ODA programmes, etc.)?

*“Investing mining companies in underdeveloped environments can take constructive roles in offering advice to government policy makers and locally active international organizations to illustrate what they have found to work successfully in more mature mining environments, such as experiences learned over the last decade in say Argentina, Mozambique, Mongolia, etc. These countries went through a significant evolution in the degree of mining exploration, mine development and overall foreign industrial investment which required parallel evolution of laws, policies and government capability to properly encourage, monitor and manage this new level of investment. Where host government capability is incapable in addressing foreign investor’s needs, investors can motivate host governments to enlist outside independent experts or international organizations to provide unbiased advice to move the investment process along for mutual benefit without the foreign investor taking a direct role in influencing the political process.”*

*Regarding an applicable role of home governments, a constructive example would be the excellent support which the US and Canadian embassies, the US State Department and Canadian Foreign Affairs have provided to us and our partners over the last few years whereby the commercial attaches of each embassy became educated on who we are, what we are trying to accomplish, the standards with which we would develop the project, and once they had learned this, Embassy staff became an excellent intermediary to assist us in advancing economically and politically complex issues to help our investment progress.”*

3. Investors in the DRC responded to threatened or actual abuse of political power by cultivating political ties so as to establish a kind of “home made” investment protection. How do efforts of this type affect the development of the rule of law in weak governance host societies?

*“Cultivating relationships between major investors and government leaders is a norm in any environment and should generally be a positive thing if the investors are from responsible backgrounds. It is constructive for key politicians to know and regularly communicate with the major investors in important industrial sectors that are critical to the economy of the country. Communications between senior levels of the DRC government, our consortium and input from other internationally recognized mining investors positively contributed to certain parts of the new DRC Mining Code as it was drafted. We periodically provided this input through the World Bank representatives and we attended several very high level work shops organized by the Ministers of Mines and Finance, so in this context political ties are positive. However in our experience, the close relationship between the past government and certain other incumbent DRC mining investors has been a problem for new investors since these relationships have allowed the incumbents to block or at least delay progress of others for competitive advantage in the cobalt market.”*

4. The DRC case study suggests that investors in weak governance host countries have to be well informed about the local political situation and about each other's activities.

- What should a company do if obtains information about wrongdoing by private actors or public officials? Should companies be encouraged to bear witness to wrongdoing? Under what circumstances should companies consider that they have whistle-blowing responsibilities?

*“In difficult countries, new investors should not immediately be expected to be whistle-blowers and hence probable martyrs, as there is normally no protective international group available that will stand up thereafter to protect the investor's position while the new investor determines how to persevere with its business objectives. However, once an investing company becomes well informed about the local environment and if major wrong doing especially by a public official is encountered, there is some degree of responsibility to communicate such problems to a higher authority, if such exists who can be relied upon to do something constructive with that information . ”*

- Should their responses be different in weak governance zones than they would be in other investment environments? If so, how?

*“Communication on wrongdoing by others can be more open in stronger governance zones since normally there is an institutional protective environment to deal with such occurrences properly . In a weak governance zone, such communications must be carefully thought through, and who to communicate the problem to can be a hard decision to make so as not to make the problem worse. (which fox do you ask about the missing chickens?)”*

- If companies have a responsibility to make their knowledge about wrongdoing public, how can they protect themselves against retaliation by host country actors?

*“A way we have dealt with this from time to time is to pass the problem discretely or anonymously through an influential local foreign embassy, who in turn passed on the issue to higher levels in the government for resolution.”*

5. The DRC case study shows that oil and mining companies provided “monetisation” services that converted the DRC's natural resource assets into (mainly) financial assets that accrued to state-owned enterprises or to the Treasury at a time when few financial and fiscal controls were in place.

- Does companies' provision of these services influence the nature of their responsibilities in weak governance host countries? If so, how?

*“Mining companies should strive to enter into commercial relationships consistent with international mining industry terms proven to support economic, sustainable mining operations. In this manner, weaknesses in state owned enterprises or the Ministry of Finance /treasury departments of such countries can be mitigated by terms which have been proven to be mutually rewarding in other countries. However, often host governments insist on certain terms in competitive tenders and therefore interested mining companies have to generally conform, or withdraw from bidding. Such was the case for quite a few projects tendered by the DRC government between 1994 – 1996, where the structure of the deals was largely dictated. Many mining companies large and small agreed to tender on that general basis. Without the war and related institutional decay, possibly these terms could have prevailed to provide successful mining development benefiting both the DRC and the investors, but certainly these terms were not ideal compared to many other jurisdictions.”*

- How can these companies avoid giving the appearance that they are aiding and abetting people who might be in a position to take advantage of the weak financial and fiscal controls in the host country?

*“Transparent and timely reporting of the nature of mining deals in weak governance environments is a good way to educate people on what is really transpiring commercially to a country’s assets. Then those who are interested can benchmark against terms in other jurisdictions. Unfortunately it is only publicly traded companies on sophisticated stock exchanges that are required to put forth such disclosure.”*

6. Is there any special role that financial companies can play (besides their important and often legally required contribution to helping combat money laundering) in improving the institutional framework in weak governance host countries?

*“Financing companies can play a role by refusing to handle accounts and money transfers for foreign investors who are not playing by internationally accepted rules, and this in turn should support the weaker institutional capabilities of local governments to minimize financial abuses.”*

### **Corporate governance – creating shareholder value with integrity**

7. The Disclosure Chapter of the Guidelines encourages companies to apply high standards of financial and non-financial disclosure. Do companies have an extra duty of transparency when investing in non-transparent host countries or are their responsibilities in this area the same in all host countries?

*“In our circumstances, being a Canadian public company also now influenced by the increased disclosure coming from the Sarbanes Oxley initiatives, we report financial and non-financial information in detail equally for all jurisdictions that we invest in which we believe for a small company such as ours is a very high level and standard of disclosure.”*

8. OECD societies have valid reasons – grounded in the public interest -- for holding large, publicly-listed companies to higher transparency standards than smaller and/or unlisted companies. The case study of publicly-listed junior mining companies with DRC investments suggests that the juniors have smaller, less open boards than large companies; are less likely to report on company policies, management practices and performance in non-financial areas. The small unlisted mining companies in the case study are found to be less transparent than both large and small publicly listed companies in the financial and non-financial areas.

- Should junior and small unlisted companies be encouraged to use their boards to assign high strategic priority to the ethical management of their investments in weak governance zones? If so, how could this be done (e.g. add board members, create a special committee with access to relevant expertise)?

*“Again, much of the above desired objectives are already happening due to Sarbanes Oxley type initiatives – such as greater level of independence within the Boards of all Canadian public companies, more rigor, responsibility and independence for audit committees, requirements for compensation and corporate governance committees, increased independent auditor responsibilities, etc. These changes are coming at a marked increased cost of doing business for small and mid-tier companies as the regulations were drafted with large corporations in mind. However we and our Canadian competitors are incorporating these new requirements and though expensive, they will be helpful in better managing our roles in difficult environments better.”*

- Recommendation II.8 of the Guidelines asks companies “to develop and apply ... management systems that foster a relationship of confidence...” with the societies in which they operate. The Disclosure chapter encourages them to communicate information on “systems for managing risks and complying with laws, an on statements or codes of business conduct”. How do these recommendations apply to small unlisted companies and to junior companies in weak governance zones? Should they be encouraged to adopt internal compliance and external non-financial reporting practices that the case study shows to be common among larger extractive industry companies?

*“The above questions are easier to answer if you are already a North American public company - even a junior, since there have been many increased levels of control and reporting added over the last 2 years that indirectly help promote responsible activity in weak governance countries. The recommendation probably having the greatest positive impact on junior companies is the introduction of additional independent parties to their Boards. This brings additional checks and balances due to the liability independent board members inherit when they sign on, plus the benefits of their experience. However not all companies have to play by the same rules, so while we of course agree all companies should be encouraged to adopt such controls, this is an academic discussion when you compare what we are disclosing compared to many other companies of foreign jurisdiction that can ignore such proposed constraints. “*

- Is asking the juniors and the small unlisted companies to open up their boards, adopt advanced compliance programmes and engage in extensive non-financial reporting equivalent to asking these companies to act like large publicly listed companies? If so, is this reasonable?

*“All junior and mid-tier Canadian mining companies are struggling with the balance between adopting better systems of governance and control, and the significantly increased costs (audit costs tripling, high independent board member fees and insurance, etc) that come with the new obligations mandated by the North American public stock security commissions. However we feel we have been able to practically incorporate these new requirements over the last 2 years and most juniors should be able to follow peer models to do so as well if they take the time to look.”*

### **Doing business with weak governance state-owned enterprises (SOEs)**

9. The case study shows that many OECD-based companies had joint ventures and other business relations with SOEs in the DRC and suggests that these SOEs’ governance rules were weak.
  - Are companies’ responsibilities the same when they enter into joint ventures with weak governance SOEs as their responsibilities with stronger governance SOEs?

*“Sometimes the structure of JV conditions are dictated upon bidding foreign companies, but barring that we believe strongly that promoting international norms in commercial terms to both strong and weak SOE’s is the best way to ensure a sustainable successful mining investment.”*

- What SOE characteristics should an investor look at when considering whether or not to enter into partnerships with weak governance SOEs and when deciding how such partnerships should be managed?

*“Track record of the SOE as a stand alone entity and with its previous JV’s, current management characteristics of the SOE (are they business men, politicians, technocrats?) and especially the financial, social and environmental record of the SOE.”*

- Guidelines Chapter X asks companies to conform “transfer pricing practices to the arm’s length principle.” Is this an especially important consideration when structuring transactions with business partnerships with weak governance SOEs?

*“For an operating mine with foreign owners which is exporting product for sale, this is a very important aspect to be transparently determined. For us, who are subject to Canadian and American legal and financial reporting norms, this is not an issue since we must conform to generally accepted accounting principles which do not allow transfer pricing manipulation whether our partner is a weak SOE or not.”*

10. Most of the larger multinational enterprises in the DRC mining sector tend to be shareholders in mixed public/private companies. In this respect their positions and interests are similar to those of the DRC citizens. In addition, large publicly listed companies tend to have significant expertise in corporate governance, involving elaborate and transparent governance practices.

- Should such companies be encouraged to seek to protect the interests of host country citizens (as shareholders in these partially state-owned companies) or are their responsibilities limited to protecting the interests of their own shareholders?

*“The achievement of sustainable, successful mining development has been shown to require a careful balance between maximizing the benefits to formal shareholders and ensuring the interests of host country citizens are well looked after.”*

- Recommendation II.6 of the Guidelines asks companies to “uphold good corporate governance principles”, while Recommendation II.3 asks them to “encourage local capacity building through close cooperation with the local community, including business interests”. Should large companies be encouraged to share their governance expertise with their SOE partners?

*“Whether the investing company is large or small, sharing our governance principles and experience with an SOE is an important component of relationship building and protecting the security of our investment in the long term.”*

### **Corporate tax payments into weak governance fiscal systems**

11. Do companies that make large tax and royalty payments to weak governance fiscal systems have a role in supporting reform of these systems?

*“Fledgling mining tax and royalty systems have regular debate on how they are applied, until these systems of taxation become well tested and mature. Therefore in order to operate successfully and to achieve more predictable financial results year on year, companies must take an active role in positively reforming such tax and royalty systems until they become fully transparent, easy to calculate and predicable for all investors alike.”*

12. If it is agreed that companies have such roles, then:

- how do these relate to those of other actors, notably host governments and international financial institutions (whose mission is *inter alia* to promote public sector reform)?

*“Government ministries and international financial institutions can help, but frankly they do not have to operate with the details, so it is the mining companies that have to take the lead on reforms, but they should do so in close communication with the international institutions so that there is good*

*communication on what the issues are and how they are ultimately solved. Also in this way International institutions can be a valuable mediator when serious tax and royalty issues can not be resolved between the companies and the host government or SOE”*

- how can companies most effectively go about supporting reform? Should companies refrain from signing contracts with governments that prohibit them from publishing their payments to host country treasuries? Are there countervailing concerns about business confidentiality that cannot be met through appropriate contracting?

*“transparent reporting and close communications with applicable International institutions on serious issues will help effect positive reforms. For us, we could never sign a contract without disclosing all material terms including payments to the government treasuries since we are a public company obligated to full disclosure. There could be certain circumstances where business confidentiality might make this an issue, for instance if a country was privatizing a number of assets in parallel, and disclosure of one deal could inappropriately affect the outcome of other deals.”*

### **Eradicating bribery of public officials**

13. Chapter VI of the Guidelines asks companies to promote employee awareness of and compliance with company policies against bribery and extortion and to adopt management control systems that discourage bribery and corrupt practices. Do participants agree that these recommendations are particularly relevant for investors in weak governance zones, where bribery and corruption is common?

*“For sure this increased awareness on the need for compliance with applicable policies and laws on bribery and corruption is necessary for staff working in difficult environments. The adoption of various levels of control needs to evolve as project activities increase as well, to ensure new employees, subcontractors etc are all aware of the rules and to monitor that they behave accordingly and consistently.”*

14. Recommendation VI.2 of the Guidelines asks companies to “ensure that remuneration of agents is appropriate and for legitimate services only”. When a company’s agent or other business partner is found to have bribed public officials, is it sufficient for the company to sever its relationship with the agent or should it be encouraged to take additional remedial actions? If so, what kinds of actions would be appropriate?

*“Naturally, severing such a relationship is the first action that should be taken and appropriate communication should then be conducted with company management, directors, officers, partners, other agents and related parties so that this problem is recognized as being promptly dealt with. If the circumstance was very serious, then presumably the applicable judicial authorities should take action. It would also be obvious that additional checks and balances be introduced to avoid this happening again.”*