**FEC**

 

**Federation of Congolese**

 **Enterprises**

 Mining Chamber

**SPEECH BY THE PRESIDENT OF THE MINING CHAMBER TO THE NATIONAL CONFERENCE ON THE BUSINESS CLIMATE**

***Kinshasa, August 27, 2012***

**Your Excellency, the Prime Minister, Head of Government,**

**Your Excellencies the Ministers,**

**Your Excellencies the Ambassadors and Heads of Diplomatic Missions,**

**The National President of the FEC,**

**Distinguished Guests,**

**Ladies and Gentlemen,**

The Mining Chamber over which we have the honor of presiding is most honored to have been associated with this national conference on the business climate and investments in the Democratic Republic of the Congo.

As you know, from exploration to exploitation, the mining sector requires major capital which investors often raise on stock exchanges and from major financial institutions.

These investments must therefore be secured if we want them to be financially viable and profitable for the national community and to their owners. Is there still a need to recall the stock decapitalization that we experienced following the long review of mining contracts?

Need I tell you that, today, real over-cautiousness has taken over international stock exchanges and the base metals market in the wake of uncertainties connected with the revision of the Congolese Mining Code?

Indeed, and to use the credo of the FEC, there aren't all that many ways to attract investors and to reassure those that are already present except by improving the business climate.

We are happy that the Government understood this and we congratulate it on having organized this conference to review the situation and to propose other measures to make even further strides in this area.

**Your Excellencies,**

**Ladies and Gentlemen,**

In connection with the theme "Business confronted by external departments", we were asked to focus on **"*Government department audits of private businesses".***

First of all, we must tell you that we will consider only the aspects connected with the relations between the mining companies and Government departments and we do so, not to be denunciatory but in a constructive spirit. In fact, it concerns the difficulties with which we are confronted each day. Also, insofar as it is possible, we will make proposals to improve these relations.

As a general rule, the mining sector is dealing with a multiplication of departments resulting from decentralization (State/Provinces) often operating in contradiction of the Mining Code. In fact, while the Mining Code, which is the bible for the mining companies, contains all of the provisions concerning the exercise of mining activities and is exclusive and exhaustive, all of the Government's departments are trying to operate and to meddle in mining activity in lieu and instead of the departments recognized by the law.

To illustrate this statement, we have identified several Government departments which assign agents to the large mining companies of Katanga on a permanent basis, and do so at the company’s expense:

* National Information Agency (ANR)
* Foreign Trade
* Congolese Office of Control [OCC]
* DGDA
* DEMIAP
* Quarantine
* Directorate General for Migration (DGM)
* Hydrocarbons
* Anti-fraud brigade

As a reminder, the only departments authorized to participate are the Division of Mines, the DGDA and the OCC.

On this topic, we cannot prevent ourselves from severely criticizing the harassment by the special departments of the National Police which impede mining companies from working in serenity.

To this red tape and police harassment is added real fiscal harassment in the form of multiple audits, unpredictable adjustments, threats and intimidations, the issuance of false proofs of payment and so forth.

**Your Excellencies,**

**Ladies and Gentlemen,**

With regard to audits, the mining companies are faced with overlapping audits by various administrations. For example, through information sent to the Chamber of Mines for the second quarter of this year, the mining companies of Katanga were subject to or are currently subject to:

* Audit by the DGRAD on the mining royalty not ordered by the Minister of Mines (generally in connection with the 2010, 2011 and 2012 accounting periods);
* Audits by the DGRAD on materials at importation (explosives, warehouses, quality of agents…) and on the parafiscal taxes applicable to imports without the mines being informed;
* Audit by the General Secretariat for Finance and the Office of the Public Prosecutor of Kinshasa specifically concerning the number of expatriate employees (from 2009 to 2011);
* Disputes accompanied by harassment by the DGDA on the customs value of importations specifically on mining inputs such as sulfur;
* Audit by the Ministry of Finance concerning investments made, fixed assets and their related depreciation;
* Audit by the General Inspectorate of Finance on royalties due in connection with land concessions;
* Audit by the National Forest Fund and the DGRAD concerning the reforestation tax;
* Audit by the National Institute for Professional Preparation (INPP) concerning the contributions paid during the 2010 and 2011 accounting periods;
* Audit by the Social Security Institute (INSS) concerning the 2010 and 2011 accounting periods;
* Unpredictable taxation based on the lack of knowledge of mining processes by the agents assigned to regular inspections (DGI, DGDA) For example: exportation of a mining product scientifically recognized as very moist is considered as a fraud by certain agents of the financial authorities resulting in heavy taxation, etc.

To these audits conducted by organisms of a national character, are added multiple audits by the DRKAT, specifically concerning residency cards for expatriate employees, etc.

Confusion is also observed in the involvement of different departments with regard to the same taxable item (DGRAD/taxing departments, IGF/DGRAD…) for example: the claiming of duties by the Atomic Energy Commission in connection with the importation of radioactive sources while the National Committee for Protection against Ionizing Radiation, with sole jurisdiction, has already prepared all of the required authorizations, etc.

Likewise we note an "inflationary trend" in the sums claimed in connection with the audits carried out.

And yet

* Ministerial decree no. 021 dated March 26, 2010 (Minister of Finance) had stipulated the rationalization of audit operations by the financial authorities, specifically by the publication on January 31 of each year of a schedule of audits for the accounting period. What about it?
* The creation of the DGE and the Tax Centers (CDI) as single fiscal contact points for certain taxpayers was supposed to make it possible to limit the “untimely” actions of other tax departments. However, it has been indicated to us that this measure has not put an end to the right of communication/right to information of the administration. This results, for the taxpayers under the authority of the DGE (the member companies of the Chamber of Mines all report to the DGE), to have to deal not only with the DGE alone, but with multiple tax centers, specifically in connection with requests for information.
* For a number of years, the reduction in the rate of collection penalties (currently 10% per month of delay without ceiling) has been projected. What about it?

Even though all these audits are not definitive and remedies remain available, such adjustments (and so many in number) put the mining companies in a significant risk situation both from the financial perspective as well as with regard to their reputation insofar as these adjustments, by their size, are the subject of communication to shareholders and to money lenders. Furthermore, they require a significant human and financial investment for their management.

In addition, these companies must respond to various requests for clarifications and/or information sent to them both for their own operations as well as for the operations performed by third-party companies, service providers or sometimes not at all.

This situation results in overloading the departments of these companies with various requests and in a potential major financial risk due to the fact that non-compliance with the time limits given to respond to information requests gives rise to the payment of fines and to notices to third-party holders.

On the other hand, there is no measure that sanctions the agents who improperly involve the administration or who give proof of exaggerated zeal in unjustified fines and disputes.

We cannot remain silent about the numerous duties and royalties collected without real consideration in terms of services by certain public organisms and certain institutions. It concerns, in this case:

* Funds for the Promotion of Industry (FPI) which collects 2% of the CIF value + customs duties;
* CMDC which collects traffic duties on transported cargo which is 40% of the imported freight X 2USD;
* The Office of Maritime Freight Management with its FERI, the cost of which is 0.59% of the CIF value;
* Foreign Trade: 50USD per license etc.
* Double penalization of an import without license on the one hand by the payment of 100% of duties and taxes due for this import and on the other hand by a payment of 100% of the CIF value of the imported good.

All of these practices, which demonstrate non-compliance with the relevant statutory and regulatory texts in force, are likely to discourage well-known mining operators (and they are not numerous) with the appropriate expertise and financial capabilities from developing their current activities and from creating new ones in the future.

Finally, how, in the context of this conference, can we fail to speak of judicial insecurity? The mining operators find themselves regularly brought before the courts and found guilty. Although they do not question the ability for anyone to bring action before the courts in order to claim their rights, numerous "abuses" must be noted, abuses which have led certain mining operators to question the impartiality of certain judges, specifically by initiating procedures in order to claim financial compensation from sitting judges for abuse of authority. This judicial insecurity does not facilitate seeking remedy from the courts and constitutes a curb on the improvement of a business and social climate based on law.

**Your Excellencies,**

**Ladies and Gentlemen,**

With a view towards contributing to the improvement of the business climate and investments, we would like, in connection with the subject that we were given to consider, to make the following proposals:

* Compliance with the restriction of jurisdictions in the mining sector (Art. 16 of the mining law): only the players in the mining sector may act and not the other departments
* Compliance with decree no. 01103 dated January 21, 2011 concerning the prohibition of audits and collection of taxes, duties, levies and other royalties owed to the State in request from financial authorities,
* Compliance with ministerial decree no. 021 dated March 26, 2010: the schedules of audits must be prepared and published (brought to the attention of the taxpayers), and it must be ensured that the audits that are the subject of scheduling are relatively precise in their purpose;
* The redefinition or the more strict application of the area of jurisdiction of the authorities and other departments of the State regarding the auditing of companies. In this regard, the intervention of the IGF in connection with an audit of the first degree must be banned;
* Likewise, as regards parafiscal taxes, the involvement of taxing departments, having the knowledge of the subject for that which concerns the operative events connected with their area, must be imperative. It would therefore be worth abrogating the provisions of Law no. 05/008 dated March 31, 2005 allowing the DGRAD to automatically order parafiscal taxes without involvement of the taxing departments. This would also make it possible to regulate the audits made, the audits by the taxing departments and the DGRAD being regularly conflated;
* The reduction in the collection penalty rate and the application of a ceiling. This measure is particularly justified in this period of stability of the FC in relation to the $;
* A study must be conducted on the compensation of inspectors and verifiers responsible for audits, and particularly with regard to the % they are given from the penalties. In fact, such a system may result in "deforming" the evaluation of certain situations, both by the taxpayer subject to audit and adjustment as well as the inspectors/verifiers.
* It is urgent that the law concerning distribution of jurisdictions between the central and provincial powers be adopted and promulgated so as to put an end to the frustrations caused by provincial administrations which cause harm to the mining companies' field operations.

It is also worth sharing the hope of the mining companies created by the actual adherence of the DRC to the OHADA, such adhesion being, we believe, an important step in the improvement of the business climate.

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We end our speech here by reiterating our thanks to the organizers for having involved us in this conference while expressing the firm hope that our proposals and all the recommendations resulting from this meeting will be taken into consideration in the interest of business practice and, consequently, the development of the Democratic Republic of the Congo.

We thank you.