



Rights and Accountability in Development

# IFC's ill-judged investments in DR Congo's Mines

## Why has IFC abandoned Congolese victims of corruption?

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### Executive Summary

On 29 August 2019, a United States court confirmed that the corrupt takeover of a mining company in the Democratic Republic of Congo had produced real victims who are entitled to a restitution award. The victims are the former shareholders in a Canadian mining company, Africo Resources Limited, which held a 75% stake in the valuable Kalukundi copper and cobalt concession in southern Congo. The shareholders lost control of their Congolese investment in 2008 when Dan Gertler, a notorious Israeli businessman, working alongside an American hedge fund and high ranking Congolese officials, orchestrated a take-over. "Africo must be screwed and finished totally!!!!", Gertler wrote in a text message revealed in earlier court papers. Back in September 2016, the hedge fund, Och-Ziff (since renamed "Sculptor"), had admitted violating the Foreign Corrupt Practices Act, with its OZ Africa subsidiary pleading guilty to criminal charges.

One of the investors in the failed Africo mining project was the International Finance Corporation, the private-sector arm of the World Bank Group. IFC was an important "seed" investor, seeking to encourage economic growth and poverty alleviation in Congo after years of devastating conflict. In 2007, it had a 6% holding in the Africo project and an option to buy more shares.

The decision by the US judge that the shareholders were victims and were entitled to restitution could have been an important moment for IFC, setting it on the road to recuperate its losses and to stand-up against corruption, which had robbed it and the Congolese people of much needed socially responsible development. The Congolese people needed a champion to fight for them, especially since residents of the affected mining communities who lost out could not be directly involved as victims in the legal case (US law requires a crime victim to be directly and proximately harmed).

But IFC was surprisingly absent. IFC says it had no entitlement to join the action because it had transferred away its "legal rights". The "third party" IFC refers to as recipient is, based on company filings, most likely a former Africo chairman, Chris Theodoropoulos. Shares equivalent to IFC's holding were "repurchased" by the company from Theodoropoulos in 2009. If and when compensation is awarded, IFC will need to explain why it has given away rights worth up to \$50 million, squandering any prospect of recovering funds for ultimate re-investment in Congo. Moreover, because victim restitution rights can only have arisen in September 2016, IFC will also need to explain exactly when it gave up these rights.

By failing to add its weight to the victim claim, IFC has also missed a crucial opportunity to send a strong message to the perpetrators of corruption. Indeed, IFC has never publicly denounced the corruption that so negatively affected its investment, even though the FCPA action against

Och-Ziff laid bare the Congolese corruption scheme, with Gertler and then president Joseph Kabila clearly identifiable as co-conspirators. A year later, in 2017, Gertler was named a “corrupt actor” by the US Treasury and placed under sanctions. Yet Gertler and his companies have not been added by the World Bank Group to the list of companies blacklisted from doing business with the Bank (a process known as debarment). Instead, IFC officials stayed quiet and appeared to slowly back away from their investment.

In Congo, a multitude of corrupt deals have left a legacy of exploitation, mismanagement, environmental harm and mass unemployment, all contrary to IFC’s aims to revitalise the local economy and provide desperately needed social investment and environmental clean-up. As well as its investment in Africo, IFC had sunk \$4.5 million into First Quantum’s Kolwezi project, which also was targeted under the corruption scheme, with the same grim consequences for local communities. Examining IFC’s record therefore matters.

Given that IFC’s investments in Congo went so spectacularly wrong, the RAID report examines what happened, what lessons could have been learned and why red flags were not raised earlier about Gertler’s role. Exactly who now stands to benefit from IFC’s restitution rights and under what circumstances did IFC sign these away?

This report forms part of a submission RAID is making to the World Bank Group’s Integrity Unit, requesting an investigation into: (i) the role of Gertler and his companies in the Congolese mining projects; (ii) the adequacy of IFC’s due diligence prior to investing in the Africo project; (iii) IFC’s record during the period of investment; and (iv) whether IFC has done all it can to support victims of corruption (for further information see RAID’s letter to the Integrity Vice-Presidency on 17 September 2017).

### **The corruption scheme**

In the September 2016 action under the FCPA, the US Department of Justice (DOJ) detailed the “DRC corruption scheme”. Referring to the Africo mining project, the US authorities described how a high-ranking public official “orchestrated the taking of Africo’s interest in the DRC Mine” and made it available to the hedge fund’s Congolese business partner. That “business partner” was Gertler. The DOJ also describes how the co-conspirators corruptly acquired the Kolwezi project, stripped from its owners (First Quantum) before being obtained by Gertler.

The corruption scheme in Congo thrived in the context of a destabilised state, as the country emerged from two consecutive wars between 1996 – 2002 that cost the lives of millions of people. According to UN experts, Gertler initially used his close ties to then President Joseph Kabila to illicitly trade in conflict diamonds. After Kabila won presidential elections in 2006, Gertler worked with the regime to obtain mineral-rich assets. Och-Ziff’s role was to finance the lucrative deals, including making funds available for the payment of bribes.

US court papers describe how numerous valuable mining assets, including Africo’s Kalukundi and First Quantum’s Kolwezi projects, were corruptly acquired and consolidated in Gertler’s company, Camrose Resources. Camrose was then sold on to “a London-listed mining company”, identifiable as Eurasian Natural Resources Corporation plc (ENRC). . In April 2013, the UK’s Serious Fraud Office launched a criminal investigation into ENRC. This is ongoing at the time of publication.

Those involved in the corruption scheme gained significant profits. According to the DOJ, Och-Ziff received over US\$342 million from Gertler-controlled companies, representing a profit for

Och-Ziff of over US\$91 million. In 2013, the influential [Africa Progress Group](#) reported that Gertler's offshore companies acquired assets worth over US\$1.6 billion for an outlay of just US\$275 million (although this figure does not include all of Gertler's Congolese deals). In 2014, an article in *Forbes Magazine* estimated Kabila's wealth at \$US15 billion. In 2019, [according to Forbes](#), Gertler was reportedly worth US\$1.2 billion.

In December 2017, Gertler and more than a dozen associated entities were [sanctioned](#) by the US government under the Global Magnitsky Human Rights Accountability Act. Another 14 Gertler affiliates were [added](#) to the list in June 2018.

### How much did IFC lose?

In November 2007, IFC invested \$4 million Canadian dollars into the Kalukundi project, which represented a 6% holding in Africo, with an option to buy more. As part of the corrupt takeover, new Africo shares were issued to Gertler, which heavily diluted the holdings of existing shareholders. In IFC's case, its holding in Africo decreased from around 6% to just over 2%.

For some 15 months after the takeover, IFC sat as an investor alongside Gertler before quietly divesting. A note tucked away in Africo's 2009-10 [financial statements](#) refers to the "repurchase" by the company of 1,731,000 common shares from an Africo director who had purchased them from a "third party" on 22 September 2009 for CAD \$0.75 per share. These are undoubtedly IFC's shares. In written correspondence to RAID on 1 May 2019, IFC subsequently confirmed it had sold its shares in Africo in 2009 to a third party, but declined to answer to whom it had sold the shares. An Africo [news release](#) gives further details of the "repurchase" of the shares on 3 November 2009 by Africo from its then Chairman, Chris Theodoropoulos. At the time of its November 2007 investment in Africo, IFC paid the equivalent of CAD \$2.31 for each of the common shares it purchased, making its loss CAD \$2.7 million.

IFC's loss may prove to be more than just the CAD \$2.7 million of its original investment. It also surrendered a potentially much higher restitution sum. Although a detailed expert valuation report commissioned by the former shareholders remains confidential, the Africo shareholders state in their letter to the judge that Och-Ziff "should pay as much as \$600 million in restitution". While the amount of compensation has yet to be determined, based on this valuation, the amount IFC could have recovered on its holding and its option could equate to an estimated US\$50 million (minus any legal costs).

But there are other possible ramifications. The recent court decision recognizing the shareholders as victims in the OZ Africa case, if it results in a large restitution sum, potentially increases the maximum fine. Such deterrence is in line with the World Bank's zero-tolerance policy on corruption, yet IFC did not add its weight to the cause.

Should the court reject the existing plea agreement, and if restitution and other matters arising cannot be renegotiated, then OZ Africa's has the right to take back its guilty plea. Such action could mean the case might proceed to trial.

## Why did IFC not join the shareholder action?

The Africo shareholders represented in the recent legal proceedings comprise more than fifty former holders of 64% of equity in Africo at the time of the bribery scheme. IFC is not among the group, although clearly it was a high-profile and easily identifiable investor in Africo.

In correspondence with RAID, IFC said it had no entitlement to join the Africo shareholder action because “the shareholder claims and related law enforcement actions occurred several years after IFC sold its shares and transferred its legal rights in the Company [Africo] to a third party.” Based on common practice, when shares are sold in the market, as was done with the IFC’s Africo shares, the “right to restitution” does not automatically accrue to the new owner. Indeed, any restitution rights in this case could only have arisen when OZ Africa pleaded guilty on 29 September 2016. Such a conclusion is at odds with IFC referring to a transfer when it sold its shares several years previously, which RAID has tracked to September 2009.

RAID followed up in writing, asking IFC to provide further details as to whom, when and under what circumstances its shareholder restitution claim was reassigned. IFC declined to comment.

IFC will need to fully explain any signing away of such restitution rights, especially if Theodoropoulos, the former Africo chairman, is the recipient and participating in the restitution claim. RAID contacted Theodoropoulos to ask for further clarification about the assignment of IFC’s restitution rights, but he did not reply. IFC’s original investment was meant to benefit Congolese residents. It would be scandalous if any restitution awards that may be granted also do not provide impoverished Congolese people with any development benefits.

## Complaint to the World Bank Groups Integrity Vice-Presidency

On 17 September 2019, RAID filed a complaint to the Integrity Vice-Presidency (INT). In this complaint RAID requests the Integrity Vice-Presidency (INT) to investigate:

- **The role of Gertler and his companies in IFC’s Congolese mining projects** under the World Bank’s sanctions regime with a view to debarring them and remedying the harm to the victims of the corruption, including the Congolese communities near to the projects who were deprived of important benefits that those projects were to deliver;
- **IFC’s actions before and after investing in the Africo Project**, with a view to reporting publicly on lessons learned to better combat corruption in the future.
- **The adequacy of IFC’s due diligence prior to investing in the Africo project.** The World Bank and other consultants were already alarmed by the lack of transparency around joint venture mining contracts and the potential for corruption, while the dispute around Africo’s ownership had already begun when IFC invested.
- **IFC’s record during the period of its investment**, including whether it was effective in identifying and acting on ‘red flags’ associated with Gertler’s interventions, how it voted on Gertler’s takeover of Africo, and whether its divestment some 15 months after Gertler gained control was timely, transparent and appropriately managed.
- **Whether IFC has done all it can to support the victims of the corruption**, in particular IFC’s entitlement to join the shareholder action and the circumstances of any reassignment of restitution rights to another party.