

NCP statement on Oryx Natural Resources

Introduction

The United Nations Panel of Experts (the UN Panel) on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo (the DRC) named Oryx Natural Resources (Oryx) in Annex 1—‘Companies on which the Panel recommends the placing of financial restrictions’—of its initial report, published in October 2002. Companies in Annex I were also considered by the Panel to be in violation of the OECD Guidelines. In its final report, published in October 2003, the Panel listed Oryx in Category 3—unresolved cases referred to the National Contact Point (NCP) in countries adhering to the Guidelines for updating or investigation. The UK NCP is located in the Europe and World Trade Directorate of the Department of Trade and Industry (DTI).

2. The Panel had decided to keep Oryx in Category 3 (cases which had not reached settlement) due to ongoing libel action by the company against Independent Newspapers, following an article in *The Independent* dated 28 November 2002. The Panel referred Oryx to the UK NCP as it felt that additional evidence might come to light in the course of that case. The Panel made no specific allegations in its referral letter to the NCP that had not already been discussed with the company.

3. The libel action was settled, in March 2004, before any evidence was given. Some documents were subsequently disclosed and included among others provided to the NCP by the UN in May 2004. The NCP has reviewed the material provided by the UN; this had been seen by the Panel and provided the framework for its dialogue with Oryx.

4. On 30 March 2005, a non-governmental organisation, Rights and Accountability in Development (RAID) submitted a complaint against Oryx under the Guidelines. The complaint broadly covered six areas. The NCP assessed the complaint and decided that two of the six areas met the criteria set out in the Guidelines and could be taken forward with the company. The remaining four areas of the complaint had been covered in detail by the UN Panel and contained no new evidence. Accordingly, the NCP judged that they would not be reopened. A copy of the NCP’s full assessment, including the issues raised by RAID and the rationales for the above decisions, is attached at annex 1 to this statement.

Oryx cooperation with the UN Panel

5. The UN Panel met with representatives of Oryx on a number of occasions, namely 19 July 2002; 24, 25 and 30 October 2002; 4 and 15 November 2002; and during March 2003. From the documentation supplied to the NCP by the UN in May 2004, it is clear that these meetings were initially fractious but became more productive as time progressed.

6. Oryx drafted a minute, which was revised several times following comment from the UN Panel. The minute, finalised on 24 May 2003, covered the issues discussed by the parties. A copy is attached at annex 2 to this statement.

Summary of dialogue between RAID and the NCP on DRC cases

7. Following the disbanding of the UN Panel, there was no clear guidance for any party on the need for complainants, within the process initiated by the UN Panel, and what their status would be. This meant that it was not possible to come to an agreement with RAID on their acting as a complainant in the De Beers and Avient cases. It is clear to the NCP that the Guidelines anticipate a complainant, but any potential complainant should submit their complaint supported by evidence for initial assessment. In this case that did not happen.

8. Lacking a complainant as the Guidelines presuppose, the NCP requested documentation from the UN to support the views of the Panel and to put this to the companies that had been named. This was supplied in March 2004 on the condition that it was to remain confidential and could only be disclosed to the companies involved or as part of a criminal prosecution. This made it difficult to assess any NGO complaint in conjunction with the UN Panel allegations.

9. In April 2004, RAID published a report, "Unanswered questions: companies, conflict and the DRC," which specifically stated that RAID made no allegations of its own. Subsequently, RAID indicated that it did wish to act as a complainant. Ministers agreed that this should be taken forward in a single process alongside the UN Panel's allegations. This led to the submission of RAID's complaint, based on its report, and to the subsequent dialogue with Oryx.

Summary of meeting between RAID and Oryx

10. In the light of RAID's complaint and the NCP's assessment, the NCP convened a meeting on 6 May 2005 between RAID and Oryx. Also in attendance were two DTI officials representing the NCP. Previously, RAID had indicated that it was unhappy with the NCP's decision not to reopen four areas of its complaint, while Oryx was unhappy that two areas were to be taken forward.

11. The process to be followed at that meeting, and the intention that it be a dialogue between the two parties, was clearly outlined in paragraphs 17 and 18 of the assessment. At the meeting, however, Oryx indicated that it was unhappy with the process and refused to enter into a direct dialogue with RAID. Oryx instead responded directly to the NCP on the two areas in question. RAID again expressed its concerns over the narrow focus of the meeting and the exclusion of four areas of its complaint.

12. The points for discussion taken from the RAID complaint were:

Declaring diamond exports

Oryx rejects the Panel's contention that it was involved in the smuggling of diamonds. Has the company anything to add, by way of public explanation, to its denial, especially in the light of additional information arising from Oryx's libel action against The Independent?

Foreign-exchange transactions

Will Oryx publish bank records and other documents to show that the foreign exchange brought into the DRC was spent on meeting the mining and labour costs of its operations in the DRC?

Given the Panel's allegation that the transportation by an Oryx employee of large amounts of foreign currency into the DRC broke the country's foreign-exchange laws, will Oryx provide documentation to back up its assertion that such a procedure was "perfectly legal," especially in the light of additional information arising from Oryx's libel action against The Independent?

13. In response to these questions, Oryx indicated that relevant documentation had been sent to the UN Panel and provided references thereto. Oryx indicated that it had no further comment to make on either of the two issues. It is not within the NCP's mandate to investigate further. Oryx also argued that the Director of RAID, while in the DRC, was invited to inspect Oryx's mining operation and had access to the documentation. Oryx stated that this offer had been refused and was no longer open. Oryx made clear that it had no further comment to make on either of the two issues. In considering this Statement in draft, RAID indicated this was not the case. Subsequent to the meeting on 6 May, RAID provided documentation indicating that it had requested more documentation than had been provided by Oryx. A copy of this letter is at annex 3.

14. Under the Guidelines, it is the role of the NCP to bring parties together and attempt to facilitate a dialogue. At the meeting between RAID and Oryx, it became clear that the views of the parties are not reconcilable. It is the view of the NCP that mediation will not assist.

Conclusions

15. The UK Government is firmly committed to the Guidelines as a baseline for corporate behaviour and an aid to companies drawing up their own codes of conduct. The purpose of the Guidelines is not to act as an instrument of sanction nor to hold any company to account. The implementation procedures within the Guidelines are a problem-solving mechanism with a view to parties coming to an agreement, or the NCP making recommendations, for future behaviour in similar circumstances.

16. The promotion of peace, stability, poverty reduction and sustainable development in the DRC and the wider Great Lakes region is a Government

priority. The DRC and surrounding area is a difficult business environment. During the period under consideration, there was (and there remains) a lack of regulation coupled with lawlessness and poor governance. Nonetheless, it is vital that companies act properly, transparently and in a way that will support the development of the region.

17. The NCP notes that the UN Panel reached resolution with Oryx on the issues raised in the Panel's reports and the text of the Oryx minute published by the Panel. The NCP would stress to Oryx the need to:

- contribute to economic, social and environmental progress with a view to achieving sustainable development;
- respect the human rights of those affected by their activities consistent with the host government's international obligations and commitments; and
- abstain from any improper involvement in local political activities.

18. In respect of the meeting between RAID and Oryx, the NCP recalls a statement made by the Chair of the Ministerial Council at the time that the Guidelines were revised in 2000. The Chair noted that the "success and effectiveness of the Guidelines will depend on the responsibility and good faith of all parties involved with their promotion and implementation." There appears to be little confidence or good faith between the two parties in this instance and no prospect of an agreed settlement.

19. The NCP is disappointed that the two parties were not able to join in a more constructive dialogue and by the absence of the prospect of an agreed settlement between the parties. The NCP is unable to form any further conclusion over the application of the Guidelines.

20. This statement was shown in draft to both parties. Oryx made no comment. RAID provided extensive comments, which the NCP has attempted to reflect where appropriate.

UK National Contact Point
June 2005

Annex 1: assessment of RAID's complaint against Oryx Natural Resources

Summary

RAID's evidence is, for the most part, an extract from their previous document "Unanswered Questions: Companies, Conflict and the Democratic Republic of Congo". In addition to this RAID have supplied various documents from a libel action by Oryx Natural Resources (Oryx) against the Independent newspaper. RAID are again clear that they make no allegations of their own. Their complaint broadly covers 6 areas. The Assessment of the National Contact Point (NCP) for the OECD Guidelines for Multinational Enterprises (the Guidelines) is that 2 of the 6 areas can be taken forwards.

The Guidelines

2. The Guidelines have a mechanism, which allows a person or organisation to raise a complaint against a company under the Guidelines. The whole process is future-focussed and based not on naming and shaming companies for alleged past breaches but on examining ongoing issues with a view to a change in the company's procedures, if appropriate. Before being accepted, the complainant must first submit the complaint, supported by evidence, to the NCP for assessment.

Oryx

3. Oryx were named by a UN Expert Panel (the Panel) as being in breach of the Guidelines. The Panel and company met several times to discuss the allegations and agreed a joint statement on the discussions. It is clear from the commissioning letter to the UK NCP from the chairman of the Panel that they had reached an agreed settlement of the issues but, due to an ongoing libel action, felt unable to move the company to the "resolved" section of their final report. Consequently, the complaint was referred to the UK NCP lest other information come to light in the course of the libel action. The libel case was subsequently settled out of court. No evidence was given under oath but some documents were provided by a disclosure order of the court and a skeleton defence argument was provided by RAID.

Assessment

4. As stated above, it is clear to the NCP that a settlement was agreed between the Panel and the company. The Panel, in these DR Congo (DRC) cases, operated in the unprecedented position of both NCP and complainant.

5. In similar cases, given that the complainant and the company have agreed, it is the practice of the NCP not to reopen these issues unless there is fresh evidence or a repeat of the previous behaviour.

6. Using this logic, it seems reasonable to separate RAID's complaint into 2 sections:

- allegations which have previously been dealt with by the UN Panel; and
- new allegations, or evidence of continuing behaviour previously dealt with by the Panel.

7. The Panel sent the UK NCP a great deal of documentation concerning Oryx that had come into its possession during its enquiry. This included various contracts, minutes, partnership agreements and notes of meetings between the Panel and the company.

8. Pages 5 and 6 of RAID's complaint contain a helpful spreadsheet stating the allegations made by the Panel, the supporting documentation and some "publicly unanswered questions".

9. Given that the allegations raised by the Panel have been settled between the parties (to the satisfaction of both the Panel and Oryx), the NCP takes the RAID complaint to be these unanswered questions.

Acquisition of the DRC diamond concessions

Given the nature of the conflict in the DRC, and the role of the Zimbabwean forces in that conflict, was it appropriate for a company to enter into a partnership agreement when the concessions were 'a barter payment for ZDF military assistance' and the proceeds were likely to fuel the war?

Will Oryx explain its role in the way in which the Senga Senga and Tshibu concessions were awarded and why this was done without public tendering and bidding?

10. The dialogue between the Panel and company went into this area in great detail. RAID offer no additional evidence, make no new allegations and all supporting documentation cited by RAID was in the possession of the UN. Consequently the NCP will not reopen this issue.

Ownership of Sengamines shares

Oryx rejects the Panel's contention, based on the minutes of an extraordinary meeting of COSLEG held in Kinshasa on 1 August 2000, that Oryx's 49 per cent public interest in Sengamines was owned by OSLEG and that Oryx was nominated to act on the latter's behalf. Has the company anything to add, by way of public explanation, to its denial?

In the light of minutes from (i) an Extraordinary General Meeting of Sengamines held on 3rd November 2000 at Cosleg's office in Kinshasa and (ii) an Extraordinary Meeting of Sengamines held at 12:15pm at the Hotel Memling Kinshasa on the same day, which appear to record the transfer of 49% of Sengamines shares to Osleg and the appointment Oryx as its agent,

has the company anything to add, by way of public explanation, to its denial of the Panel's contention that Oryx was a nominee for OSLEG?

Will Oryx publicly back up its denial of the Panel's allegation that the ZDF, through OSLEG, continued to hold interests in Sengamines, by publishing: (i) the complete Share Register of Sengamines showing the complete history of the ownership of shares from incorporation; (ii) all documents relating to COSLEG's ownership of 988 founders' shares in Sengamines and their subsequent transfer?

11. Again, the dialogue with the Panel covered this in detail, no fresh allegations are made and all supporting documentation was in the possession of the Panel. In these instances RAID appear to be requesting some kind of public explanation from Oryx to support their denials. A full explanation was given to the Panel that they appeared, from the documentation supplied by the UN, to accept.

12. In the abstract, if any company and complainant are involved in a dialogue under the Guidelines, that dialogue is confidential and there is no requirement for the details to be made public. Consequently the NCP will not reopen this issue.

The consideration paid by Oryx for its holdings in Sengamines

What consideration did Oryx pay for the 49% shareholding in Sengamines it received from COSLEG?

What consideration did Oryx pay for the shares it received when Sengamines was restructured in August 2000?

What is the total consideration that Oryx Natural Resources has paid for its holdings in the Sengamines concessions?

13. The Panel investigated the whole issue of Sengamines in detail. In this instance the supporting documentation cited by RAID post-dates the Panel (statements and skeleton argument from the libel case). However these documents are drawn from other documents that were in the possession of the Panel. The NCP does not feel able to reopen this question on that basis. In addition, the NCP finds it difficult to see, however Oryx came into possession of the shares, how this can be viewed as having a future focus.

Involvement in politics

Oryx rejects the Panel's contention that it acted as 'a front for ZDF and its military company OSLEG'. Has the company anything to add, by way of public explanation, to its denial?

Oryx rejects the Panel's contention that it was involved in making contributions to Zimbabwean politicians. Has the company anything to add, by way of public explanation, to its denial?

14. The supporting documentation for these issues was in possession of the Panel, and was the subject of the dialogue between the Panel and the company. RAID have based their questions on the Panel allegations made in their report dated 16 October 2002 and Oryx's response to these allegations, reproduced by the Panel in June 2003. There is no requirement for Oryx to make any kind of public declarations on these issues and the NCP will not reopen these issues.

Declaring diamond exports

How does Oryx account for the huge losses at Sengamines referred to by the Panel?

Oryx rejects the Panel's contention that it was involved in the smuggling of diamonds. Has the company anything to add, by way of public explanation, to its denial, especially in the light of additional information arising from Oryx's libel action against The Independent?

15. The NCP does not feel that Oryx need address the first question. The second question is supported by a defence claim in the libel action that post-dates the Panel activity. Previously the NCP has held that the company need not make any public disclosure of details of the dialogue held with the panel but in this instance, given the supporting documentation, the NCP feels this is something which can be put to Oryx as a 'specific instance'.

Foreign exchange transactions

Will Oryx publish bank records and other documents to show that the foreign exchange brought into the DRC was spent on meeting the mining and labour costs of its operations in the DRC?

Given the Panel's allegation that the transportation by an Oryx employee of large amounts of foreign currency into the DRC broke the country's foreign exchange laws, will Oryx provide documentation to back up its assertion that such a procedure was 'perfectly legal', especially in the light of additional information arising from Oryx's libel action against The Independent?

16. The NCP can find little documentation in the bundle supplied by the UN that this subject was covered in great depth. Given the defence claims (on this subject) in the skeleton argument in the libel case and the inconclusive settlement agreement, the NCP feels that this too is something than can be put to Oryx as a 'specific instance'.

The way forward

17. The NCP will convene a meeting between Oryx and RAID at the 1 Victoria Street offices of the DTI at a date to be agreed between the 2 parties, but in principle no later than 29 April 2005, to discuss the two issues (three questions noted above) to be taken forward. The proceedings may form some

part of a final Statement on the activities of Oryx in the DRC. This dialogue process will be extended only by agreement between the two parties. No other evidence or complaint is admissible under this process. If any of the two parties do not attend an agreed meeting, or any party is unreasonable over the date of the meeting, this may be reflected in the terms of the NCP Statement.

18. At the conclusion of this process the NCP hopes to make a Statement that is agreed by both parties as an accurate summation of the dialogue process. If agreement cannot be secured a Statement will be released by the NCP unilaterally. Once a Statement is released, the NCP process is over unless there are new allegations or evidence of continuing conduct contravening previous undertakings.

Duncan Lawson
For the UK National Contact Point

Annex 2: minute of 24 May 2003

Annex 3: RAID letter of 27 September 2004

27 September 2004

Geoffrey White
African Mining Management Company (Pty) Limited

Dear Geoffrey,

Thank you for your letter of 10 September.

I can only reiterate RAID's willingness to discuss these questions in the context of the OECD Guidelines' implementation procedures. We made our position clear to you and your legal representatives from the outset. We know that you are in discussion with the UK NCP and therefore there is an opportunity through the specific instance procedure (that requires a complainant) to make progress. The UK NCP is aware of our position and given that he can offer parties facilitation/mediation services this, in our view, should be the way forward. We regret that this is not happening but let me emphasize that any delay in entering into the OECD procedures is not due to RAID.

We have not 'condemned' your company in writing. We have merely restated - at De Beers' request - the questions (the documents that you have made available notwithstanding), which remain from the UN Panel of Experts report. We hope however that these issues can be resolved through the specific instance procedure.

You are under a misapprehension about 'an agreement' between us. For the purposes of RAID's report, which reviewed the UN Panel's allegations and made use of Oryx's public statements and the material that came out in open court during the action against The Independent, we restricted ourselves to using documents that were in the public domain. You were given a copy of RAID's report last April.

You say that we have been given all the documents we requested. It is true that we have been given a copy of one mining convention but at the meeting of 23 January you told me and Dan Leader that "Oryx has had three Presidential decrees over the period since it acquired the mine". That is why we wrote to Mischon de Reya to request copies of all three. You now state that there is only one convention. We also asked for a full list of shareholders and were given what we understood from you to be a partial list, which you asked us to keep confidential. These discrepancies need some explanation. RAID has a more detailed list of documents that it would like to study, which, in the normal course of events, we would have put to you during the specific instance procedure. I attach a list of the documents that RAID would like to obtain from you. With the completion of RAID's report, *Unanswered questions*, we are continuing our research into the role that companies played during the conflict.

You ask us to wait until the NCP has completed its process. But as far as we are concerned there is no process other than the specific instance procedure, which requires a complainant, a role we are prepared to assume. Any Statement from the NCP that is made without a complainant deviates from the procedures and would be perceived as biased. It would do little to help a company like Oryx clear its name. We understand that in Belgium Oryx Natural Resources' is part of an

on-going criminal investigation into Belgolaise Bank and MIBA. We await the outcome of this inquiry with interest.

I'm sure that the UK NCP would be only too happy to instigate a proper specific instance procedure if you made Oryx's position clear to DTI.

Yours sincerely,

Patricia Feeney
Executive Director

Enc.

Documents requested:

1. Tripartite agreement of 16 July 1999 between Oryx, the Zimbabwean Government and Osleg. [Details creation and ownership Oryx Zimcon]
2. Partnership agreement Osleg and Comiex, 29 October 1999 to create Cosleg Sarl.
3. *Oryx Information Memorandum*, January 2000.
4. Petra Diamonds Ltd., prospectus for reverse listing on the AIM, 18 May 2000.
5. Minutes and resolutions (authenticated by the Kinshasa Notarial Office) of an Extraordinary Meeting of Cosleg held in Kinshasa on 1 August 2000. [Transfer of Cosleg's 49% shareholding to Osleg with Oryx acting as nominee]
6. Minutes and resolutions of 9am Extraordinary Meeting of Sengamines held Cosleg's office in Kinshasa on 3 November 2000. [Transfer of Cosleg's 49% shareholding to Osleg with Oryx acting as nominee]
7. Minutes and resolutions of 12:15pm Extraordinary Meeting of Sengamines at the Hotel Memling Kinshasa on 3 November 2000.
8. Full copy of the Sengamines share register. [With earliest entry recorded as 3 November 2000]
9. Annexes to Principal Sengamines agreement of 27 August 2000: Annex A ('sketch plan') the management contract (annex B), the warranties (annex C) and the shareholders' agreement (Annex D)
10. 'Loose Minute for Presidential Intervention on Three Obstacles to Further Progress in the Implementation of the DRC-Zimbabwe Memorandum of Understanding on Military-Economic Cooperation,' from Defence Minister Sidney Sekeramayi to President Robert Mugabe, August 2002.
11. Copy of DRC government memorandum detailing address 1 May 2002 by Zvinavashe, in his capacity of Chief of Staff of the ZDF and Chairman of COSLEG, to inter-ministerial meeting of the Congolese and Zimbabwean governments in Harare.
12. Al Shanfari's letter to El Pais of 5 October 2002.
13. Incorporation documents for Coselg Sarl, 8 November 1999, Kinshasa.
14. Incorporation documents for OSLEG (Private) Limited, 11 December 1998.
15. Incorporation documents for Sengamines, 8 November 1999, Kinshasa.
16. Articles of Association Sengamimes, 8 November 2000.
17. Articles of Association Sengamimes (revised), post 3 November 2000.

