

FINAL STATEMENT BY THE UK NATIONAL CONTACT POINT FOR THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES: AFRIMEX (UK) LTD

SUMMARY OF NCP DECISION

The National Contact Point (NCP) considered the complaint brought under Chapter II (General policies), Chapter IV (Employment and Industrial Relations) and Chapter VI (Combating bribery) of the OECD Guidelines for Multinational Enterprises (the Guidelines) alleging that Afrimex paid taxes to rebel forces in the Democratic Republic of Congo and practiced insufficient due diligence on the supply chain, sourcing minerals from mines that used child and forced labour, who work under unacceptable health and safety practices. The NCP upheld the majority of the allegations brought by Global Witness. Afrimex initiated the demand for minerals sourced from a conflict zone. Afrimex sourced these minerals from an associated company SOCOMI, and 2 independent comptoirs who paid taxes and mineral licences to RCD-Goma when they occupied the area. These payments contributed to the ongoing conflict. Therefore the NCP concluded that Afrimex failed to contribute to the sustainable development in the region; to respect human rights; or to influence business partners and suppliers to adhere to the Guidelines. The NCP concluded that Afrimex did not apply sufficient due diligence to the supply chain and failed to take adequate steps to contribute to the abolition of child and forced labour in the mines or to take steps to influence the conditions of the mines. The NCP did not uphold the allegations that Afrimex failed to fulfil the bribery and corruption chapter of the Guidelines or the improper involvement in local politics.

OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES

1. The Guidelines are recommendations that governments endorse and promote in relation to the behaviour of multinational enterprises. They are voluntary principles and standards for responsible business conduct. They are the only comprehensive, multilaterally-endorsed code of conduct for multinational enterprises.
2. The Guidelines establish non-legally binding principles covering a broad range of issues in business ethics in the following areas of operation: general company policies, disclosure of information, employment and industrial relations, environment, combating bribery, consumer interests, responsible use of science and technology, competition and taxation.
3. The Guidelines are not legally binding but OECD governments and a number of non OECD members are committed to promoting their observance. The Guidelines are also supported by the business community and labour federations. In addition, a number of Non-Governmental Organisations are also heavily involved in the work of the OECD Investment Committee responsible for monitoring and reviewing the Guidelines and are increasingly involved in overseeing the operation and promotion of the Guidelines.

4. The final statement has been approved by Gareth Thomas, Minister for Trade and Consumer Affairs and copies have been placed in the House of Commons and the House of Lords libraries.

SPECIFIC INSTANCE PROCEDURE

5. The first step when a complaint is brought to the NCP under the OECD Guidelines is the initial assessment; this consists of a desk-based analysis of the complaint, the company's response and any additional information provided by the parties. The NCP uses this information to determine whether further consideration is required under the Guidelines. The initial assessment is published to www.csr.gov.uk. If a case is accepted, the NCP instigates mediation between the two parties to ascertain whether they can agree on an appropriate way forward. Should mediation fail, the NCP will determine whether the Guidelines have been met and if necessary, make recommendations for future conduct.

BACKGROUND OF COMPLAINT

6. On 20 February 2007, the UK National Contact Point (NCP) received a request from Global Witness (the Complainant) to consider the specific instance regarding Afrimex UK Ltd (the Company). The complaint alleged that Afrimex paid taxes to rebel forces in the Democratic Republic of Congo (DRC) and practiced insufficient due diligence on the supply chain, sourcing minerals from mines that use child and forced labour, who work under unacceptable health and safety practices.

APPLICABILITY OF THE GUIDELINES

7. The dates of the events that are the subject of the complaint by Global Witness are relevant. The complaint covers the period between 1998 (from the start of the second conflict in DRC) to the date of the complaint (February 2007). The current version of the OECD Guidelines came into force in June 2000 replacing the 1991 version. There is precedent for the UK NCP to investigate behaviour that took place before 2000 but in that case the parties agreed to the retrospective application of the Guidelines, in this case Afrimex withheld consent. While the NCP will not make a determination about the allegations prior to June 2000, the NCP considers that past behaviour is pertinent when considering behaviour that occurred after June 2000.

UN and DRC

8. In June 2000, The United Nations Security Council appointed an independent panel of experts:

- " To follow up on reports and collect information on all activities on illegal exploitation of natural resources and other forms of wealth of the Democratic Republic of the Congo, including in violation of the sovereignty of that country;

- To research and analyse the links between the exploitation of the natural resources and other forms of wealth in the Democratic Republic of the Congo and the continuation of the conflict.”

9. The UN Panel of Experts on the Illegal Exploitation of Natural Resources and other Forms of Wealth of the Democratic Republic of Congo published its first report on 12 April 2001¹, two of the report’s key conclusions were:

“The conflict in the Democratic Republic of the Congo has become mainly about access, control and trade of five key mineral resources: coltan, diamonds, copper, cobalt and gold. The wealth of the country is appealing and hard to resist in the context of lawlessness and the weakness of the central authority...

The role of the private sector in the exploitation of natural resources and the continuation of the war has been vital. A number of companies have been involved and have fuelled the war directly, trading arms for natural resources. Others have facilitated access to financial resources, which are used to purchase weapons. Companies trading minerals, which the Panel considered to be “the engine of the conflict in the Democratic Republic of Congo”, have prepared the field for illegal mining activities in the country.”

10. Afrimex was first mentioned as a company of concern in the Panel’s first report and was subsequently listed in Annex III of the October 2002 report, as the Panel considered Afrimex to be in violation of the OECD Guidelines. After dialogue with Afrimex, the UN classified Afrimex in Category 1, a “resolved” case that required no further action. The discussions that took place between Afrimex and the UN following this report are summarised in the letter that Ketan Kotecha sent the UN². The content of this letter is considered further in paragraph 20.

11. The UN’s ongoing concern is reflected by the creation of a further group in 2004: the Group of Experts on the Democratic Republic of Congo. Their reports are accessible at: [\[www.un.org/sc/committees/1533/egroup.shtml \]](http://www.un.org/sc/committees/1533/egroup.shtml). These reports describe the ongoing conflict, and again, make the explicit link between minerals and funding of rebel groups.

12. The UN continues to be gravely concerned about the situation in DRC. This is reflected in the number of resolutions passed by the Security Council. The Security Council first imposed an arms embargo on all foreign and Congolese armed groups and militias operating in the territory of North and South Kivu and Ituri and on groups not party to the Global and All-inclusive agreement in the Democratic Republic of the Congo on 28 July 2003 with the adoption of resolution 1493. The sanctions regime was subsequently modified

¹ www.un.org/News/dh/latest/drcongo.htm

² www.publications.parliament.uk/pa/cm200506/cmselect/cmintdev/923/923we11.htm

and strengthened with the adoption of resolutions 1533 (2004), 1596 (2005), 1649 (2005) and 1698 (2006) which, among other things, expanded the scope of the arms embargo, imposed additional targeted sanctions measures (travel ban and an assets freeze), and broadened the criteria under which individuals could be designated as subject to those measures. Resolution 1807 (31 March 2008) amended and renewed the sanctions regime until 31 December 2008 and extended the Group of Experts for the same period.

SUBSTANCE OF COMPLAINT

13. Global Witness alleges that Afrimex (UK) Ltd did not comply with Chapter II (General Policies), Chapter IV (Employment and Industrial Relations) and Chapter VI (Combating bribery) of the Guidelines, specifically:

General Policies

Enterprises should take fully into account established policies in the countries in which they operate, and consider the views of other stakeholders. In this regard, enterprises should

II.1 Contribute to economic, social and environmental progress with a view to achieving sustainable development.

II.2: Respect the human rights of those affected by their activities consistent with the host government's international obligations and commitments.

II.10 Encourage, where practicable, business partners, including suppliers and subcontractors, to apply principles of corporate conduct compatible with the Guidelines.

II.11 Abstain from any improper involvement in local politics.

Employment and Industrial Relation

Enterprises should, within the framework of applicable law, regulations and prevailing labour relations and employment practices:

IV.1b Contribute to the effective abolition of child labour.

IV.1c Contribute to the elimination of all forms of forced or compulsory labour.

IV.4b Take adequate steps to ensure occupational health and safety in their operations.

Combating Bribery

Enterprises should not, directly or indirectly, offer, promise, give or demand a bribe or other undue advantage to obtain or retain business or other improper advantage. Nor should enterprises be solicited or expected to render a bribe or other undue advantage. In particular, enterprises should:

VI.2 Ensure that remuneration of agents is appropriate and for legitimate services only. Where relevant, a list of agents employed in connection with transactions with public bodies and state-owned enterprises should be kept and made available to competent authorities.

VI.6 Not make illegal contributions to candidates for public office or to political parties or to other political organisations. Contributions should

fully comply with public disclosure requirements and should be reported to senior managements.

AFRIMEX'S RESPONSE

14. Afrimex do not believe they have acted contrary to the expectations of the Guidelines and consider the complaint made by Global Witness to have numerous misconceptions and errors.

15. Afrimex dismissed the allegation they had paid taxes to rebel forces, with the explanation that Afrimex only take ownership of the minerals at the border so do not have a tax liability in DRC. They also stated that no agent paid tax on Afrimex's behalf.

16. In regards to the supply chain for the sourcing of minerals, Afrimex explained they have never bought minerals directly from the mine. They described the supply chain for minerals as extremely fractured, with Afrimex several steps removed from the mines. The lack of an audit chain prevents Afrimex's minerals from being traced back to the mine they were sourced from. They explained that Afrimex source their minerals from a small number of comptoirs with a good reputation with whom they have long standing relationships. Following the UN Panel report Afrimex sought oral confirmation from comptoirs and following the 2005 Channel 4 news report, Afrimex sought and obtained written assurances from the comptoirs that their products meet all legal and regulatory requirements (a copy of one assurance was received by the NCP, while the other was subsequently requested, it was not received).

RELATIONSHIP BETWEEN AFRIMEX, SOCIETE KOTECHA AND SOCOMI

17. The complaint lodged by Global Witness stated that Afrimex operates in DRC as Societe Kotecha. The complaint continues by describing SOCOMI (a DRC company) as "the ore marketing arm of Societe Kotecha". As Afrimex disputed the link between the 3 companies, it was necessary to explore the relationship.

18. Afrimex explained to the NCP that its relationship with Societe Kotecha is merely business. Afrimex exports goods, mainly commodities to Societe Kotecha. Societe Kotecha provides certain services to Afrimex, for example, physical checks on minerals to confirm volumes before export. Afrimex confirmed that Societe Kotecha does not take ownership of the minerals and explained that Societe Kotecha does not trade in minerals nor has it done so in the past. Afrimex and Societe Kotecha are independent companies which do not co-ordinate their operations or exert influence over one another in any manner that compromises their independence.

19. The Global Witness complaint refers to 2 key reasons why Afrimex should be seen as connected to Societe Kotecha and Socomi. Global Witness' believe that Afrimex and Societe Kotecha trade as one entity and in a letter to the NCP dated 29 May 2007 refer to a conversation between a

Global Witness researcher and an employee at Societe Kotecha in Bukavu who referred to Afrimex as “the London office”.

20. The first key reason cited by Global Witness is Ketan Kotecha’s letter to the UN, which he described as a “recap of the main points of the discussion”. It is clear that Mr Kotecha implied to the UN that Afrimex, Societe Kotecha and SOCOMI were associated companies (even indicating they were one and the same business). The letter is referring to a family business which imports commodities, sold through a network of branches in the region and has made substantial infrastructure investments in the region, including the investment in sugar and plastic moulding factories. This description does not tally with the explanation given to NCP of Afrimex as a company that merely exports commodities to DRC and imports minerals from DRC. Afrimex has told the NCP that this letter “was perhaps misjudged” but the NCP considers it to indicate that Afrimex has either misdirected the UN or the NCP in regards to the relationship between these companies.

21. The second issue raised by Global Witness is Ketan Kotecha’s evidence to the International Development Committee³ (IDC)⁴ on 4 July 2006. Again, Ketan Kotecha appears to be discussing Afrimex and Societe Kotecha as closely associated businesses, and as paying taxes to RCD-Goma. While the NCP recognises that observers would conclude these companies are associated based on Mr Kotecha’s oral evidence, the NCP notes that Mr Kotecha subsequently wrote to the IDC to provide clarification of certain points to prevent misinterpretation. The key clarification for the purpose of determining the relationship between Afrimex and Societe Kotecha is:

“Afrimex is a UK registered company that I founded in 1984. It has a staff of four individuals (including myself) from offices in Wembley, Middlesex. It acts solely as a commissioning agent for several companies, one of which is Societe Kotecha. Societe Kotecha is my father’s Congolese company, established in Bukavu as Kotecha’s in the early 1960’s. Societe Kotecha directly employs approximately 160 people in the Congo. All of its investment and business activities are conducted in the Congo, and it deals with a number of other companies and engages in a variety of businesses unrelated to its dealings with Afrimex.⁵”

22. This letter introduces the view that a clear separation of the business exists.

23. Afrimex states that the owners and directors of the 2 companies are different. The NCP understands that the directors of Societe Kotecha are

³ www.parliament.the-stationery-office.com/pa/cm200506/cmselect/cmintdev/923/923ii.pdf

⁴ The IDC was appointed by House of Commons to examine expenditure, administration and policy of DFID and its associated public bodies. IDC website:

http://www.parliament.uk/parliamentary_committees/international_development/committee_remit.cfm

⁵ <http://www.publications.parliament.uk/pa/cm200506/cmselect/cmintdev/923/923we10.htm>

Ketan Kotecha and Ramnik Kotecha, while the directors of Afrimex are Ketan Kotecha and Didi Kotecha (the NCP sourced confirmation of Afrimex directors from Companies House). Ketan Kotecha told the NCP that he is a minority shareholder with a minor role in the running of Societe Kotecha.

24. Afrimex describes SOCOMI as being a separate business from Societe Kotecha and was formed by Ramnik Kotecha and 2 others in 1984. The NCP requested confirmation of the other directors, primarily to satisfy itself that the remaining directors were not comptoires but Afrimex stated they did not have access to this information. The NCP is only interested in SOCOMI for the period of the complaint while it was involved in the mineral industry (until November 2001 when it moved to telecommunications). Afrimex state that to the best of its knowledge SOCOMI did not act as a comptoire and merely crushed ore and exported minerals that it had bought locally.

25. The NCP gave careful thought to the views put forward by the parties and referred to the Guidelines which pointed to flexibility in defining an “MNE”:

“A precise definition of multinational enterprises is not required for the purposes of the Guidelines. These usually comprise companies or other entities established in more than one country and so linked that they may co-ordinate their operations in various ways. While one or more of these entities may be able to exercise a significant influence over the activities of others, their degree of autonomy within the enterprise may vary widely from one multinational enterprise to another⁶.”

26. In considering whether these companies were associated, the NCP considered a variety of factors. The NCP did not find this relationship clear cut. The NCP accepted Afrimex’s explanations for the ambiguities and confusion instigated by Mr Kotecha’s evidence to the IDC evidence and his letter to the UN. Ultimately, the NCP kept returning to the same key issues:

- The linkage between the directors in the 3 companies: Mr Ketan Kotecha is a director of Afrimex and Societe Kotecha, Mr Ramnik Kotecha is a director in Societe Kotecha and SOCOMI (during the period that SOCOMI traded in minerals until 2002).
- Mr Ketan Kotecha and Ramnik Kotecha are shareholders of Societe Kotecha.
- Familial relationship – Ramnik Kotecha is Ketan Kotecha’s father.
- Societe Kotecha is a key (but not sole) customer of Afrimex.
- Societe Kotecha provides some services to Afrimex in regards to checking and coordinating mineral deliveries.

27. The NCP believes these links are sufficient to determine that Afrimex was in a position to significantly influence Societe Kotecha and SOCOMI.

⁶ 1.3 of OECD Guidelines for Multinational Enterprises
<http://www.csr.gov.uk/oecd/doc/OECDGuidelinestextDocA.pdf>

Therefore, the NCP has treated these companies as linked for the purposes of this complaint.

PROCESS

28. The parties entered into mediation and met 3 times. They were unable to agree a mediated settlement and the process subsequently moved to an NCP determination. Mediation is a confidential process between the parties and the NCP will not comment on the discussions that took place during these sessions.

NCP ANALYSIS

29. The NCP will only determine on the period after 2000 but as referred in paragraph 7, consideration of Afrimex's behaviour before 2000 is pertinent when considering behaviour from June 2000.

30. Global Witness alleges that Afrimex paid taxes to an armed group (RCD-Goma) that was engaged in armed conflict against the national Government and these payments contributed to financing (and therefore prolonging) the conflict. These aspects of the complaint fall to paragraphs II.1 and II.2 of the Guidelines.

31. Afrimex explained their trade in minerals is confined to importing minerals from the Democratic Republic of Congo. As Afrimex effectively takes ownership of the minerals at the border, they currently do not have any tax liability in DRC nor have they had tax liability in the past for minerals. Tax paid in DRC on the minerals exported by Afrimex is the responsibility of their suppliers.

32. The NCP considered Mr Kotecha's evidence to the IDC (referred to in paragraph 21), Mr Kotecha was asked whether Afrimex made any payments to any political organisations or military organisation in DRC, he responded in the negative. Mr Kotecha also confirmed that taxes were paid to the "RCD Government" i.e. RCD Goma, who occupied the area during the conflict and used the taxes collected to fund the conflict. Mr Kotecha subsequently provided written clarification to the IDC, stating that he had responded to these issues on behalf of his family's business and was not talking about Afrimex.

33. The NCP accepts that Mr Kotecha referred to Societe Kotecha paying taxes to RCD-Goma and not Afrimex. As the complaint centres on the trade of minerals the NCP is restricted to considering the mineral trade only. The NCP accepts that Societe Kotecha does not trade in minerals; the taxes paid to RCD Goma by Societe Kotecha would have been around other business activities and do not form part of this complaint.

34. In correspondence with the NCP, Mr Kotecha referred to SOCOMI holding a mineral license until 2002. During the oral evidence given to the IDC by Mr Kotecha, he refers to the payment of licences and taxes during this

period. The NCP believes this included the mineral licences and taxes paid by SOCOMI.

35. Therefore SOCOMI paid taxation and licence fees as outlined in the complaint:

“From August 1998 to November 2000, non-government forces involved in the conflict imposed a \$15,000 per year licence fee in addition to a tax estimated at 8% of the total value of exports on all coltan traders”.

36. This is supported by statistics of exports of coltan and cassiterite collected by IPIS during their research in DRC for the 2002 report “Supporting the War Economy in the DRC: European Companies and the Coltan Trade⁷”. The statistics cover the period January 2000 to July 2001. A proportion of these statistics are used within the report, and show SOCOMI as a significant exporter of minerals from Eastern DRC during this period. The statistics received by the NCP direct from IPIS are more detailed than those used in the report and show Afrimex to be a significant customer of SOCOMI during the period of the research.

37. The NCP considered the eligibility of the statistics provided by IPIS. IPIS is an independent research institute which focuses on Sub-Saharan Africa; areas of expertise include the exploitation of natural resources. The UK NCP discussed the status of IPIS with the Belgian NCP who confirmed the credibility of the organisation and its work. The NCP considers the statistics received are material evidence in substantiating the trade between SOCOMI and Afrimex.

38. The NCP believes that Afrimex was in a strong position to influence SOCOMI and to question whether SOCOMI should have been paying money to RCD-Goma through the purchase of mineral licences and paying taxes. The information received from IPIS implies that Afrimex was SOCOMI's only export customer during the period of the statistics collected in 2000/01. If this is the case, Afrimex was the reason that SOCOMI traded in minerals and therefore Afrimex is responsible for SOCOMI paying the licence fees and taxation to RCD-Goma. If Afrimex was not SOCOMI's only customer, then their responsibility for the payment of taxes depends on what proportion of SOCOMI's trade in minerals was with Afrimex. These licence fees would have been paid to RCD-Goma during the period they occupied the area (1998 to 2002 – when SOCOMI changed its business activity from minerals).

39. The NCP concludes that Afrimex failed to apply sufficient pressure on an associated company (SOCOMI) to cease trading in minerals during a period when taxes and licence fees were paid to RCD-Goma. These taxes and licence fees were used to fund the continuation of the war. Therefore the NCP determined that Afrimex failed to meet the expectation of paragraphs II.1 and II.2.

⁷ <http://www.grandslacs.net/doc/2343.pdf>

40. SOCOMI was not Afrimex's only supplier. Therefore, the NCP considered whether the supply chain paragraph (II.10) of the guidelines applied. Taxation would have been paid down the supply chain and the NCP was required to consider whether Afrimex was in a position to influence its business partners and suppliers.

41. The NCP's consideration is centred on the level of "due diligence" applied to the supply chain by Afrimex. Professor Ruggie⁸, defines due diligence as "a process whereby companies not only ensure compliance with national laws but also manage the risk of human rights harm with a view to avoiding it. The scope of human rights-related due diligence is determined by the context in which a company is operating, its activities, and the relationships associated with those activities"⁹.

42. Mr Kotecha confirmed to the IDC that during the period of the conflict (1998 to 2003) the amount of cassiterite purchased remained at a similar level as that purchased before the conflict while the amount of coltan increased by 100%.

43. On November 2000, RCD-Goma imposed a monopoly on the coltan trade through Societe Miniere des Grands Lac (SOGIML). A tax of \$10 per kilogramme of coltan was applied to all traders. Afrimex said they stopped purchasing coltan once this monopoly was imposed. This explanation is partially supported by the IPIS research (covering the period January 2000 to July 2001) which shows just one purchase of coltan by Afrimex after November 2000. As Afrimex only received the IPIS documents from the NCP on 22 January 2008, they explained they had insufficient time to follow up this single transaction.

44. The NCP has struggled with the inconsistencies put forward by Afrimex in its evidence. For instance Afrimex explained to the NCP that it had stopped importing coltan once the SOGIML monopoly was created. This is contradictory to Mr Kotecha's evidence to the IDC when he confirmed that Afrimex increased its imports of coltan by 100% during the war.

45. The NCP considered the influence that Afrimex has over its suppliers to consider whether the supply chain requirements of the Guidelines should be applied.

46. Afrimex used 2 independent comptoirs during this period. These comptoirs will have paid taxes and licences to RCD-Goma.

47. Afrimex explained to the NCP that it requested oral reassurances from its suppliers after the discussions with the UN Panel in 2003 and subsequently written assurances after the Channel 4 news item: Congo's tin soldiers in 2005. This indicates that during the period of the war (prior to 2003); Afrimex did not apply any conditions on its suppliers. This is

⁸ Professor John Ruggie is the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises

⁹ www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf

unacceptable considering the context of the conflict and human rights abuses taking place.

48. During Mr Kotecha's appearance at the IDC, he cited the written statements from his comptoirs but confirmed that he had not asked his suppliers whether they had made payments to RCD-Goma or any other military organisation or political party.

49. Afrimex provided the NCP with one of the written statements Mr Kotecha referred to during his evidence to the IDC. These statements were requested from Afrimex's suppliers following the 2005 Channel 4 news article "Congo's tin soldiers". The document is dated July 2005 and is signed by Afrimex's supplier Muyeye, in which he confirms that the minerals sold to Afrimex are purchased from officially recognised producers who are trustworthy individuals and all appropriate export certificates are obtained from the competent authorities.

50. The NCP does not consider the suppliers' statements constitute sufficient due diligence, particularly as it does not deal with rents extracted through the supply chain. In judging how robust these documents are, the NCP considered Mr Kotecha's admission to the IDC that he had never asked his suppliers about payments to political or military organisation.

51. The NCP concludes that Afrimex did not fulfil the requirements of paragraph II.10 of the Guidelines. The lack of due diligence on the supply chain means that Afrimex failed to fulfil the expectations of paragraphs II.1 and II.2 of the Guidelines. The payment of taxation down the supply chain funded the conflict in which numerous human rights abuses have occurred. The conflict prevented the economic, social and environmental progress key to achieving sustainable development and contributed to human rights abuses.

52. The complainant alleges that payment of taxes to rebel forces constitutes a breach of Chapter VI (combating bribery) of the Guidelines, in particular VI.2 and VI.6. As the NCP has accepted that Afrimex did not pay taxes in DRC, the NCP did not uphold this element of the complaint (Chapter VI).

53. The second part of the complaint alleges that Afrimex practiced insufficient due diligence sourcing minerals from mines that use child and forced labour, working under unacceptable health and safety practices. The specific Guidelines cited are IV.1b, IV.1c and IV.4b.

54. Afrimex questioned whether they could contribute to the abolition of child and forced labour considering they were several steps removed from the mine in the supply chain. The NCP refers to the concept of due diligence described in paragraph 41. If sufficient due diligence is applied to the supply chain, then the NCP considers that Afrimex can make a contribution.

55. Afrimex would have been aware of the potential for minerals to be sourced from mines which use child and forced labour. When Mr Kotecha gave evidence to the IDC, he confirmed that he was aware of the Channel 4 news article “Congo’s tin soldiers” which illustrated the conditions in the Bisie mine in Walikale. When he was challenged on the potential for the minerals purchased to have been sourced from mines which use forced labour, he responded:

“As I mentioned earlier, we asked the people from whom we were buying, the registered comptoirs or the licensed comptoirs, and they assured us that these are not materials coming from any such areas, these are coming from where they have control of the mines.”

56. Mr Kotecha confirmed to the IDC that he had never visited a mine to determine whether forced labour occurred and that his business practices were based on the assurances provided by his suppliers. The NCP recognises that Eastern DRC is a dangerous place, FCO travel advice is not to travel to eastern and north eastern DRC, with the exception of Goma and Bukavu, where advice is against all but essential travel. This is due to continued insecurity and lawlessness in these areas. Instability and fighting between Congolese army and insurgents in North Kivu province have led to a very high number of civilians being displaced. The NCP fully understands why Mr Kotecha would be unwilling to visit the mines to establish the conditions but that in itself illustrates the requirement for increased due diligence.

57. The reliance on oral assurances from the suppliers and the subsequent written statements amount to insufficient due diligence for a company sourcing minerals in the conflict zone in Eastern DRC. The NCP is concerned that these assurances lack substance and are not underpinned by any checks. Afrimex readily admitted to the NCP that it did not know the source of the minerals and put forward the view that as the NCP could not prove that its minerals were sourced from a mine that uses child or forced labour then the NCP could not determine that Afrimex failed to meet the requirements of the Guidelines. The NCP disagrees with this view and asserts that this in fact, supports its view that Afrimex practiced insufficient due diligence on the supply chain. Therefore, the NCP determines that Afrimex failed to meet the requirements of Paragraph IV.1b, IV.1c and IV.4b.

NCP CONCLUSIONS

58. As Mr Kotecha has been trading with DRC since the 1980s and his family trading in DRC since the 1960s, it is untenable to conclude that he was unaware of the situation and the widespread human rights abuses that have taken place in Eastern DRC. When Mr Kotecha gave evidence to the IDC he said he was fully aware of the human rights abuses in Eastern DRC during the conflict. Afrimex was named in a UN report in 2001; this report explicitly linked the ongoing conflict with the mineral trade. Afrimex was then named in the Channel 4 news report “Congo’s tin soldiers” in 2005. It appears neither of these experiences led Afrimex to take action to deal seriously with the allegations made and to consider changing their behaviour.

59. Afrimex purchased minerals sourced from Eastern DRC throughout the period of occupation (1998 to 2003). The NCP restricts itself to concluding on the period from June 2000. The NCP accepts that Afrimex did not pay taxes to RCD-Goma as it did not accrue a tax liability in DRC. However, the NCP recognises that Afrimex did not take steps to influence its associated company, SOCOMI. SOCOMI paid taxes and mineral licences to RCD-Goma and these payments contributed to the continuation of the conflict. Therefore the NCP concluded that Afrimex failed to meet the following requirements of the OECD Guidelines for Multinational Enterprises:

II.1 *“Respect the human rights of those affected by their activities consistent with the host government’s international obligations and commitments.”* and
II.2 *“Contribute to economic, social and environmental progress with a view of achieving sustainable development.”*

60. The NCP accepts that Afrimex did not pay taxes to RCD-Goma. While Societe Kotecha and SOCOMI did, the NCP does not believe these payments constitute bribery. Therefore the NCP does not consider that Afrimex failed to meet the expectation of Chapter VI of the Guidelines that deal with bribery and corruption. The NCP also rejects the allegation that Afrimex participated in improper involvement in local political activity (paragraph II.11).

61. The NCP has found insufficient evidence that Afrimex encouraged business partners or suppliers (comptoirs and SOCOMI) to apply principles of corporate conduct compatible with the Guidelines. Taxation on minerals paid by these business partners and suppliers to RCD-Goma will have paid for weapons and therefore the contributed to the continuation of the conflict. From June 2000, the NCP has concluded that Afrimex failed to meet the following requirements of the OECD Guidelines for Multinational Enterprises:

II.1 *“Respect the human rights of those affected by their activities consistent with the host government’s international obligations and commitments.”* and
II.2 *“Contribute to economic, social and environmental progress with a view of achieving sustainable development.”*

II.10 *Encourage, where practicable, business partners, including suppliers and subcontractors, to apply principles of corporate conduct compatible with the Guidelines.*

62. The NCP also concluded that from June 2000 Afrimex applied insufficient due diligence on the supply chain and this remains the case. The UK NCP expects UK business to respect human rights and to take steps to ensure it does not contribute to human rights abuses. Afrimex did not take steps to influence the supply chain and to explore options with its suppliers exploring methods to ascertain how minerals could be sourced from mines that do not use child or forced labour or with better health and safety. The assurances that Afrimex gained from their suppliers were too weak to fulfil the requirements of the Guidelines. Therefore the NCP found that Afrimex had failed to:

IV.1.b *“Contribute to the effective abolition of child labour.”*

IV.1.c *“Contribute to the elimination of all forms of forced or compulsory labour.”*

IV.4.b *“Take adequate steps to ensure occupational health and safety in their operations.”*

NCP RECOMMENDATIONS

63. Afrimex offered to formulate a corporate responsibility policy document to shape its actions going forward. The NCP thanks Afrimex for this suggestion and understands that work is underway on this document.

64. In creating this corporate responsibility document, the NCP draws Afrimex's attention to the UN Special Representative on the issue of Human Rights' recent report: "Protect, Respect and Remedy: A Framework for Business and Human Rights". In this report, Professor Ruggie outlines a basic human rights due diligence process which will include "a human rights policy...broad aspirational language may be used to describe respect for human rights but more detailed guidance in specific functional areas is necessary to give those commitments meaning."

65. In formulating this corporate responsibility document, Afrimex is required to consider the potential implications of their activities. The Company has been provided with a great deal of information over the years describing the human rights abuses associated with the mineral trade in Eastern DRC. Afrimex must take proactive steps to understand how their existing and proposed activities affect human rights in DRC. This impact assessment should make explicit references to internationally recognised human rights. The information gathered in this impact assessment should directly feed into the corporate responsibility policy.

66. To ensure this policy is effective, it needs to be integrated into Afrimex's way of working; to create this policy without a subsequent change in behaviour would merely create a worthless piece of paper. In Afrimex's case this means requiring its suppliers to do no harm: to take credible steps to ensure that military forces do not extract rents along the supply chain; to require a commitment that adequate steps are taken to ensure that minerals are not sourced from mines using forced and child labour, and are not from the most dangerous mines. Afrimex then needs to consider the necessary steps to monitor the effectiveness of this policy, which should be reviewed periodically.

67. The NCP also refers Afrimex to the OECD Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones, which has been developed as part of the OECD's Investment Committee's follow up to the Guidelines. The Risk Awareness tool consists of a list of questions that companies should ask themselves when considering actual or prospective investments in weak governance zones. These questions cover obeying the law and observing international relations; heightened managerial care; political activities; knowing clients and business partners; speaking out about

wrongdoing; and business roles in weak governance societies – a broadened view of self interest.

68. The Risk Awareness Tool states that ‘Companies have the same broad responsibilities in weak governance zones that they do in other investment environments – they are expected to comply with their legal obligations and to observe other relevant international instruments covering such areas as human rights...’. A company should question what steps it has to take to avoid situations where it might aggravate existing problems, for example, human rights abuses and violent conflict and what measures it has adopted to respect the human rights of those affected by its activities consistent with the host government’s international obligations and commitments. Key questions that a company should ask itself are:

- Do the host government, other important political bodies and non-state actors respect human rights?
- Do non-state actors impair the enjoyment of human rights?
- If the country is experiencing armed conflict, do the parties to the conflict respect international humanitarian law?
- Does the host government fully control its territory? If not, what is the human rights situation in areas outside of effective government control and is international humanitarian law respected if there is armed conflict?
- What do external evaluations of the government’s record in respecting human rights and international humanitarian law indicate?

69. The *Risk Awareness Tool* warns of the ‘heightened risks of entering into relationships with employees, clients or business partners that might damage business reputations or give rise to violations of law or to other abuses (e.g. of human rights).’ The onus is upon companies to exercise heightened care to manage these risks, including ‘informing itself about possible roles in host country criminality, corruption and violent conflict of people with whom it may have business or political relations’ and ensuring ‘that it does not, through its business relations, facilitate criminality, corruption and/or human rights abuses or contribute to fuelling violent conflict (e.g. through heightened care in the collection of information, selection of employees and business partners, contracting practices, assessment and resolution, documentation and follow-up monitoring)’.

70. The Risk Awareness tool has already been shared with Afrimex and can also be downloaded from: www.oecd.org/dataoecd/26/21/36885821.pdf

71. The UN sanctions apply on arms in DRC. The Group of Experts on the DRC outlined their view of “due diligence” on purchasing minerals from Eastern DRC; this includes the precise identification of deposits from which minerals have come; whether the deposits are controlled/taxed by illegal armed groups and; a refusal to buy such minerals. The sanctions unit at the Foreign and Commonwealth Office (FCO) provides the following advice to UK companies that are sourcing minerals from conflict areas:

“It is clear that where a company or individual is intending to purchase minerals from areas of the DRC where there is a high rebel presence it will need to consider carefully where it risks being in breach of the arms embargo and may need to demonstrate to the appropriate authorities that it has taken all reasonable steps to ensure that its actions comply with the existing sanctions regime.”

72. Afrimex sources minerals from Eastern DRC where there is a high rebel presence. This advice is pertinent to Afrimex and should be incorporated into the policy document that Afrimex is currently formulating.

73. The July 2007 report by the UN Group of Experts on the Democratic Republic of Congo¹⁰ illustrates the on-going situation in DRC, particularly the methods by which rebels extract rents from the mineral trade:

106. Following up on the case study of cassiterite (tin oxide) production in Walikale presented in the group’s interim report the presence, nature or abuse and illegal exploitation by members of the non-integrated FARDC 85th Brigade have not substantially changed. A small number of soldiers under the direct command of the 8th Military Region and the mining police who were recently deployed in the Walikale area were not able to break the 85th Brigade’s control of the mining sites and the transit routes to and from the mining areas. Extortion and illegal taxation of producers and transporters have become even more profitable to the members of this armed group because of the increase in the world market price of tin oxides (cassiterite), accelerating the demand for transport, local trade and frequency of flights to and from Walikale.”

74. Despite this paper being published after the date of the complaint, the NCP considers it to be pertinent to illustrate the continuing situation in DRC and the urgent need for Afrimex to take steps to ensure due diligence. The extract describes a specific set of circumstances and events in this region. The 2007 Pole Institute paper “Rules for Sale”¹¹ commissioned by DFID, USAID and Comesa, describes both the comptoirs used by Afrimex as having premises in Njingala at Walikale, this makes it likely that some of the minerals purchased by Afrimex were sourced from this area. This alone does not prove that extortion and illegal taxation on these minerals took place but it illustrates the clear need for Afrimex to apply due diligence on the supply chain.

75. The UK Government expects British companies to exercise the highest levels of due diligence in situations of widespread violence and systematic human rights abuse, such as that which prevails in Eastern DRC.

¹⁰ www.securitycouncilreport.org/atf/cf/{65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9}/DRC%20S2007%20423.pdf

¹¹ www.pole-institute.org/documents/regard19_anglais.pdf

76. The NCP urges UK companies to use their influence over contracting parties and business partners, when trading in natural resources from this region, to ensure that due diligence is applied to the supply chain.

77. The NCP reiterates John Ruggie's definition of due diligence:

“Due diligence can be defined as a process whereby companies not only ensure compliance with national laws but also manage the risk of human rights harm with a view to avoiding it. The scope of human rights-related due diligence is determined by the context in which a company is operating, its activities, and the relationships associated with those activities⁸”.

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