

OT Watch v. Ivanhoe Mines and Rio Tinto re Oyu Tolgoi Mining Project, Mongolia

1. The complaint was filed on 1 April 2010 with both the Canadian NCP and the UK NCP. With the agreement of OT Watch, on 15 April 2010 the Canadian NCP took overall lead of the complaint. The complaint referred to alleged breaches of Chapter II, Article (1) which calls on enterprises to “Contribute to economic, social and environmental progress with a view to achieving sustainable development”; and Chapter V, Article (3) of the OECD Guidelines which calls on companies to “Assess, and address in decision-making, the foreseeable environmental, health, and safety-related impacts associated with the processes, goods and services of the enterprise *over their full life cycle*” (our emphasis). On 14 January 2011, the Canadian NCP concluded its Initial Assessment on the complaint. On 25 February 2011, OT Watch responded to the Initial Assessment.
2. OT Watch has serious concerns regarding the fairness of: (a) the procedure followed by the Canadian NCP to arrive at the Initial Assessment of 14 January 2011; and (b) the content of the Initial Assessment.
  - a) Procedural unfairness. OT Watch considers that the Canadian NCP did not allow the parties to comment on the Initial Assessment, and that the Canadian NCP did not make it sufficiently clear at the start of the complaint process that, as part of the Initial Assessment, the Canadian NCP was undertaking an in-depth examination of the allegations contained in the complaint in order to ascertain whether the complaint was material and thus relevant to the implementation of the Guidelines. As a result of this alleged lack of clarity, OT Watch did not submit all the documentation that it could have submitted, nor made additional arguments in support of its complaint that it could have made, had OT Watch known that the Canadian NCP was examining the complaint with the aim of making a determination as to whether Ivanhoe Mines had acted consistently with the Guidelines.
  - b) Unfairness of the content. OT Watch believes that the Initial Assessment heavily relied on information provided by Ivanhoe Mines and that the Canadian NCP selectively disregarded other sources of information. A letter dated 10 March 2011 from the International Finance Corporation (IFC) of the World Bank to OT Watch acknowledged that “*An Environmental and Social Impact Assessment (ESIA) meeting full international standards is currently being prepared by Oyu Tolgoi and its consultants and will be disclosed as part of the public consultation process in due course. The Senior Lenders to Oyu Tolgoi are working with the company to ensure that the water and human rights related issues that you [OT Watch] raise are fully addressed in both a local and regional context*”. The IFC’s letter shows that the existing impact assessments on the Oyu Tolgoi project did not meet relevant international standards and that all, or at least some, of the issues raised by OT Watch have not yet been addressed and thus should have merited further consideration under the Guidelines.
3. Misinterpretation of the Guidelines: the Canadian NCP reached a contradictory conclusion that: a) the case should be closed because “It is not practical or realistic to expect these extensive and complex matters that involve many parties and entities to be adequately addressed or resolved by dialogue between NGOs and companies on a case-by-case basis”; and b) encouraged further dialogue because “the successful resolution of issues necessitates the adoption on both sides of a willingness to communicate and to work together”. Implicit in the Canadian NCP’s decision to close the case would appear to be a misinterpretation of the relevance of the Guidelines to sustainable development.