

# **STATEMENT BY UNITED KINGDOM NATIONAL CONTACT POINT FOR OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES (NCP): ANGLO AMERICAN<sup>1</sup>**

1. A 'specific instance' relating to Anglo American plc was submitted to the NCP on 21 February 2002 under the auspices of the OECD Guidelines for Multinational Enterprises by Non-Government Organisation Rights and Accountability in Development (RAID).

## **The OECD Guidelines for Multinational Enterprises**

2. The Guidelines are recommendations that governments endorse and promote in relation to the behaviour of multinational enterprises. The Guidelines are voluntary principles and standards for responsible business conduct. They are the only comprehensive, multilaterally-endorsed code of conduct for multinational enterprises.

3. 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.

4. 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 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.

## **The complainants:**

**5. Rights and Accountability in Development (RAID).** A Non-Government Organisation founded in 1997 that aims through its research to promote social and economic rights and improve corporate accountability.

## **The company subject of the allegations**

### **Anglo American plc.**

6. Anglo American plc is the subject of the allegations submitted to the NCP by RAID. Prior to May 1999, the two principal constituent parts of what is now Anglo American plc were Anglo American Corporation of South Africa (AACSA) and Minorco. Minorco was a Luxembourg-based company that had no involvement in the copper industry privatisation process in Zambia.

7. AACSA was domiciled, headquartered and incorporated in South Africa and, moreover was the largest company quoted on the Johannesburg Stock Exchange. In 1999, a new British company, Anglo American plc, entered into a Scheme of Arrangement under which it purchased all of the outstanding shares of AACSA in exchange for shares of its own. AACSA remained in existence as a South African company, continued to own all its

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<sup>1</sup> This specific instance does not follow the UK NCP process as published in May 2008. This is because this case was being finalised as the process was being agreed.

own assets and acts as holding company for Anglo American's South African, and certain other, assets.

8. Anglo American plc also acquired all of the shares of Minorco in exchange for cash and its own shares.

9. AACSA therefore was not a UK company for the major part of the period covered by RAID's complaint. In addition, the Anglo American Group has had a UK parent only since May 1999 and that, accordingly, the company directing the negotiations in Zambia was part of a UK-Group only after May 1999.

### **Applicability of the Guidelines**

10. The dates of the events (1995-2000) that are the subject of the complaint by RAID and the date of incorporation of Anglo American plc in the UK (1999) are relevant. This is because the version of the Guidelines that applied at that time of the Zambian copper privatisation (1995-2000) related to enterprises and their activities in OECD member countries only.

11. Zambia is not a member of the OECD, and neither is South Africa – which is where AACSA was incorporated at the time. In the light of this, the issue for the NCP to resolve was whether it would be legitimate to accept the case and retrospectively apply the 2000 version of the Guidelines, which do apply to the activities of multinational enterprises in non-OECD countries, to RAID's complaint.

12. The NCP sought the guidance of the OECD Investment Committee (CIME). CIME is the committee that coordinates work of OECD members in respect of investment and as such, monitors and provides guidance to NCPs. The eventual view of CIME was that it would be reasonable for the NCP to accept the case under the terms of the 2000 Guidelines.

13. In any event, irrespective of the view of CIME, the company undertook to respond voluntarily to RAID's concerns and to explain the company's conduct from the mid-1990s.

14 Throughout the period of the consideration of the specific instance, the company made strenuous efforts to respond to questions from the complainant to detailed questions in respect of complex issues that occurred a number of years ago. It should also be recorded that both parties benefited from information and comments provided by DFID's representation in Zambia which informed the NCP's initial assessment (a copy of which is attached to this statement). Both parties also entered into a constructive and detailed exchange of information which clarified a number of issues. The constructive approach taken by RAID throughout this complex case is also commended by the NCP.

### **The Complaint**

15. Relates to a number of issues arising from the privatisation of the copper industry in Zambia during the period 1995 -2000.

16. RAID allege that in the context of the privatisation process AACSA (one of the companies that merged with Minorco to form Anglo American plc – see paragraphs 6 – 9 above) through its nominated directors on the board of Zambian Consolidated Copper Mines (ZCCM – the Government agency operating the mines) influenced the privatisation process so that it favoured the aspirations of AACSA at the expense of the Zambian Government. Specifically it is alleged that AACSA was able to purchase the Konkola

Deep Mining Project without entering into a competitive tendering process and that the company also obtained first right of refusal over the purchase of facilities at Mufulira (smelter and refinery) and Nkana (mine) thereby denying an opportunity for other enterprises to make an offer.

17. In connection with the privatisation process, RAID alleges that the company sought and accepted derogations from Zambian legislation in respect of taxation and environmental controls with the result that standards of environmental controls such as on emission targets were weakened and the health and safety of workers and the population in general suffered; and that the weakened environmental controls were not disclosed. Linked to the taxation derogations, RAID also allege that the company secured a number of financial incentives and concessions that were not available to other enterprises.

18. The complaint by RAID focussed on the following broad areas of the OECD Guidelines:

Influence over the regulatory framework in Zambia (Chapter II.5 – not seeking exemptions from regulatory framework).

- The terms of the privatisation

Anti competitive practices (Chapter IX – Competition)

- Konkola Deep
- Mufulira and Nkana

Tax concessions (Chapters II.5 and IX)

- Special concessions
- Seeking and accepting exemptions
- Government revenue
- Anti-competitive element

Environmental concerns (Chapter II.5)

- Environmental deregulation and derogation
- Emission targets

Social provision (Chapter II.1 – need to contribute to economic, social and environmental progress and II.2 – respect for human rights)

- Abdication from provision
- Fees and employees' pay
- Access to services
- Cost recovery

Employment, training and local business development (Chapter IV.5 – need to employ and develop local personnel)

- Training and retraining
- Local suppliers and business development

Disclosure and consultation (Chapter II.2 – respect for human rights, II.4 – disclosure of material information on material issues to employees and other stakeholders)



## Anglo American plc's response to the Complaint

§. The Company responded that the RAID complaint was without foundation within the terms of the Guidelines. In relation to the first aspects of the complaint that the directors of AACSA allegedly behaved in an anti-competitive manner in relation to the privatisation of ZCCM, the Company pointed out that the Directors of Zambian Copper Investments (ZCI) had considerable and detailed knowledge of the assets involved and were entitled to take a view as to the privatisation model most likely to produce a competitive Zambian copper industry – given the interdependence between the mines. In arguing against the model proposed in the Kienbaum Report, the Directors did not thwart the settled policy of the Zambian Government nor insist upon their favoured model. In the event, privatisation proceeded on the basis of a study conducted by Rothschild.

§. The Company responded by noting that the Zambian Government had not at any time adopted the Kienbaum Report as its preferred way forward and Anglo American Directors had not blocked the adoption of the Report. The Zambian Government had not, in any case, shown a consistent desire to move forward speedily with the privatisation and their intentions were not clear. Thus it is impossible to apportion blame for the shelving of the Kienbaum model and the commissioning of the Rothschild Report and strange for RAID to portray donors as playing a negative role vis a vis the Zambian Government.

§. In relation to the process for the privatisation of the Konkola Deep asset, the Government of Zambia had been unsuccessfully seeking investors in the project for some years and had publicly invited expressions of interest from the corporate sector. None had been forthcoming. In the absence of such expressions, in late 1995 AACSA had offered to bring together a consortium and to conduct a feasibility study and an option was granted in that light.

## RAID's counterarguments

§. Opposition from Anglo American ended the prospects of the Kienbaum plan and delayed the privatisation of ZCCM. This placed the Zambian Government under immense pressure from donors to sell the mines quickly. Other investors were never invited to bid on Konkola Deep (KDMP) and it did not figure in the mine packages identified to be sold by competitive tender. The company's exclusive options to develop KDMP and excise the Mufulira smelter from the recommended package did have 'a chilling effect on competitive bids'.

§. Other mining companies had the same investment challenges, but without the benefit of special tax concessions and exemptions accorded to Anglo American. The Permanent Secretary to the Ministry of Mines and Minerals development stated: 'The Government may not immediately realise substantial revenues from taxes and mineral Royalties due to the incentives accorded to the companies...' Compliance with provision II.5 of the *Guidelines* does not, however, hinge on projections of government revenue nor upon the company's return on investment, but rather on whether exemptions were sought or accepted. Concessions insisted upon in negotiations by Anglo American and framed in the sale agreements were subsequently incorporated in amendments to primary legislation.

§. The same pattern emerges in respect of environmental deregulation. Exemptions negotiated by the company allowed Konkola Copper Mines (KCM) to comply with its own 'site-specific environmental standards' and thereby exceed the existing World Bank guidelines on SO<sub>2</sub> ambient air quality.

§. It is stated in the company's social assessment that KCM, 'is not directly involved in the management of social issues – e.g. service provision, healthcare or education – in Kitwe.' Agreements with the mining union over continued social

§. The Government were, for this reason, welcoming of the Company's willingness to shoulder the costs of feasibility studies and to seek other investors since this was the only route through which the deposit was likely to be developed at that time.

§. In relation to the terms of the privatisation of the existing operating assets, the Company also pointed out that when it, together with the Commonwealth Development Corporation and the International Finance Corporation, formulated the bid, no other significant player in the mining sector was prepared to participate in the process given the poor condition of the assets and low metals prices. Far from seeking to negotiate fiscal terms that would produce unusually attractive returns, terms were negotiated in a transparent manner between the parties, designed to ensure that the project would meet investment hurdle rates required of any projects of similar scale. Rather than disadvantage the Zambian Exchequer, the transaction removed the burden of operations that were losing cash at a rate of some \$20 million per month and were otherwise facing closure. In the event, over the two years following privatisation, the operations cost Anglo American shareholders over \$350 million – investment which helped to secure their viability under their present owners. In regard to the issue of environmental standards, the Company explained that far from lowering standards, the ZCCM assets had been non-compliant with Zambian law for some time before privatisation and that through its investment, environmental and health standards (especially in relation to malaria and HIV/AIDS), the environmental performance of the assets was significantly improved to the benefit of the workforce and the local population.

§. The Company pointed out that the RAID view of the impact of the wording of the Guidelines was not grounded in practicality since in the situation which they appeared to be seeking there would have been no investment and the mines would probably have closed with implications for

provision for employees were never disclosed and it has not been possible to establish that education and health services to the wider community were 'on very much the same basis as under ZCCM'.

§. It is important to move away from the notion that Anglo American's withdrawal from Zambia is proof that every concession and exemption sought from the government was justified: the decision to withdraw from KCM was based on an immediate lack of project finance and the particular circumstances of Anglo American plc and did not bring into question the longer term viability of KCM per se or the copper industry as a whole in Zambia. KCM was subsequently sold to a new investor and a significant recovery in the price of copper in recent years has increased the value and profitability of mining companies on the Copperbelt. KCM returned an operating profit of US\$413 million in 2006-2007. Copper production in Zambia is projected to increase by over 150% over the period 2005 to 2010.

livelihoods, public services and the environment. Moreover, RAID never submitted a complaint against the similar terms accorded to the Mopani consortium which acquired the second largest parcel of resources. The RAID position is similarly impractical in relation to the environmental arrangements that were agreed between the Company and the Government. Their view would only have had merit if environmental performance was being allowed or intended to deteriorate. As the DfID assessment observed: 'It should be noted that environmental management under ZCCM is widely acknowledged to have been very weak, leaving a costly legacy'. Prior to Anglo American's ownership, for example, on a mass balance basis 75% of sulphur emissions ended up passing into the atmosphere, but within 18 months that had already been reduced by 40% and the environmental programme was designed to achieve a twentyfold reduction in ambient CO2 levels.

§. The Company also noted that RAID was mistaken in characterising the decision by Anglo American to withdraw from its ownership of KCM as in some way specific to the circumstances of the Company rather than indicating a lack of viability for the KCM assets. The other KCM shareholders – the IFC, private sector arm of the World Bank, and the UK Government owned Commonwealth Development Corporation - were similarly unwilling to commit additional funds. The onward sale by the Government of Zambia to Vedanta Resources, some while later, would not have been possible but for Anglo American's investment in the assets which reduced production costs by over a quarter and the fact that the operations were gifted back to the Government of Zambia debt free.

## **CONCLUDING REMARKS**

19. It is usual practice for the NCP to make determinations of compliance and to issue recommendations in respect of a specific instance on those matters which remain unresolved. On the narrow facts of the current specific instance under consideration, the NCP does not propose to make any recommendations aimed at achieving compliance for

the pragmatic reason that a considerable period of time has passed since the ZCCM privatisation was concluded, during which Anglo American has sold the companies that are the subject of the complaint.

20. However, the NCP compliments both RAID and Anglo American for engaging constructively throughout this long running case and sharing a great deal of information about issues and events that were the subject of the original complaint. This exchange resulted in the clarification of a complex case and a deeper mutual understanding of both parties.

21. The complainants did raise a number of issues that the Government encourages all enterprises to address in all their activities at home and abroad. The NCP therefore takes the opportunity of this statement to draw to the attention of all UK companies, including Anglo American, the recommendations on responsible business behaviour contained in the OECD Guidelines for Multinational Enterprises. The NCP is currently developing a Guidelines promotion campaign and in this context, NCP staff are available to visit enterprises and other organisations in order to conduct awareness raising events.

22. The NCP also draws attention to the OECD Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones, which has been developed as part of CIME's follow up to the Guidelines. The Risk Awareness tool consists of a list of questions that companies might ask themselves when considering actual or prospective investments in weak governance zones. The questions cover the following issues:

- Obeying the law and observing international relations.
- Heightened managerial care.
- Political activities.
- Knowing clients and business partners.
- Speaking out about wrongdoing.
- Business roles in weak governance societies – a broadened view of self interest.

23. The Risk Awareness tool can be downloaded from:  
[www.oecd.org/dataoecd/26/21/36885821.pdf](http://www.oecd.org/dataoecd/26/21/36885821.pdf)

UK NCP  
May 2008



Date 10 June 2003

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Dear Mr Bickham,

**OECD GUIDELINES FOR MULTINATIONAL  
ENTERPRISES: SUBMISSION ON ANGLO  
AMERICAN OPERATIONS IN ZAMBIA**

As you know we received a report from DFID Zambia on the allegations made by RAID and AFRONET in respect of alleged breaches of the OECD Guidelines for Multinational Enterprises ("the Guidelines") by Anglo American ("AA") relating to your operations in Zambia.

The procedure under the OECD Guidelines is as follows:

- The DTI, acting as the National Contact Point (NCP) under the OECD Guidelines passes the report by DIM Zambia and our initial assessment to you. I also enclose the paper from DFID Zambia which comments on points made by RAID/Afronet.
- You have an opportunity to comment on any outstanding points or supply additional information on the matters raised. I appreciate that there is quite a bit to take on board in this letter and the MID document but I would be grateful for a response by one month from the date of this letter.

- We will then take the report, initial assessment and any information you supply to the complainants who will be invited to respond within one month, we will then copy their reply to you. We would hope that any outstanding matters could be resolved by constructive dialogue between the two parties. We would be happy to assist with this.
- There is no timeframe on this dialogue, however, if, at any point during this dialogue either party feels the discussion is exhausted, they can ask the NCP to make a statement.

## **(1) INFLUENCE OVER REGULATORY FRAMEWORK**

### **Kienbaum**

There appears to be no evidence of any breach of the Guidelines on this point.

### **Rothschilds**

There appears to be no evidence of any breach of the Guidelines on this point.

## **(2) ANTI-COMPETITIVE PRACTICES**

### **Konkola**

We consider that the authors present a reasonable prima facie case. Reference is made to the recommendation, in the Kienbaum report, for competitive bidding - it has already been alleged in the report that AA was the primary cause of that report being rejected.

We would like to draw your attention to this issue and invite you to comment or provide further information, which we will offer to the complainants.

### **Postponement of Konkola Purchase**

It is asserted that AA 'unreasonably refused to deal'. There seems to be, however, nothing in the succeeding text to support this claim of unreasonableness.

We consider that there is a lack of clear evidence for asserting that AA anticipated and planned all of the complained of developments. In particular, there is no evident causative link between AA and the collapse of the Kafue Consortium bid. The significance of the collapse in the price of copper and the onset of recession in Asia appear to us to be understated in the complaint.

Although apparently significant in themselves, the facts and figures set out at the end of this section (on page 3.7) do not, on the information presented, seem to be capable of being sufficiently clearly causally linked to the alleged 'unreasonable refusal to deal'.

Consequently, on the evidence provided, there appears to us to have been no breach of the Guidelines on this point. Should you wish to comment further on this point please be assured that we will pass on your comments to the complainants.

### Mufulira and Nkana

The information supplied by DFID reveals a tangled web of dealings on this issue. It is debatable as to whether the option held over the smelter and refinery by AA did not have a chilling effect on competitive bids. Such activities might be said, at the time, to have fallen under the general 'abuse of a dominant position' provision as set out at 3.5 of the report.

We would draw your attention to this issue and invite further comments.

### **Tax and Environmental Concessions**

It is unclear to us how the obtaining of such concessions can be said to be anticompetitive per se, particularly in the context of the OECD Guidelines (Chapter X in particular). It is our view that consideration of these allegations seems to sit more properly with the later allegation of seeking or accepting exemptions from the statutory or regulatory framework (Chapter II General Policies 5. of the OECD Guidelines - Part (I) of the report).

However if the complainants were to produce any new evidence to the effect that AA brought pressure to bear on the Government to provide these tax incentives we may wish to reconsider this matter. Our assessment of this allegation takes account of the fact that the plant seems to have become rather run-down, and the Government, for economic reasons, may have decided of its own volition to offer additional incentives to dispose of it. We would welcome your views on this point.

## **(3) FINANCIAL INCENTIVES AND CONCESSIONS**

### **Tax**

See above.

### **Foreign exchange**

There appears to be no evidence of any breach of the Guidelines on this point.

## **(4) SOCIAL PROVISION**

The exact position of AA in relation to the Nkana operation and its owner (beyond the fact of AA managing the operation) is unclear to us and we would welcome further clarification from you on this matter.

The complaints under this heading do seem significant in the context of Chapter /I General Principles 1. and 2. of the OECD Guidelines. In order to be able to consider them more fully, it would be helpful to know the provision of what facilities, where, have been abdicated (by AA in particular)? Where services are now being provided on a fee-paying basis, how do such fees differ to the pre-existing arrangements and whether there is any corresponding change in employees' pay? This information would help to demonstrate whether or not there has been any financial detriment to workers receiving such services. To whom are the services accessible a) in theory - i.e. are they explicitly restricted, for example, to employees and their families or are they open to the community at large (if one exists beyond such people) and b) in practice - i.e. who is actually able to pay for such services, if chargeable, and to what extent? It is, in our view, also important to know the extent to which the fees charged represent the actual cost of the services provided.

The actual extent of social difficulties experienced in respect of these allegations is not yet clear but the information presented in the report does, in our opinion, warrant comment from AA.

## **(5) EMPLOYMENT, TRAINING AND LOCAL BUSINESS**

With regard to a), without knowing details of the deal between the parties concerned it is difficult to identify whether AA is guilty of conduct which breaches the Guidelines. Perhaps AA would like to comment on this?

In (b) it would be helpful if AA could supply some examples of contractual agreements with local suppliers and of specialised items which cannot be bought in Zambia,

As regards (c), clarifications are sought on a number of issues in the DFID report including inter alia,

the list of local companies with ownership details; - the copy of the IFC study on local business development (excluding the amount of the AA/KCM contribution); - the number of Zambian businesses funded in the Business partners for Development programme; - whether or not it has prepared a Local Business Development Programme and whether or not the IFC initiative is a part of or separate to this; - why KCM sought exemptions from import duty in primary legislation (if it is the case that it did).

## **(6) ENVIRONMENTAL REGULATION AND HEALTH AND SAFETY**

### **Initial Environmental Deregulation**

The Complainants' allegation is that the Rothschilds report and associated 'model' development agreements must have been subject to the approval of [AA] by virtue of its position on the ZCCM board and it can only be assumed that the company therefore exercised a degree of influence over the proposals for environmental deregulation."

This is, in our view, a complaint based on 5. of Chapter II General Policies of the OECD Guidelines.

The question is whether AA did, in fact, influence to a significant extent the formation of the statutory or regulatory framework, by seeking or accepting relevant exemptions contained therein which could be said to fall within the spirit of the above cited provision of the OECD Guidelines.

AA may wish to clarify or comment on the above.

### **Additional Deregulation Applicable to KCM**

There is insufficient information available on why GRZ has undertaken to take no action against KCM for failure to comply with environmental legislation, nor as to why KCM has an extended stability period (to 2020, compared to 2012-2015 for other proprietors), for us to assess whether there is cause for concern under the OECD Guidelines under this head of complaint. In this regard we would welcome clarification from AA on whether there were or are particular concerns in relation to the KCM operations; Over time, Taced by other operators, may go some way to justifying these concessions and the nature and extent of any such particular problems?

With regard to standards actually 'set' for emissions etc., these would seem to fall within Chapter V Environment 1. or 3. of the OECD Guidelines.

We would welcome further information from AA on its involvement in the formulation of the standard for sulphur referred to in the report in order to more fully consider this matter.

### **Health and Safety**

Although no specific breach of the OECD Guidelines is here alleged, the issue does seem, potentially, to fall within 5 of Chapter V Environment. We would welcome AA's views on this matter.

### **(7) DISCLOSURE AND ACCOUNTABILITY**

We note that, the complaint does also indicate (at. page 3.26) that AA requires the consent of the Zambian Government for the disclosure of relevant parts of the KCM development agreement. The authors of the complaint would appear to have improperly discounted this obstacle, if it is accurately represented.

There are allegations that AA has failed to comply with IFC guidelines on disclosure. We have not had an opportunity to consider these particular complaints in that context but do not think that they are relevant under the OECD Guidelines.

As with the second paragraph under (4) above, where it is said that there is no independent information in relation to the claims, it must be considered whether satisfactory evidence could be presented and, if so, whether the activity complained of is contrary to the OECD Guidelines. With regard, in particular, to the squatters issue, it seems likely that independent evidence of the relevant circumstances could be obtained. The lack of independent evidence may not necessarily prevent a finding of a breach of the Guidelines. We note that the DFID report does not dismiss this claim by the complainants.

If the complainants allegations were to be substantiated, breaches of Chapter H General Policies 2. of the OECD Guidelines (respect for human rights), Chapter III Disclosure 4. f) (disclosure of material information on material issues to employees and other stakeholders) and Chapter V Environment 2. b) (adequate and timely communication and consultation with directly affected communities) could arise.

AA is invited to comment on this issue.

Yours sincerely,

Duncan Lawson

National Contact Point for the OECD Guidelines for Multinational Enterprises.

