

# **GOVERNMENT RESPONSE TO THE ALL PARTY PARLIAMENTARY GROUP ON THE GREAT LAKES REGION REPORT ON THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES AND THE DEMOCRATIC REPUBLIC OF CONGO**

## **Introduction**

The All Party Parliamentary Group on the Great Lakes Region (APPG) published its report in February 2005. The report is the APPG's assessment of the success of the application of the OECD Guidelines for Multinational Enterprises to the Democratic Republic of Congo. The report makes recommendations to the UK Government, to the OECD Investment Committee and OECD governments and to members of the government and parliament of DR Congo on how to take forward the final report of the United Nations Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of DR Congo.

2. This response addresses in detail the recommendations made to the UK Government by the APPG report and contains brief comment on the recommendations made to the OECD Investment Committee and OECD governments. The remaining recommendations are a matter for members of the government and parliament of DR Congo.

## **General response**

3. The Government welcomes the APPG's report and its focus on DR Congo. Supporting peace, stability and poverty reduction in the Great Lakes is a priority for the UK government. The Government is keen to support the government and people of DR Congo as much as possible by promoting the Guidelines and resolving the outstanding cases from the UN Panel process, which it sees to be consistent with its wide-ranging and ongoing support to the peace process and political transition in DR Congo. There are also clear synergies with the recent Commission for Africa recommendations in the context of corporate responsibility, anti-corruption and sustainable development generally.

4. The UN Panel process has been problematic for a number of reasons. In its first report, the Panel named a number of companies as being in breach of the Guidelines. However, this report was published before the companies were given an opportunity to respond to the criticism or comment on the Panel's accusations. The Panel then began a dialogue with the companies named and published their responses as a second report.

5. The UN Panel then reached settlement with a number of companies and published its final report at the end of its mandate in October 2003. In its final report, the Panel divided the companies into five categories:

- category 1—resolved;
- category 2—resolved but referred to the National Contact Point (NCP) in countries adhering to the Guidelines responsible for monitoring compliance;
- category 3—unresolved cases referred to the NCP for investigation and updating;
- category 4—pending cases with governments for individuals and companies; and

- category 5—parties that did not react to the Panel’s report.

6. Four UK companies were listed in category 3: De Beers, Avient, Oryx Natural Resources and DAS Air Cargo. However, the UN Panel did not supply the UK NCP—located in the Europe and World Trade Directorate of the Department of Trade and Industry (DTI)—with any documentation on which it based its assertions. This meant that the NCP was unable to make any immediate progress.

7. Following the disbanding of the UN Panel in October 2003, there was no clear guidance for any party on the status of complainants within the process initiated by the UN Panel. The process therefore continued without a complainant initially, despite the NCP encouraging NGOs to act in this capacity. The NCP then approached the UN to seek documentation on the companies accused. This was provided in March 2004 on the understanding that the UK respected the confidentiality of the documents provided. This also made it difficult to admit complainants to the process. In April 2004, the NCP made a statement on the activities of De Beers, finding the allegations unsubstantiated. A subsequent statement on the activities of Avient, in September 2004, made recommendations on the company’s future conduct. RAID agreed to act as a complainant in the Oryx case and the NCP attempted to facilitate a dialogue between Oryx and RAID. A statement on Oryx Natural Resources, which could not be agreed by either of the two parties, was issued in June 2005. The text of all three statements is set out in appendices 1, 2 and 3, respectively. A statement on the remaining company in category 3, DAS Air Cargo, remains outstanding at the time of this response.

8. The Government acknowledges that all parties would benefit from greater clarity in the NCP’s procedures for promoting and implementing the Guidelines, although absolute clarity cannot be assured given the terms of the Guidelines themselves and the nature of the complaints received so far. Following further consideration of these issues, the Government proposes to consult stakeholders on possible improvements in the autumn.

## **Recommendations to the UK Government**

### *Recommendation 1: complainants to be admitted into the NCP process*

9. The Government had agreed, before the APPG report was published, that complainants should be admitted into the process involving the two companies remaining in category 3 at that time. The principal NGO concerned subsequently submitted evidence supporting its complaint against Oryx Natural Resources to the NCP for assessment. Two areas of the complaint were taken forward with the company, the NCP considering that the remainder had already been covered by the UN Panel. A copy of the NCP’s assessment of the complaint is included in the statement on Oryx Natural Resources in appendix 3.

### *Recommendation 2: greater human and material resources for the NCP; cases should be examined within an agreed timeframe*

10. The report states that a single DTI official is responsible for handling cases under the Guidelines. In fact, the NCP works under the active management of both a Principal and an Assistant Secretary. All three officials and their predecessors have been heavily involved in the cases; there is no shortage of resources, human or financial, to handle the current NCP workload. The delay in these particular cases has stemmed from the need to involve

other Government departments and agencies with an investigative remit as well as the parties themselves.

11. As a matter of course, the NCP can and does request assistance from other Government departments where specialist knowledge is required (e.g. the Department for Environment, Food and Rural Affairs on environmental issues and the Department for Work and Pensions on labour issues). As stated in the Guidelines, the NCP can also "offer and, with the agreement of the parties involved, facilitate access to consensual and non-adversarial means, such as conciliation or mediation, to assist in dealing with the issues."

12. No firm timescales are set out within the Guidelines, and it is important to note that complex cases, such as those in DR Congo, may take some time to bring to a conclusion. However, the Government recognises that it is in the interests of all parties to see cases resolved as quickly as possible. The NCP has already published timescales for the parts of the process that are within the control of Government departments; details are set out in appendix 4. There may be merit in establishing indicative timescales for other parts of the process. The NCP could also issue interim statements where it felt that public updates were appropriate. These considerations will be addressed by the proposed stakeholder consultation.

*Recommendation 3: greater formalised involvement of the Department for International Development (DFID) and the Foreign and Commonwealth Office (FCO)*

13. While final determination of Guidelines cases is a matter for DTI as the lead Government department, other relevant departments are fully involved throughout their consideration. Clearly, the departments involved vary depending on the nature of the complaint. The Government nonetheless sees merit in greater formalisation of these arrangements and will establish an official-level group, on which all interested departments are represented, to discuss the issues raised by cases and assist the NCP in their determination.

*Recommendation 4: clear recommendations to be given by the NCP to companies*

14. The nature of the recommendations made by the NCP is taken from the text of the Guidelines, whose overarching purpose is to encourage better corporate behaviour and, where this is questioned, to facilitate the engagement of both parties in a constructive dialogue. The implementation procedures are best described as a confidential dispute-resolution mechanism to encourage this dialogue. It should also be remembered that adherence to the Guidelines by companies is voluntary. Nonetheless, the Government agrees that the question of whether NCP statements should contain clearer and more specific recommendations should be addressed as part of the proposed stakeholder consultation.

*Recommendation 5: criminal investigations into any companies who may have committed illegal acts*

15. The NCP has no powers of investigation or prosecution. If it has cause to suspect that an illegal act has taken place, it will report this to the relevant authorities. This is consistent with the provisions of the Civil Service Code. In the past, the NCP has reported such concerns to a number of authorities with these powers who have conducted investigations of their own.

16. The Government holds that the NCP should not conduct a parallel examination of any matters subject to possible legal action. The Crown Prosecution Service shares this view. In these circumstances, the NCP would forbear from acting until the legal process was completed and then, if the complainant wished to proceed, conduct an assessment of the complaint at that stage.

*Recommendation 6: possible Select Committee scrutiny of the NCP process*

17. It is already entirely within the prerogative of Parliamentary Select Committees to scrutinise the NCP process.

*Recommendation 7: participation in the creation of a Handbook for companies operating in conflict zones*

18. The Government agrees. Discussions are ongoing within the OECD Investment Committee to draw up best-practice guidelines for conducting business ethically in “zones of weak governance.” The UK has contributed to the current draft; business, trade unions and civil society have also provided their views. At a conference in Ethiopia in March 2005, the chairman of the Working Party of the Investment Committee invited responses from interested African parties. The current draft is to be revised and re-presented to the Investment Committee in September 2005. It should be noted that this advice, while intended to be helpful to companies considering investing in these zones, would not formally extend or add to the current Guidelines.

*Recommendation 8: priority given by the international community, including the DRC, to discussing ways of improving regulation of business in conflict, possibly by the establishment of a permanent UN body*

19. The international community is working through a range of bodies to maximise the contribution that the private sector can make to conflict resolution and prevention. Sector-specific initiatives, such as the Kimberley Process and the Voluntary Principles on Security and Human Rights, focus on natural resources, which are often the most prone to fuelling conflict and crime. In addition, via the UN Global Compact, the UN (including relevant agencies) is examining ways in which states and international organisations can work with the private sector and civil society to help to identify and manage risks in conflict-prone countries and regions. The UN Commission on Human Rights in April 2005 agreed a resolution to appoint a Special Representative of the Secretary General to take forward a series of issues on business and human rights, including identification and clarification of standards of corporate responsibility and accountability for transnational corporations and other business enterprises with regard to human rights. Additionally, the Government is pleased to note that the DRC have signed up to the Extractives Industry Transparency Initiative and have had a conference to promote it in country, with support from DFID.

## **Recommendations to the OECD Investment Committee and OECD governments**

*Recommendation 9: greater investigative powers and resources for NCPs*

20. The role and responsibilities of NCPs are set out in the Commentary on the Implementation Procedures of the Guidelines. The Government is content that the current powers of the UK NCP are consistent with the intention and scope of the Guidelines. The NCP is able to call on the services of bodies with investigative powers such as the SFO, CPS etc where there is a suspicion of criminal activity.

21. NCP resources are a matter for national governments. Again, the Government is content that those available to the UK NCP are sufficient (see response to recommendation 2).

*Recommendation 10: guarantee the impartiality of NCPs*

22. The impartiality of NCPs is a matter for national governments. The Government is content that the UK NCP discharges its functions impartially.

*Recommendation 11: elaboration of the human rights provision in the Guidelines*

23. There is currently no specific human-rights provision in the Guidelines, although a number of clauses in the General Policies section deal with human-rights-related issues. Moreover, a number of clauses in the General Policies section deal with human-rights-related issues, and a number of other complementary initiatives also cover this area (see response to recommendation 8).

*Recommendation 12: guidelines to apply to both trade and investment*

24. It is clear from the text of the Guidelines and the view of the OECD Investment Committee that the Guidelines were intended to apply to cases involving investment rather than a “purely trade” scenario. However, the UK NCP has never declined a case on the grounds that it does not involve an “investment link,” and other NCPs have also commonly accepted what might appear to be a trade case in such circumstances.

## **APPENDIX 1: STATEMENT ON DE BEERS**

### **Introduction**

De Beers was named in Annex 3 (Business enterprises considered by the Panel to be in violation of the OECD Guidelines for Multinational Enterprises) of the initial UN Expert Panel report on the Illegal Exploitation of Natural Resources and Other Forms of Wealth in the Democratic Republic of the Congo (DRC) published in October 2002.

In the final Panel report published in October 2003 De Beers was named in Category 3 (unresolved cases referred to NCP for updating or investigation).

These lists contain the names of entities that the UN Expert Panel on the DRC alleged had been in breach of the OECD Guidelines for Multinational Enterprises.

### **Basis of Allegations**

Specifically the Panel alleged De Beers was in breach of its own Diamond Best Practice Principles, published by the Diamond Trading Company (a member of the De Beers group) in 2000 and, consequently, in breach of the OECD Guidelines. The Panel did not, however, identify which provision(s) of the OECD Guidelines for MNEs they alleged De Beers to be in breach.

The panel based its allegations on a claim that three sightholders, clients of the Diamond Trading Company (DTC) - the sales and marketing subsidiary of the De Beers Group - exported diamonds from the DRC, contributing to funding of parties involved in the conflict and that De Beers failed to monitor the compliance of these sightholders against The Diamond Trading Company's Diamond Best Practice Principles.

### **Co-operation with the UN Expert Panel**

These specific allegations (above) were only made known to De Beers by the Panel at a meeting between the two in May 2003. Prior to that date, De Beers were completely unaware of the basis upon which the Panel alleged that it was in breach of the OECD Guidelines.

The UN Expert Panel did not contact De Beers to discuss these allegations before publishing their initial report.

After the initial report was published, De Beers wrote to the Panel in December 2002 and February 2003 requesting a meeting to discuss the report; neither letter elicited any immediate response by the Panel. However, in April 2003, the Panel invited De Beers to a meeting in May 2003, referred to above.

The Panel refused to give De Beers any details of the basis of their allegations prior to the meeting and consequently De Beers was unable to bring relevant documentation or appropriate members of staff to the meeting to address the Panel's concerns.

Following the meeting, De Beers replied in writing, addressing the specific allegations relating to the three sightholders raised by the Panel. The Panel did not reply to De Beers response nor ask De Beers for any further information and rather published its final report listing De Beers as a company that had been in breach of OECD Guidelines.

De Beers have stated their disappointment with the way this Panel conducted its affairs, particularly when they had previously enjoyed constructive relations with the United Nations, principally, in the development of the Kimberley Process Certification Scheme where their work was commended by the Secretary-General.

### **NCP Comment on Panel Accusations**

#### Activities of 3 shareholders.

Based on the information which it has seen, the UK NCP is satisfied that the relationship between De Beers and the three companies named by the UN Panel is such that the activities of those three companies in the DRC, insofar as they relate to De Beers, are outside the remit of the UK National Contact Point (NCP) acting under the OECD Guidelines for Multinational Enterprises.

#### Breach of Best Practice Principles.

The UN Expert Panel on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of Congo (The UN Expert Panel) alleged that De Beers breached the DTC Diamond Best Practice and, consequently, were in breach of the OECD Guidelines for MNEs. The UN Expert Panel did not specify which provisions of those Guidelines were alleged to have been breached, failed to give adequate or timely information supporting its allegations and failed to engage meaningfully in the dialogue process envisaged by the Guidelines.

In the circumstances and on the basis of the information provided, the UK NCP concludes that the allegations made by the UN Expert Panel against De Beers are unsubstantiated.

## **APPENDIX 2: STATEMENT ON AVIENT**

### **Introduction**

Avient were named in Annex 3 (Business enterprises considered by the Panel to be in violation of the OECD Guidelines for Multinational Enterprises) of the initial UN Expert Panel report on the Illegal Exploitation of Natural Resources and Other Forms of Wealth in the Democratic Republic of the Congo (DRC) published in October 2002.

In the final Panel report published in October 2003 Avient were listed in Category 3 (unresolved cases referred to NCP for updating or investigation).

These lists contain the names of entities that the UN Expert Panel on the DRC alleged had been in breach of the OECD Guidelines for Multinational Enterprises.

### **Basis of Allegations**

Specifically the Panel alleged Avient provided military supplies to both the Congolese Army (FAC) and the Zimbabwe Defence Force (ZDF), thus contributing to the conflict in the area.

It was alleged that Avient provided crews for Antonov 26 aeroplanes and Mi 24 helicopters stating that these types of aircraft were used in offensive action in the DRC at the time Avient were contracted by the government of the DRC. The Panel did not supply further details nor evidence of any specific actions undertaken by Avient crews.

Finally the Panel alleged that Avient brokered the sale of six military helicopters to the DRC Government. No evidence was supplied by the Panel to support this allegation.

The Panel did not, however, identify which provision(s) of the OECD Guidelines for MNEs they alleged Avient to be in breach of.

### **Co-operation with the UN Expert Panel**

In the Panel documentation the company is described as 'Avient Air'. The company has denied ever being incorporated as Avient Air and for the purposes of this process the UK NCP has conducted all dialogue with representatives of Avient Ltd.

The Panel stated in a letter to the UK NCP dated 26 September 2003 that some progress had made with Avient over the allegations but that it could not come to definitive conclusions before the Panel's mandate expired in October 2003. Avient met with the Panel in May 2003 and corresponded with the NCP, the Panel and the UN on a number of occasions subsequently. Avient were, and remain, unhappy with the conduct of the Panel throughout— although they agreed to cooperate with the Panel, the UK NCP and to abide by the Guidelines. Specifically Avient feel aggrieved that the allegations were presented as fact, but without evidence to substantiate such assertions. Subsequently these allegations have been produced by banks, organisations and governments as reasons as to why they cannot conduct business with the company.

### **NCP Comment on Panel Accusations**

The Panel supplied very little evidence to support the allegations made. Some documentation was supplied by the UN in May 2004 and, informed by this documentation

and discussion with Avient, the NCP asked Avient to respond formally to the specific accusations.

1. The Panel allege that *Avient Air had a close relationship with Oryx* (another company named in the UN report) *and that Avient Ltd. was a military company which supplied services and equipment to the ZDF and the FAC.*

Avient Ltd. has confirmed that they carried commercial cargo from Zimbabwe and South Africa to the DRC (Mbuji-Mayi) for Oryx and had done so for a number of years, providing a selection of manifests, as requested by the NCP, to support this. The equipment carried was commensurate with mining activity.

From the evidence provided, the NCP finds that although owned and partly managed by a former military person, Avient Ltd. is not a military company.

Avient Ltd. denies supplying equipment to the ZDF and FAC, but concedes supplying services (“carriage, re-supply and movement of personnel and equipment”) to the ZDF. They stress this was not a tactical or military role but a supply function.

Avient Ltd. also provided engineering, training and crews for the FAC for a short period of time. They claim certain issues within the DRC made such work ineffective and these also meant that the crews supplied by Avient Ltd. hardly ever flew. Their major support function was the airdropping of food and supplies to DRC Government forces who were cut off in places by rebel forces. Avient Ltd claim its staff respected all cease-fire agreements.

2. *Crewing for Antonov cargo planes, Mig 23 Jet fighters and MI 24 attack helicopters.*

Avient Ltd. admits carrying cargo and supplies under a commercial arrangement with the Government of the DRC using their Antonov aircraft.

Avient Ltd. provided crew for a Mig 23 jet fighter to train DRC crews to fly and maintain the aircraft. On arrival in the DRC the staff found the aircraft were in poor condition and supplied to the FAC a list of spare parts required to make them airworthy. This resulted in one aircraft flying a circuit of Kinshasa airport and thereafter a flight training course was arranged as agreed. Events overtook such training and the course was cancelled after 3 days; the aircraft never flew again and the whole crew returned home.

Avient Ltd. admits that it provided crew for an MI 24 helicopter and that they were involved in the relief of isolated places but shortly afterwards it suffered a technical problem and the staff returned home.

Avient Ltd. claim that the FAC became disillusioned with the methodology employed by the Company and the contractual arrangements were dissolved after 8 months. This is supported by UN documentation.

3. The Panel allege that *Avient Ltd. brokered the sale of six military helicopters to the DRC Government.*

Avient Ltd. absolutely denies this allegation. No evidence has been supplied by the UN to support this allegation. No evidence from other enquiries across government by the NCP has arisen. In the circumstances the NCP finds this allegation unsubstantiated.

## Conclusions

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 however, 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 for the NCP to make recommendations for future behaviour in similar circumstances. In this case, given that there is no complainant, it falls to the NCP to make recommendations.

The DRC and surrounding area is a difficult business environment. During the period under consideration there was a lack of regulation coupled with lawlessness and poor governance. With this in mind, although difficult, it is important for companies to act in a way which would support the development of the region.

The NCP accepts Avient Ltd's contention that they were working within a contractual arrangement with the officially recognized governments in the area.

In future Avient Ltd. should carefully consider the recommendations of the Guidelines particularly, but not exclusively, Chapter 2 before entering into contracts with Governments and businesses in the area.

Specifically Chapter 2 of the Guidelines states enterprises should;

- 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;
- abstain from any improper involvement in local political activities.

## **APPENDIX 3: 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.

## **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 Oryx 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.

**Annex 2: minute of 24 May 2003**

S/2002/1146/Add.1

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Final Submission, pursuant to paragraph 11 of Security Council Resolution 1457 (2003), in reaction to the Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth in the Democratic Republic of the Congo  
[S/2002/1146]

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Filed jointly by  
Oryx Natural Resources Limited and Mr Thamer Al Shanfari

*JSK*

## INTRODUCTION and SUMMARY

*This Memorandum is submitted jointly by Oryx Natural Resources ("Oryx") and its former Chairman Mr Thamer Al Shanfari ("Mr Al Shanfari"). It is made in response to the Security Council, which in Resolution 1457 (2003) invited individuals, companies and States named in the Report of the Panel of Experts(S/2002/1146) ("the Report" and "the Panel") to submit their reactions to the Report.*

Oryx and Mr Al Shanfari were subject to intense criticism in the Report and were listed in an Annex to the Report as "Companies/Persons on which the Panel recommends the placing of financial restrictions", along with other multinational companies operating in the DRC.

Oryx and Mr Al Shanfari have always maintained since the publication of the Report, and continue to maintain, that the allegations of wrongdoing were false.

Oryx and Mr Al-Shanfari are fully supportive of the position of the Security Council in its Resolution 1457, notably in its definition of the current process, as laid out in paragraph nine of the Resolution. It is in the spirit of this that Oryx and Mr Al-Shanfari met with the Panel in March and May 2003.

Although they would have welcomed the opportunity to respond to the allegations when Oryx approached the Panel in July 2002, prior to the publication of the Report, they have been encouraged by the dialogue that they have had with the Panel since then.

Since the publication of the Report, Oryx and Mr Al-Shanfari have held a number of meetings with the Panel, both in New York and in Nairobi, and have now received the Panel's unanimous and clear assurance that as a result of these meetings and the full and frank disclosure by both Oryx and Mr Al-Shanfari the Panel is recommending to the Security Council the removal of the Company and Mr Al Shanfari from all of the annexes of its Report and can no longer persist with the allegations against the company and Mr Al Shanfari. No allegations of wrongdoing remain.

As a result of these disclosures and discussions, concluded on 24th May 2003 in Nairobi, Oryx prepared a text and agreed it point by point with the Panel, and has reached a minuted and formal resolution with the Panel that the document reflects the unanimous agreed view of the Panel, Oryx and Mr Al Shanfari in accordance with UN Resolution 1457. This is copied below. Oryx would like to take this opportunity to thank the Panel for its time, and the opportunity to clarify these issues.

Oryx and Mr Al-Shanfari welcome the dialogue which they have had with the Panel and welcome this position of the Panel. Both look forward to being able to assist in any future role the Panel may have.



### Note upon the conclusion of Oryx's meetings with the Panel

Oryx notes that the Security Council has mandated the Expert Panel on the DRC, and encouraged companies and individuals named in the Report of October 2002 to exchange information and re-examine the allegations recorded in the Report. Consequently Oryx and Thamer Al Shanfari have been afforded the opportunity to make representations to the Panel and have been given some documents and other information on which the Panel relied (subject to the Panel's obligation to protect the safety of its sources). Oryx and Thamer Al Shanfari have answered all the questions that the Panel has raised.

#### A: Introduction

Oryx Natural Resources welcomes constructive criticism from any expert quarter, and supports the Security Council's intentions in the creation of the Panel and its inquiry.

In a spirit of co-operation, the Panel, Oryx and Thamer Al Shanfari have engaged in a dialogue and exchange of documentation and other information regarding the Panel's allegations.

Oryx acknowledges that certain aspects of the Sengamines project, which though neither illegal nor in any way secret, might be considered not to have matched the 'best practice' that the Panel is trying to encourage. Oryx welcomes constructive criticism in this regard.

#### B: Long Term Commitment

Oryx has a long term interest in the further development of a stable, transparent economy in the DRC, backed up by the rule of law. The company is happy to endorse the Panel's efforts, and work closely with any future role that the Panel or its successors might have in monitoring and issuing constructive criticism.

Oryx and Thamer Al Shanfari undertake to ensure that any future projects where they are involved will adhere to the ethical standards embraced by the Panel.

Oryx invested in the DRC during a period of hardship for the country when it was receiving little support and minimal inward investment.

#### C: Preventive Measures

Following the publication of the Panel's Report on October 16th, 2002, and in light of the constructive dialogue with the Panel, Oryx has conducted a review of its business practices. Oryx and Thamer Al Shanfari have taken, and will continue to take, very seriously any rumours or allegations made against Oryx or Thamer Al Shanfari or Sengamines from whatever sources.

Consequently, Oryx is planning to establish a specific mechanism, including the introduction of new PR briefings and controls and procedures. This is to minimise the



risk of wrongdoing or improper behaviour by Oryx employees and agents or other parties and to promote a better understanding of the company by all parties in a transparent and open manner. Oryx and Thamer Al Shanfari will continue to investigate vigorously any allegations of wrongdoing in a public, open and transparent manner.

**D: OECD**

Oryx is committed to adhering fully with the OECD Guidelines for Multinational Enterprises as the standards for its business practices and governance. Oryx will therefore liaise with the OECD National Contact Point to help Oryx set up the appropriate rules and practices and through regular meetings intend to keep it informed of progress on implementation.

Oryx proposes to hold regular meetings with the Panel to ensure that its relationship with the UN and other relevant institutions is constructive and mutually beneficial.

**E: Specific Allegations**

Oryx notes that the Security Council Resolution 1457 states that the Panel is not a judicial body, and does not have the resources to carry out an investigation whereby its findings can be considered as established facts. Oryx acknowledges the difficulties that the Panel faces in the handling of information without judicial process. Oryx also notes that the Panel based its opinion on activities in the DRC with the information it held at that time.

Since publication of the Report in 2002, there has been extensive dialogue between Oryx, Thamer Al Shanfari and the Panel, during which the Panel was provided with substantial quantities of information. Oryx believes that this process has enabled the Panel to update and expand its knowledge of the activities of Oryx and Thamer Al Shanfari.

Oryx understands that as a result of its dialogue with the Panel the names of Oryx Natural Resources and Thamer Al Shanfari will be removed from the annexes of the Panel's Report of October 2002. Oryx understands that as a result, the disputed allegations recorded in this Report about Oryx and Thamer Al Shanfari can no longer be pursued.

Oryx further understands that the Panel's work in this field is by nature constantly developing. Oryx remains ready to engage in discussions about any future concerns or allegations that may arise in the future to enable the Panel to base its assertions on the best possible information.

Oryx hopes that the Panel's findings will promote a transparent and open understanding of Oryx Natural Resources' and Thamer Al Shanfari's role in the development of Sengamines SARL.

24th May 2003, UN offices, Nairobi.



### **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.

## APPENDIX 4: UK NCP TIMESCALES

