

**Initial Assessment By The UK
National Contact Point For
The OECD Guidelines For
Multinational Enterprises**

**COMPLAINT FROM RIGHTS AND
ACCOUNTABILITY IN
DEVELOPMENT (RAID) AND
ACTION CONTRE L'IMPUNITE
POUR LES DROITS HUMAINS
(ACIDH) CONCERNING EURASIAN
NATURAL RESOURCES
CORPORATION (ENRC) MINING
SITES IN THE DEMOCRATIC
REPUBLIC OF CONGO (DRC)**

SEPTEMBER 2013

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Summary of the UK NCP decision

- **The UK National Contact Point (NCP) for the OECD Guidelines for Multinational Enterprises (the Guidelines) has decided that some of the issues raised merit further examination and has accepted the complaint for further consideration. This does not mean that the NCP finds the company to have acted inconsistently with the Guidelines.**
- **The NCP has accepted issues relating to the company's responsibilities under Chapter II (Paragraphs 1,2,3,12,13 and 14), and Chapter IV, Paragraph 1. The NCP has not accepted issues relating to the other Chapter IV and Chapter VI provisions cited by RAID.**

The complaint and response

The complaint

1. On 3rd May 2013, the civil society organisation Rights and Accountability In Development (RAID) wrote to the UK National Contact Point (NCP) raising concerns under the Guidelines about the operations of companies controlled by the Eurasian Natural Resources Corporation (ENRC) in the Democratic Republic of Congo (DRC).
2. The complainants say they are raising concerns on behalf of two village communities in the DRC which lie on neighbouring mining concessions, and in an area where there is also artisanal mining.
3. One of the two concessions is owned by a Canadian mineral exploration company, and the other by a Congolese company. Both these companies are majority owned by an intermediate enterprise. In August 2010, ENRC acquired a majority holding in the intermediate enterprise, and in December 2012, it became the sole owner.
4. RAID say that ENRC should have addressed the following issues which they claim are affecting the two villages on the two concessions:
 - a) RAID claim that the first village does not have reliable access to a safe, clean water supply. Water sources traditionally used are polluted. A new borehole water supply provided by the Canadian company in 2007 has been out of operation since a riot by artisanal miners in July 2012, forcing villagers to walk long distances for drinkable water.

- b) RAID say that villagers claim that the riot in July 2012 was triggered by actions by security guards to remove artisanal miners¹ from the Congolese company's concession. RAID also make allegations about other incidents which they claim suggest that guards provided by the concession holding companies' security providers have appeared poorly trained or corrupt.
 - c) RAID claim that the Canadian company had, in consultation with villagers, developed plans in 2006 for resettlement of the first village; however, no steps have been taken to implement these plans. The village is now allegedly suffering adverse effects from mining activity, and RAID claims some farmers have been removed from their land without being resettled or compensated.
 - d) The second village, which is on the concession held by the Congolese company, is also allegedly suffering environmental and social effects from mining, but RAID claim no monitoring is in place to establish whether it needs to be resettled.
5. RAID say that ENRC should address these issues by:
- a) Immediately restoring the water supply to the first village, and undertaking environmental and social monitoring there.
 - b) Developing an artisanal mining strategy, ensuring security provision meets relevant standards, providing an effective dispute resolution mechanism for reporting security incidents, and investigating the July 2012 incident.
 - c) Implementing the resettlement plan for the first village and retrospectively documenting compensation arrangements.
 - d) Undertaking environmental and social monitoring in the second village to assess whether a resettlement plan is required.

Guidelines provisions cited

- 6. The complaint refers to paragraphs 1, 2, 3, 11, 12 and 13 of Chapter II of the Guidelines, and makes an additional non-specific reference to Chapter IV of the Guidelines (which concerns Human Rights) which the complainants describe as further defining the requirements of paragraph 2 of Chapter II. Chapter II concerns enterprises' General Policies, and the provisions cited include enterprises' responsibilities to: contribute to economic, environmental and social progress; respect human rights (the provision the complainants say is further defined by Chapter IV); encourage local capacity building; avoid or address adverse impacts enterprises cause; prevent or mitigate adverse impacts enterprises are linked to by a business relationship, and

¹ Non-industrial small scale digging by independent individuals or groups to extract minerals etc to sell

encourage business partners to apply standards compatible with the Guidelines.

7. In a further submission on 8th July (see Paragraph 18), the complainants refer to a slightly amended set of Chapter II provisions (dropping the reference to Paragraph 11 and citing additionally Paragraph 14 which refers to stakeholder engagement). They also refer to each specific provision of Chapter IV (Human Rights), and to each specific provision of Chapter VI, which concerns enterprises' responsibilities in respect of the Environment. No new issues are raised or evidence offered with regard to the additional provisions.
8. The NCP has considered all the provisions referred to, and sets out from paragraph 35 below the provisions in respect of which it considers further examination is merited.

The company's response

9. ENRC responded to the complaint on 19th June 2013 and says that the allegations made by RAID are unfounded.
10. ENRC notes that it had no interest in the concession owning companies before August 2010, and that until December 2012 its interest was as one of two partners in the intermediate company that held stakes in them. It had sole control of the intermediate company only from December 2012 when it bought out its partner.
11. RAID supported its allegations by reference to a report prepared in November 2012 in connection with ENRC's buyout of its partner, and to an account of a visit to the villages in March 2013. ENRC considers it is unreasonable for RAID to conclude from a visit 3 months after the buyout was completed that actions identified in the report were not completed. ENRC also considers that RAID misinterprets points made in the report.
12. In respect of the issues raised by RAID, ENRC says:
 - a) The Canadian concession holder has only carried out exploratory activity on its concession to date and is not responsible for any pollution. Pollution of the traditional water sources in the first village is a result of artisanal mining activity, other activities of villagers (e.g. washing clothes) and activities of neighbouring concession holders unrelated to ENRC. The borehole water supply provided from 2007 was damaged in the riot in July 2012. ENRC claims that ENRC and its subsidiaries therefore bear no responsibility for the unavailability of a clean water supply, but in it was nevertheless taking action to repair the borehole supply and expected it to be operational soon.

- b) ENRC considers that its security arrangements and its policy in respect of artisanal miners meet the relevant standards. ENRC claims the artisanal mining policy is widely known, consistently implemented, allows a reasonable time for artisanal miners to leave, involves relevant government bodies and is overseen by the Congolese concession holding company. ENRC says security providers are selected through a rigorous process that includes checks relating to human rights incidents, and contracts set out standards expected and providers are under the direct supervision of ENRC's own security team. ENRC says that the July 2012 riots were investigated and ENRC considers RAID's allegations about the trigger for the rioting to be categorically untrue.
- c) ENRC claims that resettlement plans for the first village have not been implemented because the mining operations associated with them have not occurred: the Canadian concession holder's plans were affected by the 2008 global recession. ENRC state that farmers legally removed to allow construction activities to take place had been properly compensated and this is documented.
- d) ENRC also states that the Congolese company does not undertake monitoring at the second village because the only activity it carries out near the village is non-invasive exploratory drilling: its nearest mine site is 9km away. ENRC claims it has included the second village in its stakeholder engagement plans, however, and has begun meetings with villagers. ENRC considers that the impacts on the village reported by RAID result from the actions of artisanal miners.

Further submissions

- 13. In response to an enquiry from the NCP, ENRC provided an update on 26th June about the water supply system, and on 1st July ENRC gave a further update indicating that the system was back in operation.
- 14. In a further submission on 8th July, RAID challenged points in the company's response and urged the NCP to accept the complaint immediately. As noted at paragraph 9 above, the submission referred to some additional provisions of the Guidelines not mentioned in the original complaint. It also added another party to the complaint: the Congolese civil society organisation, Action Contre l'Impunite pour les Droits Humains (ACIDH).
- 15. On 1st August, RAID and ENRC each made further representations to the NCP. RAID's representation made allegations about actions by ENRC that RAID believed were intended to circumvent the complaint process. ENRC's representation made allegations about the accuracy of RAID's claim to represent the villages named in the complaint.

16. On 2nd August, ENRC made additional representations about the handling of the complaint and the role of RAID's Executive Director as a member of the NCP's Steering Board (see Paragraph 24.)
17. The NCP's Initial Assessment was circulated to parties in draft on 8th August with an invitation to send any comments by 22nd August. Comments received from both parties have been considered before finalising this Initial Assessment.

The UK NCP process so far

18.

7 th May	UK NCP receives complaint
14 th May	UK NCP shares complaint with ENRC and invites response
19 th June	UK NCP receives ENRC response
26 th June & 1 st July	UK NCP receives further ENRC updates
8 th July	UK NCP receives further submission from complainants
10 th July	UK NCP shares further submission with ENRC
17 th July,	UK NCP telephone call with ENRC
1 st & 2 nd August	UK NCP receives further representations from both parties
8 th August	UK NCP circulates draft Initial Assessment to parties
21 st August	UK NCP receives comments from RAID and an additional supporting document
22 nd August	UK NCP receives comments from ENRC
20 th September	UK NCP finalises assessment and shares with parties
26 th September	UK NCP receives further comments from ENRC

19. All documents submitted were shared with both parties, and a note of the NCP's call with the company was shared with the complainants.

UK NCP decision

20. The UK NCP considers that some of the issues raised merit further examination. This does not mean that the UK NCP considers ENRC to have acted inconsistently with the Guidelines.
21. The issues accepted by the NCP for further examination relate to whether the company acted consistently with the Guidelines in implementing its site security arrangements, its management of risks associated with the company's interactions with artisanal miners, and its engagement with villagers about operations affecting them. The

NCP has not accepted the issues in respect of resettlement and environmental monitoring.

22. The UK NCP took the following points into account:

Identity of the complainant and its interest in the matter

23. RAID is a well established civil society organisation promoting human rights and responsible conduct by businesses abroad. RAID has provided details of its links with communities directly interested in the issues raised in the complaint, but the NCP notes that ENRC disputes RAID's claim that these communities authorised RAID to act for them. The NCP considers that RAID is able to provide information about the issues raised in the complaint.
24. RAID's Executive Director, who provided a witness statement supporting the complaint, is currently a member of the UK NCP's Steering Board. The Steering Board has general oversight of the NCP, but its members do not play a part in the NCP's decisions on complaints and are expected to absent themselves if a complaint in which they have a declared interest is discussed at a Board meeting, and not to take part in any procedural review of a complaint in which they have an interest.

Whether the issue is material and substantiated

25. The UK NCP considered whether the issues raised are material and substantiated, such that they merit further examination, and which obligations under the Guidelines the issues relate to.

Are the issues material and substantiated, such that they merit further examination:

26. RAID support their allegations by reference to a witness statement of their Executive Director giving an account of visits to the villages identified in the complaint, and to a report prepared for ENRC in November 2012 in connection with its buyout of the intermediate company. The witness statement records conditions in the villages and statements from villagers during a visit to the DRC in March 2013. The November 2012 report describes the condition of the intermediate company's mining "assets" (it includes a report on the Congolese company concession, but not the Canadian company concession).
27. RAID also refer to other plans and reports of the companies in the complaint, and to relevant international standards. Their further submission of 8th July is additionally supported by a statement by ACIDH reporting a visit to the villages in June 2013. The NCP notes ENRC disputes aspects of this statement.

28. The documents provided suggest that the Canadian company provided the borehole water supply from 2007 voluntarily (rather than under any legal or contractual requirement). The NCP notes that it is now back in operation. However ENRC do not dispute that it was unavailable from mid-2012 to June 2013. The complaint and response offer different accounts as to why it became unavailable, but both regard rioting by artisanal miners in July 2012 as the trigger event. The NCP considers the issue with regard to the water supply merits further examination because of the period of unavailability and because of uncertainty about its future security arising from the issue of security arrangements.
29. ENRC do not dispute that actions of artisanal miners on the two concessions have also led to other adverse impacts on both villages named in the complaint. The NCP understands that artisanal mining is illegal under DRC law when it takes place on a company concession. ENRC refute RAID's allegations that the company's handling of illegal artisanal mining on the concessions caused or contributed to the impacts on villagers.
30. While recognising that ENRC disputes much of the evidence provided by RAID, the NCP considers that there is sufficient evidence in relation to the company's response to artisanal mining and the associated security of the mining sites (including security of the water supply) for the UK NCP to conclude that these issues merit further examination.
31. In relation to the resettlement and environmental monitoring obligations, it appears to the NCP that that these obligations arise in relation to companies' own mining operations. The selection of reports referred to in the complaint do not appear to the NCP to show that the nature and extent of the companies' recent or current mining activities affect the villages in the complaint.
32. In respect of the first village, no evidence is offered that the mining development that necessitated its resettlement went ahead. The report prepared for ENRC in November 2012 suggests that new plans for a joint mining operation by the two concession holding companies are now under consideration.
33. In respect of the second village, the complaint and response do not appear to the NCP to establish a link between the adverse impacts and mining by the companies in the complaint. The report referred to by RAID does not appear to recognise the village, and ENRC says that the Congolese company is not undertaking any mining activity near it. As it is part of the concession the villagers are, however, stakeholders.
34. The NCP concludes that, insufficient evidence has been provided to substantiate the aspects of the complaint relating to environmental monitoring and implementation of the resettlement plan. The NCP notes that ENRC says it has initiated communications with the second

village. The NCP concludes, however, that there is enough evidence to substantiate an issue in respect of the adequacy of communications with this village.

Which obligations under the Guidelines do the material and substantiated issues relate to:

35. As outlined at Paragraphs 7 & 8 above, RAID referred in the initial complaint to provisions of Chapter II of the Guidelines (General Policies), but in its further submission of 8th July referred an amended set of Chapter II provisions, to Chapter IV provisions (Human Rights) and additionally to Chapter VI provisions (Environment).
36. Aside from a few provisions relating to responsibilities in respect of business partners or suppliers, the Guidelines generally relate to enterprises' own activities. This includes the activities of all the entities within a multinational enterprise.
37. The NCP considers that the material and substantiated issues relate to the following provisions of the Guidelines:

Chapter II - General Policies

Enterprises should.....

1. *Contribute to economic, environmental and social progress with a view to achieving sustainable development.*
2. *Respect the internationally recognised human rights of those affected by their activities.*
3. *Encourage local capacity building through close co-operation with the local community, including business interests, as well as developing the enterprise's activities in domestic and foreign markets, consistent with the need for sound commercial practice.*
12. *Seek to prevent or mitigate an adverse impact [on matters covered by the Guidelines] where they have not contributed to that impact, when the impact is nevertheless directly linked to their operations, products or services by a business relationship. This is not intended to shift responsibility from the entity causing an adverse impact to the enterprise with which it has a business relationship.*
13. *In addition to addressing adverse impacts in relation to matters covered by the Guidelines, encourage, where practicable, business partners, including suppliers and sub-contractors, to apply principles of responsible business conduct compatible with the Guidelines.*
14. *Engage with relevant stakeholders in order to provide meaningful opportunities for their views to be taken into account in relation to planning*

and decision making for projects of other activities that may significantly impact local communities.

Chapter IV - Human Rights

Enterprises should.....

1. Respect human rights, which means they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.

38. Chapter IV provisions were added to the Guidelines in 2011 and are applied by the UK NCP to activities of enterprises from 1st September 2011 and to ongoing impacts known to enterprises at that date. The provisions contemplate a number of different relationships that an enterprise may have to human rights impacts. The complaint refers to an impact on the right of access to safe water and sanitation. The NCP considers that the complaint is made in respect of ENRC itself being involved with this impact (Paragraph 1 of Chapter IV) rather than causing or contributing to it (Paragraph 2) or being linked to it by a business relationship (Paragraph 3). This is because it does not appear to the NCP that the borehole supply system was provided in 2007 to maintain access to a safe water supply that the Canadian company's activities at that time otherwise compromised.

39. The remaining Chapter IV provisions cited by RAID relate to human rights policies, due diligence and remedy processes: these issues do not appear to the NCP to be raised in the complaint.

40. In respect of the Chapter VI provisions referred to in RAID's 8th July submission, the NCP considers that these relate principally to responsibilities of enterprises for environmental impacts of their own activities. It does not consider that the complaint clearly identifies mining activities of ENRC and its subsidiaries to which these provisions would apply.

Relevance of applicable law and procedures, including court rulings:

41. The NCP does not consider that applicable laws and procedures referred to in the complaint affect its decision on whether the issues raised in this case merit further consideration. If no mediated agreement is reached on the substantiated issues, the NCP may consider any law and procedures applicable to the issues raised in the complaint as part of its further examination.

How similar issues have been, or are being, treated in other domestic or international proceedings:

42. The UK NCP notes that the company that owns the concession that includes the first village (and that provided the water supply) is itself a (Canadian) multinational enterprise to which the Guidelines apply. The complaint is addressed to and handled by the UK NCP because it relates to the actions of ENRC since it acquired control of the parent company of the concession-holder. The UK NCP has informed the Canadian NCP about the complaint. The Canadian NCP confirmed that it had not received any related complaint about actions of the Canadian company at any time during its holding of the concession.

Whether the consideration of the specific issue would contribute to the purposes and effectiveness of the Guidelines:

43. The NCP considers that it can offer its good offices to help the complainant and the company resolve the issues raised in the complaint. The NCP notes that one of the objectives initially stated by the complainants – to restore the water supply – has already been achieved.

Next steps

44. The UK NCP will formally ask RAID and ENRC whether they are willing to engage in mediation/conciliation with the aim of reaching a settlement. Subject to their response, the UK NCP will liaise with the parties to arrange mediation/conciliation meetings.
45. If a mediated/conciliated solution is possible, the UK NCP will reflect the outcome in its Final Statement without making a determination as to whether the company acted inconsistently with the Guidelines.
46. If a mediated/conciliated solution is not possible, or the parties do not wish to engage in mediation/conciliation, the UK NCP will conduct a separate examination into the complaint and will reflect in a Final Statement the outcome of this and a determination of whether the company acted inconsistently with the Guidelines.

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